

MEMORANDUM

From: Acting Bank Commissioner Tim Kemp

Date: January 17, 2019

The Office of the State Bank Commissioner (OSBC) is receiving inquiries about banking money for marijuana and marijuana-derived products. Given the level of inquiries and the complexities of the laws pertaining to marijuana, the OSBC has issued the following background information and guidelines.

Defining Marijuana. As the term is used in both Kansas and federal law, marijuana broadly encompasses all parts and all varieties of the plant cannabis, with some exceptions. The cannabis plant contains over a hundred drugs called cannabinoids, which actively affect the central nervous system—including the brain—and the immune system. The primary psychotropic drug in marijuana is tetrahydrocannabinol (THC). A less extreme drug in marijuana is cannabidiol (CBD), which is non-psychotropic. Hemp refers to varieties of cannabis having significantly less THC and more CBD than other varieties of cannabis.

Kansas Law. The Kansas legislature passed a bill in 2018 that exempts CBD from the definition of marijuana.¹ Kansas does not stand alone in doing so, as forty-seven states have legalized CBD. Kansas also passed legislation the same year to exclude industrial hemp from the definition of marijuana. Hemp is now legal under Kansas law when cultivated, possessed, or used for activities authorized by the new law.²

Federal Law. Marijuana use is not just regulated by state law, but also by federal controlled substances law, federal medical drug law, and an international treaty called the Single Convention on Narcotic Drugs. Under federal law, marijuana and marijuana-derived products are illegal.

The 2018 Agricultural Improvement Act exempts hemp from the federal definition of marijuana, thereby legalizing hemp at the federal level.³ The bill passed both the House and Senate at the end of 2018 and was signed by President Trump on December 20, 2018.

After states began legalizing marijuana in 2012, the Obama administration responded with two memos from Attorney General James Cole (Cole Memos); the first memo related to marijuana enforcement in general and the second memo related to marijuana-related financial crimes.

The Financial Crimes Enforcement Network (FinCEN) issued its own guidance after the Cole Memos.⁴ The FinCEN Guidance was approved by the Federal Reserve Board of Governors (FRB),

¹ S.B. 282.

² S.B. 263.

³ H.R.2, § 12619, 10113.

⁴ Fin. Crimes Enf't Network (FinCEN), Dep't of the Treasury, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014) ("FinCEN Guidance"), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

the FDIC, the OCC, and the NCUA.⁵ Each of these agencies incorporate the FinCEN Guidance into their supervisory process and are reviewing the FinCEN Guidance for inclusion in the Federal Financial Institutions Examination Council BSA/Anti-Money Laundering Examination Manual.

These agencies also pointed out that “further clarity from Congress on the legal treatment of state-licensed marijuana-related businesses under federal law would provide greater legal certainty for both marijuana-related businesses and banks and credit unions.”⁶

Congress has yet to provide clarity to the issue. In 2017, a House bill and a Senate bill were introduced, both known as the “SAFE Banking Act,” which would make it legal for banks to serve businesses that are legal under state law even if they are illegal under federal law.⁷ These bills have 115 cosponsors but no action has been taken on them since September 2017.

Under the Trump administration, Attorney General Jeff Sessions issued a memo on January 4, 2018, which rescinded both Cole Memos.⁸ After the rescission by Sessions, FinCEN said that the FinCEN Guidance “remains in place.”⁹

In the wake of the Sessions Memo, states have called on Congress to clarify the situation through several joint letters. In January 2018, a bipartisan group of 19 attorneys general sent a joint letter to Congress endorsing the SAFE Banking Act or similar legislation.¹⁰ In April 2018, a bipartisan group of 13 state treasurers did the same.

On June 7, 2018, a bill was introduced in the Senate called the Strengthening of the Tenth Amendment Through Entrusting States (STATES) Act, which would make marijuana offenses only illegal federally to the extent that they are illegal under each state’s laws. A bipartisan group of 12 state governors sent a joint letter to Congress endorsing the STATES Act. In August 2018, 13 banking supervisors sent a joint letter to Congress requesting either a safe harbor for banking (i.e., the SAFE Banking Act) or that Congress would entrust states with marijuana oversight (i.e., the STATES Act). In total, the signatories of all four joint letters represent 28 different states asking Congress to take action to clarify the situation for banks.

National associations have called on Congress to clarify the situation as well. The American Bankers Association “takes no position on the moral issues raised by legalizing marijuana,” but “believes the time has come for Congress and the regulatory agencies to provide greater legal

⁵ Letter from FRB, FDIC, NCUA, & OCC to Wash. Governor Jay Inslee (Aug. 13, 2014), <https://dfi.wa.gov/documents/banks/gov-inslee-interagency-response.pdf>.

⁶ *Id.*

⁷ Secure and Fair Enforcement (SAFE) Banking Act, H.R. 2215, 115th Cong. (2017), S. 1152, 115th Cong. (2017).

⁸ Jefferson B. Sessions, III, Att’y Gen., Dep’t of Justice, *Memorandum for All United States Attorneys: Marijuana Enforcement* (Jan. 4, 2018) (“Sessions Memo”), <https://www.justice.gov/opa/press-release/file/1022196/download>.

⁹ Letter from Drew Maloney, Assistant Sec’y for Legislative Affairs, FinCEN, to Representative Denny Heck (Jan. 31, 2018), https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18_Heck.pdf.

¹⁰ Letter from 19 State Attorneys General to U.S. Congressional Leaders (Jan. 16, 2018) (“Attorney Generals’ letter”), <https://www.documentcloud.org/documents/4351551-Final-Banking-Letter-to-Congress.html>.

clarity to banks operating in states where marijuana has been legalized for medical or adult use.”¹¹ The Independent Community Bankers of America have endorsed the SAFE Banking Act (both the House and Senate versions).¹²

Attorney General Jeff Sessions resigned in November, 2018. The acting Attorney General or the new Attorney General, once appointed and confirmed, could issue different guidance on the issue.

In the meantime, the FinCEN Guidance, which is followed by the FRB and the FDIC, remains in place.

FinCEN Guidance. The FinCEN Guidance outlines eight federal priorities, each of which is aimed at preventing a particular kind of harm. When these eight federal priorities are implicated, the federal government is more likely to enforce federal marijuana laws.¹³ The eight federal priorities are:

1. Keeping marijuana out of the hands of *minors*;
2. Keeping marijuana money from going to *gangs and cartels*;
3. Keeping marijuana from going *to other states*;
4. Keeping marijuana activity from being used as a *cover* for other illegal activity;
5. Preventing *violent crimes*;
6. Preventing *drugged driving* and other public health concerns;
7. Keeping marijuana off *public lands*
8. Keeping marijuana off *federal property*.¹⁴

New Types of SARs for Marijuana Banking. The FinCEN Guidance establishes three new types of SARs for marijuana-related transactions. Marijuana Limited SARs are for transactions that do not implicate the eight federal priorities. Marijuana Priority SARs are for transactions that do implicate the eight federal priorities. Marijuana Termination SARs are for terminating the bank’s relationship with the business.

Continuing SARs. When reporting marijuana-related activity, it can be aggregated and reported in continuing SARs.¹⁵ Continuing SARs need to be filed every 90 to 120 days, so about three SARs would need to be filed each year for each marijuana-related business that a bank handles.

¹¹ American Bankers Association, *Marijuana and Banking* (last visited Nov. 28, 2018), <https://www.aba.com/Advocacy/Issues/Pages/marijuana-banking.aspx>.

¹² Independent Community Bankers of America, *ICBA Supports Legal Safe Harbor for Banking Cannabis Businesses* (June 6, 2018), <https://www.icba.org/news/press-releases/2018/06/06/icba-supports-legal-safe-harbor-for-banking-cannabis-businesses>.

¹³ Fin. Crimes Enf’t Network (FinCEN), Dep’t of the Treasury, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014) (“FinCEN Guidance”), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

¹⁴ *See id.* (this is a paraphrase of the eight priorities).

¹⁵ Fed. Fin. Insts. Examination Council (FFIEC), *Suspicious Activity Reporting – Overview*, Bank Secrecy Act Anti-Money Laundering Examination Manual, SAR Filing on Continuing Activity (last visited Nov. 28, 2018), https://www.ffiec.gov/bsa_aml_infobase/pages_manual/olm_015.htm.

Banks Are Filing Marijuana SARs. FinCEN releases quarterly statistical reports of marijuana banking activity as reported in SARs.¹⁶ As of July 12, 2018, FinCEN had received both Marijuana Limited and Marijuana Termination SARs from filers in 50 states.¹⁷ This means some banks in Kansas have already filed Marijuana Limited and Marijuana Termination SARs.

Red Flags. The FinCEN Guidance provides red flags that might tip off banks that they are dealing with marijuana-related monies. Broadly, the red flags include:

- Questionably high revenues
- Rapid movement of funds
- A business not able to prove that it is following state law
- Large outside investments without proof of a legitimate source
- The owner of the business lives in a different state
- Cash that smells like marijuana¹⁸

Conclusion. The laws relating to marijuana and marijuana-derived products is still developing. States are moving towards legalizing marijuana and marijuana-derived products faster than the federal government, and Kansas has recently enacted legislation to legalize CBD oil and the production of hemp as a research crop. Given the complexity and uncertainty between state and federal law on marijuana and marijuana-related products, the OSBC is unable to provide clear direction to banks on the legalities of banking monies derived from these products. OSBC recommends banks and other financial institutions review the background information contained in this memo, review FinCEN guidance, file the appropriate SARs reports as prescribed by FinCEN, and consult with their attorney.

¹⁶ FinCEN, *Frequently Requested FOIA-Processed Records* (last visited Nov. 28, 2018), <https://www.fincen.gov/frequently-requested-foia-processed-records>.

¹⁷ FinCEN, *Marijuana Banking Update*, 2 (June 2018).

¹⁸ FinCEN Guidance.