

Alert | Financial Regulatory & Compliance



July 2020

FinCEN Issues Guidance to Financial Institutions on Hemp-Related Due Diligence

The obligations of financial institutions to monitor and report potential illicit activity involving cannabis-related products has been a source of increased attention in the financial industry, in light of the changing legal landscape at the state and federal level. On June 29, 2020, the Financial Crimes Enforcement Network (FinCEN) issued new guidance to financial institutions on the due diligence and reporting requirements mandated by the Bank Secrecy Act (BSA) in connection with customers engaged in hemp cultivation and related activities (FinCEN Hemp Guidance or Guidance). The Guidance supplements a more limited interagency statement on the topic, which was issued by FinCEN and federal bank regulators on Dec. 3, 2019 ([see Interagency Hemp Statement](#)).

As part of the 2018 Farm Bill, Congress removed hemp from the definition of marijuana under the Controlled Substances Act (CSA),¹ and on Oct. 31, 2019, the U.S. Department of Agriculture (USDA) issued an interim final rule establishing a regulatory program to facilitate the legal production of hemp ([see Interim Final Rule](#)). Pursuant to the Interim Final Rule, hemp may be grown only with a valid USDA-issued license or under a USDA-approved state or tribal plan. Additionally, as previously set forth in the

¹ For these purposes, hemp is defined as the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis.

Interagency Hemp Statement, a state or tribe may validly prohibit, or more stringently regulate, hemp production, notwithstanding the relaxation of strictures under federal law.²

The FinCEN Hemp Guidance identifies two ways that a financial institution may confirm a hemp producer's compliance with applicable licensing requirements:

- 1) obtaining a copy of the license, or
- 2) obtaining a written attestation by the hemp grower that they are validly licensed.

Consistent with the general expectation that financial institutions tailor their due diligence to the risk profile of each customer, the Guidance provides that the degree to which a financial institution should seek additional supporting information on licensure (if at all) will depend on an assessment of the level of risk posed by each customer. Financial institutions may decide to request additional information including, among other things, crop inspection reports, testing reports, license renewals, updated attestations from the business, and/or correspondence with licensing authorities.

An important component of an effective BSA/AML compliance program is to develop and maintain a customer risk profile that is updated on a risk basis, and to conduct ongoing monitoring to identify and report suspicious transactions.

The FinCEN Hemp Guidance reminds financial institutions that engaging in a hemp-related business is not itself cause for filing a Suspicious Activity Report (SAR). Unlike SAR filing expectations for marijuana-related businesses, FinCEN expects financial institutions to **follow standard SAR procedures for hemp-related business customers** and to file a SAR if the financial institution becomes aware, in the normal course of business, of suspicious activity. Examples of suspicious activity by hemp-related business customers which may merit a SAR include:

- A customer that appears to be engaged in hemp production in a state or jurisdiction in which hemp production remains illegal.
- A customer that 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 that 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.
- The financial institution becomes aware that the customer continues to operate (i) after a license revocation, or (ii) inconsistently with applicable law.

Importantly, the Guidance notes that, to the extent the financial transactions of a hemp-related business are comingled with marijuana-related activities, a financial institution should apply [FinCEN's Feb. 14, 2014 Marijuana Guidance](#).³ However, the Guidance clarifies that, if the proceeds of the businesses are kept separate, or the customer and its financial institution are able to identify which proceeds are

² For example, Mississippi does not permit the cultivation of hemp within the state.

³ That guidance was issued in 2014 at least in part in response to guidance from the U.S. Department of Justice (DOJ) concerning marijuana-related enforcement priorities (referred to as the "Cole Memo") that has since been rescinded. However, FinCEN has indicated that, notwithstanding the rescission of the Cole Memo, financial institutions should continue to follow FinCEN's 2014 Marijuana Guidance.

marijuana-related and which are hemp-related, then the 2014 Marijuana Guidance, including specific SAR filing, would apply *only* to the marijuana-related part of the business.

Currency Transaction Reports and FinCEN Form 8300

Last, the Guidance reminds financial institutions that they must report currency transactions in connection with hemp-related businesses in the same manner they would for any other customer. 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.

While the Guidance provides some much-needed clarity on BSA/AML compliance expectations in connection with providing financial services to lawful hemp-related businesses, it also suggests that financial institutions are expected to have basic familiarity with the law of the state or tribal jurisdiction where hemp-related businesses operate, as well as with the contours of the federal regulatory regime.

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