U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 18 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Deputy Attorney General James M. Cole before the Committee on September 10, 2013, at a hearing entitled "Conflicts between State and Federal Marijuana Laws." We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

Questions for the Record
Deputy Attorney General James M. Cole
U.S. Department of Justice

Committee on the Judiciary
United States Senate

"Conflicts between State and Federal Marijuana Laws"
September 10, 2013

Questions Posed by Senator Leahy

1. **You testified that the Department of Justice is consulting with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding the lack of access to financial services for marijuana businesses operating in accordance with state law.**

   What, if any, other federal government agencies is the Department of Justice consulting with on this issue?

   Does the Department of Justice intend to issue guidance to states, banks, federal regulators, and law enforcement regarding the provision of financial services to marijuana businesses operating in accordance with state law?

Response:

The Department of Justice and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) worked closely in considering policy options and developing guidance on these issues. On February 14, 2014, the Department of Justice issued guidance [Attachment A] to all U.S. Attorneys regarding marijuana and related financial crimes. FinCEN also issued guidance on February 14, 2014 [Attachment B], regarding Bank Secrecy Act (BSA) expectations for financial institutions seeking to provide services to marijuana-related businesses.

2. **As I noted at the hearing, the media has reported that Drug Enforcement Administration (DEA) agents instructed armored car companies to cease providing services to marijuana dispensaries, leaving no professional protection for what has largely become an all-cash business. You testified that you believe the DEA merely asked these armored car companies questions, and that this questioning occurred prior to issuance of your August 29 memorandum to United States Attorneys.**

   What, if any, guidance has been provided to the DEA regarding the use of armored car services, banking services, or any other financial services by marijuana-related businesses operating in accordance with state law? If guidance has not been provided to the DEA, does the Department of Justice intend to provide it in light of these media reports?

Response:

The memorandum I issued on August 29, 2013 [Attachment C, "August 29 memorandum"], provided guidance to all Department attorneys and law enforcement agents, including Special Agents of the Drug Enforcement Administration (DEA), regarding enforcement priorities under the Controlled Substances Act (CSA). The provision of financial services to marijuana businesses implicates a number of other federal criminal statutes in addition to the CSA, including the money laundering statutes (18 U.S.C. §§ 1956, 1957, 1960) and the Bank Secrecy Act. To address these issues, I issued a memorandum on February 14, 2014 [Attachment A], which provides guidance to all Department attorneys and law enforcement agents regarding marijuana-related financial crimes.

3. **Several states, including Vermont, have enacted laws permitting the cultivation under state permit or license of industrial hemp – that is, cannabis with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. The Controlled Substances Act currently does not distinguish between industrial hemp and marijuana.**

    (A) Does the guidance for enforcement of federal marijuana laws outlined in your August 29 memorandum also apply to state laws regarding the cultivation and processing of industrial hemp?

Response:

The cultivation of marijuana for industrial purposes is governed by the CSA and permitted pursuant to the registration requirements found in Title 21, United States Code, Section 823. In addition, the Agricultural Act of 2014, Pub.L. 113-79, permits institutions of higher education and State departments of agriculture to grow or cultivate "industrial hemp," as defined in the statute, for purposes of research conducted under an agricultural pilot program or other agricultural or academic research. These are lawful activities when conducted in compliance with federal and state law, and accordingly, do not implicate the guidance of the August 29 memorandum.

Maintaining an effective system of registration for manufacturers of controlled substances is an important federal interest. Accordingly, the Department of Justice, through the DEA and consistent with the mandates of Section 823 of the CSA, will continue to work to facilitate federal registration by individuals and entities within states permitting the cultivation of marijuana for industrial purposes who are seeking to engage in such lawful activity. To the extent marijuana is cultivated, either for consumption or for industrial or other purposes, in violation of federal law, the guidance of the August 29 memorandum would apply to the use of investigative and prosecutorial resources to enforce the relevant provisions of the CSA.

    (B) Does the Department of Justice intend to prosecute those who cultivate or process industrial hemp in compliance with state law if none of the Department's eight enforcement priorities (as outlined in your August 29 memorandum) is implicated?

Response:

Please see the response to Question 3(A), above.

Questions Posed by Ranking Member Grassley

4. **Will the Department of Justice establish specific, quantifiable metrics by which it will evaluate how the state laws legalizing and regulating the cultivation, trafficking and/or recreational use of marijuana are affecting each of the areas of federal enforcement priority identified in the August 29, 2013 Cole Memorandum? If so, will it make those metrics public? If it will not establish metrics, how will it know whether its stated policy of "trust but verify" is a success or failure?**

Response:

The Department's focus is on applying its limited investigative and prosecutorial resources to enforcing the CSA in a manner that addresses the most significant threats to public safety, as discussed in the August 29 memorandum. As noted in the August 29 memorandum, the Department's guidance rests on the expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. To the extent conduct in any state implicates the eight enforcement priorities, the Department will enforce the CSA consistent with the August 29 memorandum. The Department will consider data of all forms – federal surveys on drug usage, state and local research, and, of course, feedback from the community and from federal, state, and local law enforcement – on the degree to which state systems protect federal enforcement priorities and the public. We are also working with the Office of National Drug Control Policy and other partner agencies to identify other mechanisms by which to evaluate such data.

5. **Although the Department of Justice has decided to defer any legal challenge to these state laws at this time, is it the Department's position that the laws legalizing recreational use of marijuana in Colorado and Washington are preempted by federal law? Why or why not?**

Response:

Preemption analysis is statute-specific and presents a question of whether state laws conflict with the federal statutory regime. For example, the analysis of state laws altering or eliminating punishments for marijuana-related activity could differ substantially from that of state laws establishing a regulatory regime or framework for sanctioning or facilitating activity that remains in violation of federal law. With regard to these particular laws in Colorado and Washington, and without reaching the ultimate question of preemption, the Department has determined that, at this time, we can continue to enforce the CSA pursuant to our traditional federal enforcement priorities. We expect our state partners will enforce their state laws in a manner that prevents harm to federal interests and the public. If the state systems implemented in Colorado and Washington do not protect those priorities, the Department is prepared to bring federal cases to protect them.

6. **What is the Department of Justice's position as to whether the policy announced in the August 29, 2013 Cole Memorandum violates the United States' treaty obligations, including the Single Convention on Narcotic Drugs, which requires the United States to limit exclusively to medical and scientific purposes the use and possession of certain drugs, including marijuana, or otherwise violates international law? What is the basis for its position? Did the Department consult with the State Department in advance of announcing its policy? If so, what was the State Department's position?**

Response:

The Department, together with the Department of State and the Office of National Drug Control Policy, has met with the International Narcotics Control Board, the body responsible for monitoring compliance with the UN drug treaties, and presented the view of the United States that the enforcement guidance issued on August 29, 2013, does not violate the United States' treaty obligations. Marijuana continues to be a schedule I controlled substance under federal law, and the Department of Justice is continuing to enforce federal drug laws. More generally, the Department and the Administration are committed to continuing to fully cooperate with the international community to combat drug trafficking, including marijuana trafficking.

Questions Posed by Senator Feinstein

7. **While I support the compassionate use of marijuana in certain medical situations when prescribed by a physician for a serious illness, I am concerned about individuals taking advantage of California's medical marijuana law.**

   As one example, on January 24, 2013, the Department of Justice announced that San Diego resident Joshua Hester was sentenced to 100 months in prison for creating two medical marijuana dispensaries and a phony board of directors as a front for a multi-million dollar drug trafficking organization. He pled guilty to charges of conspiracy to distribute over 1,000 kilograms of marijuana.

   It is important that the Department of Justice continues to investigate and prosecute owners of medical marijuana dispensaries in California that distribute the drug for illicit, non-medical use.

   (A) Will the Department of Justice continue to pursue individuals in California operating outside of the scope of our state medical marijuana law?

Response:

We share your concerns about the dangers to public health and safety posed by large-scale drug traffickers. The Department has directed its prosecutors and agents to continue to investigate and prosecute marijuana cases on a case-by-case basis, and the primary question in all cases will be whether the conduct at issue implicates one or more of the federal enforcement priorities set forth in the August 29 memorandum. In many cases, the conduct of individuals operating outside the scope of state marijuana laws will also harm those federal enforcement priorities. In those cases where the conduct does not harm federal priorities, we expect our state and local partners to address those cases consistent with the traditional federal-state approach to drug enforcement.

(B) What language can you point to in your August 29, 2013 memo that will assure me that these prosecutions will continue?

Response:

The August 29 memorandum sets forth the Department's eight priorities that will continue to guide enforcement of the CSA against marijuana-related conduct. Individuals in California whose conduct implicates any one of our traditional eight enforcement federal priorities – such as defendants like Mr. Hester, who operated a criminal enterprise and fraudulently attempted to conceal his ownership interest and the income he earned from the dispensaries through a sham board of directors – will continue to be targets of federal enforcement.

8. **Due in part to successful enforcement efforts against marijuana cultivation on public lands, marijuana growers in California are moving onto privately-owned agricultural land, particularly in the Central Valley. One tactic is the use of a "deceptive lease," in which the marijuana grower makes a false statement of his or her intentions for use of the farmland in order to lease the land. This presents serious problems for farmers and landowners in California.**

Marijuana cultivation also leads to environmental degradation and increased crime, which affect all of us.

Given the confusion surrounding state and federal marijuana laws, farmers are unsure how to deal with the problem. In a September 10, 2013 letter to Attorney General Holder, I asked that the Department of Justice, in coordination with the Department of Agriculture, conduct a public information campaign to educate farmers in California on the relevant laws and how to deal with marijuana grown on their property.

Will the Department of Justice commit to conducting a public information campaign to assist farmers and landowners in dealing with the problem of agricultural marijuana grows?

Response:

The public health, safety and environmental harms that flow from marijuana cultivation are of great concern, and the United States Attorneys have been active in prosecuting cases involving firearms and interstate trafficking that originate with agricultural land grows. These cases are, and will continue to be, enforcement priorities, as are cases involving illegal marijuana cultivation on public lands. The Department, consistent with the August 29 memorandum, will continue to enforce prohibitions on marijuana cultivation that threaten public health, safety or environmental harms.

In our December 12, 2013, response to your September 10, 2013, letter we noted that the Department of Justice will coordinate with the Department of Agriculture in an effort to develop appropriate materials addressing these issues. We appreciate your letter dated January 29, 2014, in which you provided valuable input regarding the information you suggest be included in any materials from the Departments of Justice and Agriculture for landowners and farmers faced with illegal marijuana grows on their land. We are working with the Department of Agriculture to develop useful information for those impacted throughout the country, including farmers and landowners in California's Central Valley.

9. **Your August 29th memorandum lists a number of enforcement priorities for the Justice Department, including the prevention of drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.**

I am very concerned about the impact that Colorado and Washington's legalization initiatives will have on drugged driving in these states.

What metrics will you use to assess when federal enforcement is necessary in the case of drugged driving or other public health consequences in Colorado and Washington?

Response:

Please see the response to Question 4, above.

10. Your August 29th memorandum states that the Justice Department will continue to prevent the "diversion of marijuana from states where it is legal under state law in some form to other states."

It seems that this is already a problem. According to the Colorado High Intensity Drug Trafficking Area (HIDTA), in 2012, there were 274 Colorado marijuana interdiction seizures destined for other states compared to 54 in 2005. This is a 407 percent increase.

How will you assess when federal enforcement is needed for diversion of marijuana from Colorado and Washington to other states?

Response:

The August 29 memorandum identified interstate trafficking of marijuana from states such as Colorado and Washington to other states as a federal enforcement priority. Accordingly, U.S. Attorneys' Offices will prosecute cases involving the diversion of marijuana from such states in accordance with their prosecutions guidelines, as with any other case under the CSA.

11. The Monitoring the Future Survey, sponsored by the National Institute on Drug Abuse, demonstrates that marijuana use among minors is increasing. For instance, the most recent report shows that 36% of high school seniors used marijuana in the last 12 months. At the same time, this data suggests a sharp decline in the amount of risk teenagers perceive to be associated with its use.

(A) With this data in mind, what, if any, changes in marijuana use among minors would need to be observed by the Justice Department to trigger federal intervention pursuant to your latest guidance?

Response:

As set forth in our August 29 memorandum, the Department expects that jurisdictions that have enacted laws legalizing marijuana in some form will also establish strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, and to protect against the harms that we have identified. Specifically, these harms include the dangers that marijuana availability and use could pose to minors. Preventing the distribution of marijuana to minors is one of the Department's eight enforcement priorities. If state enforcement efforts are not sufficiently robust to protect against this harm and/or the other harms that we have identified, then the Department may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions focused on those harms. In making these determinations, if it appears from reliable information that the absence of strong and effective regulatory and enforcement systems is contributing to an increase in marijuana use among minors in a particular jurisdiction, the Department will consider this data as well as all other available information and evidence.

(B) Has the Justice Department developed, or does it plan to develop, criteria to assist states in "implementing strong and effective regulatory and enforcement systems" that would prevent federal intervention?

Response:

We have not developed specific criteria for state regulations. Rather, the August 29 memorandum identifies eight specific federal priorities that we expect jurisdictions that enact marijuana laws to affirmatively address through stringent regulatory and enforcement systems. We expect that Colorado and Washington will continue to work to implement strong and effective systems that address the harms we have identified.

12. You state in your August 29th memo that, "prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities." Two sentences later, the memo qualifies this sentence by stating that a "marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular enforcement priority."

Let's examine a hypothetical – but realistic – scenario under the Department of Justice's guidance. Would a large-scale marijuana dispensary that does not distribute to minors, does not fund gangs or criminal enterprises, does not divert marijuana to other states, does not traffic in other drugs, is not involved in violence, and does not use public or federal lands be an enforcement priority if it's clear that it is selling its drugs to those who have no legitimate medical purpose to consume marijuana?

Response:

It is difficult to respond to such a hypothetical. As set forth in the August 29 memorandum, the Department's eight enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement. For example, even if there was a lack of evidence that a large-scale marijuana dispensary was distributing marijuana to minors, the dispensary could be conducting business near a place or area associated with minors, or marketing its products in a manner designed to appeal to minors, or having its products diverted, directly or indirectly, to minors. These are the type of facts that would inform whether investigation and prosecution would be warranted under the first priority. Similarly, there are additional facts that may inform whether the conduct of a large-scale marijuana enterprise is implicating other federal enforcement priorities. Furthermore, as stated in the August 29 memorandum, a marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority.

Attachments

Attachment A

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General *Washington, D.C. 20530*

February 14, 2014

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Related Financial Crimes

On August 29, 2013, the Department issued guidance (August 29 guidance) to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). The August 29 guidance reiterated the Department's commitment to enforcing the CSA consistent with Congress' determination that marijuana is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. In furtherance of that commitment, the August 29 guidance instructed Department attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against marijuana-related conduct:

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

Under the August 29 guidance, whether marijuana-related conduct implicates one or more of these enforcement priorities should be the primary question in considering prosecution

under the CSA. Although the August 29 guidance was issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide. The guidance, however, did not specifically address what, if any, impact it would have on certain financial crimes for which marijuana-related conduct is a predicate.

The provisions of the money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a "specified unlawful activity," including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct can also serve as a predicate for prosecution under 18 U.S.C. § 1960. Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. *See, e.g.,* 31 U.S.C. § 5318(g). Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.

As noted in the August 29 guidance, the Department is committed to using its limited investigative and prosecutorial resources to address the most significant marijuana-related cases in an effective and consistent way. Investigations and prosecutions of the offenses enumerated above based upon marijuana-related activity should be subject to the same consideration and prioritization. Therefore, in determining whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance and reiterated above.[1] For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers' activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers

[1] The Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) is issuing concurrent guidance to clarify BSA expectations for financial institutions seeking to provide services to marijuana-related businesses. The FinCEN guidance addresses the filing of Suspicious Activity Reports (SAR) with respect to marijuana-related businesses, and in particular the importance of considering the eight federal enforcement priorities mentioned above, as well as state law. As discussed in FinCEN's guidance, a financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the federal enforcement priorities or violate state law, would file a "Marijuana Limited" SAR, which would include streamlined information. Conversely, a financial institution filing a SAR on a marijuana-related business it reasonably believes, based on its customer due diligence, implicates one of the federal priorities or violates state law, would be label the SAR "Marijuana Priority," and the content of the SAR would include comprehensive details in accordance with existing regulations and guidance.

services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.

The August 29 guidance rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities. Consequently, financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal enforcement priorities. [2] In addition, because financial institutions are in a position to facilitate transactions by marijuana-related businesses that could implicate one or more of the priority factors, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors. Moreover, as the Department's and FinCEN's guidance are designed to complement each other, it is essential that financial institutions adhere to FinCEN's guidance.[3] Prosecutors should continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct of a person or entity threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

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[2] For example, financial institutions should recognize that a marijuana-related business operating in a state that has not legalized marijuana would likely result in the proceeds going to a criminal organization.

[3] Under FinCEN's guidance, for instance, a marijuana-related business that is not appropriately licensed or is operating in violation of state law presents red flags that would justify the filing of a Marijuana Priority SAR.

Attachment B

Department of the Treasury
Financial Crimes Enforcement Network

Guidance

FIN-2014-G001
Issued: February 14, 2014
Subject: BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network ("FinCEN") is issuing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice ("DOJ") concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, distribute, or dispense marijuana.[1] Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum (the "Cole Memo") to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.[2] The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates 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. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most

[1] Controlled Substances Act, 21 U.S.C. § 801, *et seq.*
[2] James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, the Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the "Cole Memo priorities"):[3]

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

Concurrently with this FinCEN guidance, Deputy Attorney General Cole is issuing supplemental guidance directing that prosecutors also consider these enforcement priorities with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA.[4]

Providing Financial Services to Marijuana-Related Businesses

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of

[3] The Cole Memo notes that these enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA.

[4] James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014).

products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement's priorities. A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports ("SARs") as described below.

Filing Suspicious Activity Reports on Marijuana-Related Businesses

The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.[5] Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds.

One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a SAR that facilitates law enforcement's access to information pertinent to a priority.

"Marijuana Limited" SAR Filings

A financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a "Marijuana Limited" SAR. The content of this

[5] *See, e.g.*, 31 CFR § 1020.320. Financial institutions shall file with FinCEN, to the extent and in the manner required, a report of any suspicious transaction relevant to a possible violation of law or regulation. A financial institution may also file with FinCEN a SAR with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations.

SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term "MARIJUANA LIMITED" in the narrative section.

A financial institution should follow FinCEN's existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a "Marijuana Limited" SAR.[6] The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a "Marijuana Priority" SAR.

"Marijuana Priority" SAR Filings

A financial institution filing a SAR on a marijuana-related business that it reasonably believes, based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law should file a "Marijuana Priority" SAR. The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. Financial institutions should use the term "MARIJUANA PRIORITY" in the narrative section to help law enforcement distinguish these SARs.[7]

"Marijuana Termination" SAR Filings

If 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, it should

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[6] Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (Question #16), *available at:* http://fincen.gov/whatsnew/html/sar_faqs.html (providing guidance on the filing timeframe for submitting a continuing activity report).

[7] FinCEN recognizes that a financial institution filing a SAR on a marijuana-related business may not always be well-positioned to determine whether the business implicates one of the Cole Memo priorities or violates state law, and thus which terms would be most appropriate to include (i.e., "Marijuana Limited" or "Marijuana Priority"). For example, a financial institution could be providing services to another domestic financial institution that, in turn, provides financial services to a marijuana-related business. Similarly, a financial institution could be providing services to a non-financial customer that provides goods or services to a marijuana-related business (e.g., a commercial landlord that leases property to a marijuana-related business). In such circumstances where services are being provided indirectly, the financial institution may file SARs based on existing regulations and guidance without distinguishing between "Marijuana Limited" and "Marijuana Priority." Whether the financial institution decides to provide indirect services to a marijuana-related business is a risk-based decision that depends on a number of factors specific to that institution and the relevant circumstances. In making this decision, the institution should consider the Cole Memo priorities, to the extent applicable.

file a SAR and note in the narrative the basis for the termination. Financial institutions should use the term "MARIJUANA TERMINATION" in the narrative section. To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity. See *Section 314(b) Fact Sheet* for more information.[8]

Red Flags to Distinguish Priority SARs

The following red flags indicate that a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law. These red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list. It is thus important to view any red flag(s) in the context of other indicators and facts, such as the financial institution's knowledge about the underlying parties obtained through its customer due diligence. Further, the presence of any of these red flags in a given transaction or business arrangement may indicate a need for additional due diligence, which could include seeking information from other involved financial institutions under Section 314(b). These red flags are based primarily upon schemes and typologies described in SARs or identified by our law enforcement and regulatory partners, and may be updated in future guidance.

- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
    - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
    - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
    - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
    - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
    - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.

[8] Information Sharing Between Financial Institutions: Section 314(b) Fact Sheet, *available at: http://fincen.gov/statutes_regs/patriot/pdf/314bfactsheet.pdf.*

- Deposits apparently structured to avoid Currency Transaction Report ("CTR") requirements.

- Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.

- Deposits by third parties with no apparent connection to the accountholder.

- Excessive commingling of funds with the personal account of the business's owner(s) or manager(s), or with accounts of seemingly unrelated businesses.

- Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.

- Financial statements provided by the business to the financial institution are inconsistent with actual account activity.

- A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.

- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.

- The business is unable to demonstrate the legitimate source of significant outside investments.

- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a "consulting," "holding," or "management" company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.

- Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.

- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.

- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.

- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.

- A marijuana-related business's proximity to a school is not compliant with state law.

- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

Currency Transaction Reports and Form 8300's

Financial institutions and other persons subject to FinCEN's regulations must report currency transactions in connection with marijuana-related businesses the same as they would in any other context, consistent with existing regulations and with the same thresholds that apply. For example, banks and money services businesses would need to file CTRs on the receipt or withdrawal by any person of more than $10,000 in cash per day. Similarly, any person or entity engaged in a non-financial trade or business would need to report transactions in which they receive more than $10,000 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). A business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8), and therefore, is not eligible for consideration for an exemption with respect to a bank's CTR obligations under 31 C.F.R. § 1020.315(b)(6).

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FinCEN's enforcement priorities in connection with this guidance will focus on matters of systemic or significant failures, and not isolated lapses in technical compliance. Financial institutions with questions about this guidance are encouraged to contact FinCEN's Resource Center at (800) 767-2825, where industry questions can be addressed and monitored for the purpose of providing any necessary additional guidance.

Attachment C

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined 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. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

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[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
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