

# Marijuana and Banking

Testimony before the Nevada Gaming Policy Committee

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## 8/29/13 Cole Memo

- 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
- Recognition of increasing number of states legalizing possession of small amounts of marijuana
- Sets forth federal "enforcement priorities" given limited federal resources

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# Cole Memo-Enforcement Priorities

- Preventing distribution of marijuana to minors
- Preventing sale proceeds from benefiting criminal enterprises, gangs and cartels
- Preventing diversion to states where criminal
- Preventing pretext for other illegal drugs/activity
- Violence and use of firearms
- Drugged driving
- Possession on public lands
- Growing and use on public property

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# Cole Memo

- Outside of these activities, enforcement generally left to state and local police, so long as they have enacted comprehensive and effective regulatory system to safeguard against use by minors and support of other criminal enterprises
- But memo 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

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## 2/14/14 FinCEN Guidance

- Providing clarity in this context should enhance the availability of financial services for marijuana businesses. This would promote greater financial transparency in the marijuana industry and mitigate the dangers associated with conducting an all-cash business.

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## 2/14/14 FinCEN Guidance

- 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.

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# 4/1/14 Grassley/Feinstein Letter

- The mission of the Financial Crimes Enforcement Network (FinCEN) is to safeguard the nation's financial system from illicit use and to combat money laundering. However, the guidance that FinCEN recently issued regarding the proceeds of illegal marijuana trafficking severely undermines that mission.
- Letter posed 8 questions regarding potential prosecution of financial institutions

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# 5/8/2014 FinCEN Response

**1.** Given FinCEN's mission to safeguard the nation's banking system from illicit use and to combat money laundering, on what legal authority does it purport to "enhance the availability of financial services" for illegal drug traffickers?

- **We don't.**

**2.** Does FinCEN's guidance alter the federal criminal laws that prohibit the distribution and sale of marijuana, the laundering of marijuana proceeds, and any services that aid and abet these activities?

- **No impact. We defer to DOJ.**



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# FinCEN Response to Grassley

- 3.** Does FinCEN’s guidance alter the federal criminal laws that subject any proceeds obtained, directly or indirectly, from illegal activity, including the distribution of marijuana, to forfeiture?
- **No impact. We defer to DOJ.**
- 4.** Does FinCEN’s guidance alter the Bank Secrecy Act’s criminal penalties for failing to establish an anti-money laundering program designed “to guard against money laundering through financial institutions”?
- **No. Including criminal penalties.**
- 5.** Does FinCEN have any authority to exercise enforcement discretion relating to the federal criminal laws referenced above, or to decline to enforce these laws?
- **No. That would be DOJ.**

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# Filing Suspicious Activity Reports on Marijuana-Related Businesses

- 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.

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# Use of Marijuana Business to Launder Money From Other Criminal Enterprises—Red Flags Include

- 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

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# Use of Marijuana Business to Launder Money From Other Criminal Enterprises—Red Flags Include

- 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.
- A marijuana-related business engages in international or interstate activity

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# 21 U.S. Code § 856 — Maintaining Drug-Involved Premises

- It is a federal crime to manage or control any place, ... as an owner, ... and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance. 21 U.S.C. § 856(a)(2).”