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U.S. Issues Marijuana Guidelines for Banks

By SERGE F. KOVALESKI FEB. 14, 2014

The Obama administration on Friday issued guidelines intended to give banks confidence that they will not be punished if they provide services to legitimate marijuana businesses in states that have legalized the medical or recreational use of the drug, even though it remains illicit under federal law.

The guidance, which requires banks to vigorously monitor their marijuana-industry customers, was provided by the Treasury Department and the Justice Department in separate advisories. The policy does not grant immunity from prosecution or civil penalties to banks that serve legal marijuana businesses. But it directs prosecutors and regulators to give priority to cases only where financial institutions have failed to adhere to the guidance.

Still, the banking industry was quick to say that the new guidelines would not be sufficient to make banks feel at ease about opening accounts for or granting loans to marijuana businesses because the drug would still be illegal under the federal Controlled Substances Act.

“While we appreciate the efforts by the Department of Justice and FinCEN, guidance or regulation doesn’t alter the underlying challenge for banks,” Frank Keating, president of the American Bankers Association, said in a statement, referring to the Financial Crimes Enforcement Network, the Treasury unit that issued part of the guidelines. “As it stands, possession or distribution of marijuana violates federal law, and banks that provide support for those activities face the risk of prosecution and assorted sanctions.”

Twenty states and the District of Columbia allow the use of marijuana for medical purposes, and two of those states, Colorado and Washington, have also legalized the recreational use of the drug. Those numbers may grow this year, as several other states are considering measures to legalize marijuana use.

In a three-page memo to prosecutors issued in conjunction with the new banking guidelines, Deputy Attorney General James M. Cole wrote that prosecutions may not be “appropriate” when banks do business with marijuana entities that are operating legally under state law and do not violate any of the eight priorities set forth in a Justice Department memo last August. Those priorities include preventing the distribution of marijuana to minors and preventing revenue from the sale of marijuana from going to criminal enterprises.

Jennifer Shasky Calvery, director of the Financial Crimes Enforcement Network, said she was unaware of any banks that have been punished for servicing legal marijuana businesses.

Legal marijuana entrepreneurs have stressed that access to banking has been their most pressing concern. Their businesses are conducted almost entirely in cash, raising huge security concerns, because it is difficult for them to open and maintain bank accounts, or to accept credit cards. Banks have been apprehensive about providing services to marijuana businesses for fear that the authorities might punish them for violating money-laundering laws, among other federal statutes and regulations.

Last month, Attorney General Eric H. Holder Jr. acknowledged that having so much cash on hand presented a public safety problem for legal marijuana businesses, adding that they should have access to the country's banking system.

Some representatives of the legal marijuana industry said that although the guidelines showed progress, federal laws need to be revamped.

"It's a great step in the right direction, but ultimately it would not solve all the problems here," said Michael Elliott, executive director of the Medical Marijuana Industry Group in Colorado. "We need to go beyond saying that this is a low law enforcement priority. There are still violations of federal law going on here. So, federal laws need to be changed to ensure that what is legal in states like Colorado is legal at the federal level, as well."

Marijuana remains a Schedule 1 drug — along with heroin, LSD and Ecstasy — under the Controlled Substances Act. This week, 18 members of Congress, in a joint letter to President Obama, asked him to instruct Mr. Holder to remove marijuana from any of the drug schedules or to reschedule it to a lower category.

"Classifying marijuana as Schedule 1 at the federal level perpetuates an unjust and irrational system," the lawmakers, led by Representative Earl Blumenauer, Democrat of Oregon, said in the letter. "Schedule 1 recognizes no medical use, disregarding both medical evidence and the laws of nearly half of the states that have legalized medical marijuana."

Ms. Shasky Calvery said in a conference call with reporters that the guidelines should clarify how financial institutions can provide services to marijuana businesses while maintaining their obligation to comply with the federal anti-money-laundering law, the Bank Secrecy Act. She also said that the guidelines were drafted "to move from the shadows" the financial operations of marijuana businesses.

The guidance "will provide transparency and mitigate the risks to the financial system," Ms. Shasky Calvery said. The authorities do not intend to crack down on banks "for a technical mishap," she said, adding: "We are not looking to have a gotcha enforcement regime."

In a seven-page document explaining the guidelines, FinCEN called for "due diligence" by financial institutions in monitoring their marijuana customers, including reviewing their applications for state licenses and understanding their "normal and expected activity," such as the types of products they sell and whether they have medical or recreational customers.

Since the financial transactions of a marijuana business are considered illegal under federal law, banks are required to file suspicious activity reports on those entities. A spokesman for the Treasury unit, Steve Hudak, said the reports under the guidelines would be abbreviated versions. Banks will have to initially file one suspicious activity report on a marijuana business, then three a year after that.

The new guidelines also establish different kinds of suspicious activity reports, depending on whether a bank believes a marijuana business is running afoul of the Justice Department's priorities or is violating state law.