

Harold B. Scoggins, III
Attorney
Admitted in Oregon and Washington
hscoggins@fwwlaw.com

121 SW Morrison Street, Suite 600
Portland, Oregon 97204
tel 503.228.6044
fax 503.228.1741
www.fwwlaw.com

February 25, 2015

**TESTIMONY
PRESENTED BY HAROLD B. SCOGGINS, III
FARLEIGH WADA WITT
Counsel for the Northwest Credit Union Association
Before the Joint Committee on Implementing Measure 91**

Good evening Chairs Burdick and Lininger and members of the committee, my name is Harold Scoggins. I am an attorney with Farleigh Wada Witt, outside counsel for the Northwest Credit Union Association. Our firm also represents many individual credit unions throughout Oregon and Washington and the U.S. I appreciate the opportunity to talk with you today about some of the regulatory issues affecting credit union service to marijuana related businesses as you consider how to implement Measure 91.

In my testimony, I will briefly outline the applicable regulatory requirements and legal concerns associated with providing financial services to marijuana related businesses. These regulatory requirements and legal concerns arise primarily from the direct conflict that exists between federal laws criminalizing production, distribution, and use of marijuana, and Oregon state law which permits those same activities. Although these problems will not be eliminated without a change in federal law, there are steps that Oregon can take in order to minimize the regulatory burden, compliance, and legal risk imposed on financial institutions and the marijuana related businesses they choose to serve. These steps include development of a clear and robust regulatory scheme for businesses that conduct these activities, making information about the businesses readily available to financial institutions at minimal cost, and maintaining clear communications with local and federal authorities regarding the types of activities in Oregon that likely to come under federal scrutiny.

Background

State laws legalizing medicinal marijuana use (and in Washington and Colorado, recreational marijuana use) and legalizing marijuana distribution for permitted purposes have left credit unions in a bind. Growers and distributors quickly formed new businesses to meet the newly legalized demand. Like any new business, these organizations need financial services in order to successfully operate. However, financial institutions have been unable to provide those services, due to Bank Secrecy Act (BSA) compliance and federal criminal concerns .

Growing and distributing marijuana for permitted purposes is no longer a crime under the law of 20 states (and the District of Columbia). However, it remains a federal crime. The U.S. Justice Department's (DOJ) assurances that it will not pursue criminal charges against marijuana-

related businesses (MRBs) permitted by state law did not address the BSA concerns faced by credit unions serving those businesses. Credit unions must file suspicious activity reports when they are aware that a member is depositing funds derived from illegal activity into the member's account. In addition, the DOJ's non-enforcement stance provides no explicit protection for a credit union potentially aiding and abetting federal criminal activity.

FinCEN attempts to address the BSA issues by laying out its expectations in three key aspects of serving MRBs:

- Due diligence in account opening for MRBs;
- A special regime of SAR filing requirements for MRBs; and
- Continuing due diligence requirements in serving MRBs.

The guidance is aimed at harmonizing credit union BSA requirements with the enforcement priorities set out last August in a U.S. Department of Justice Memorandum from Deputy Attorney General Andrew Cole to U.S. Attorneys (the Cole Memo).

Due Diligence in Account Opening

FinCEN listed five specific due diligence points that credit unions must address before providing services to an MRB:

- (1) Verifying with state authorities that the business is duly licensed and registered;
- (2) Reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
- (3) Requesting from state licensing and enforcement authorities available information about the business and related parties;
- (4) Developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); and
- (5) Considering whether the MRB implicates one of the Cole Memo priorities or violates state law. The Cole Memo priorities include the following:
 - 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.

Any credit union that provides service to MRBs must adopt procedures to complete these five requirements (including analysis of the Cole Memo factors) and document the results.

SARs for MRBs

FinCEN has attempted to alleviate the continuing SAR filing requirements that otherwise apply when a credit union member is engaged in ongoing activity that triggers SAR filing. Because the basic filing requirement resides in the BSA statutes, FinCEN had limited authority to deal with the issue. However FinCEN found a way by creating three special types of SARs for MRBs.

Marijuana Limited SAR

If an MRB's activity would not trigger any SAR filing requirements except for the fact that the MRB is dealing with marijuana, the credit union may file a Marijuana Limited SAR. This SAR is labeled a "Marijuana Limited" SAR in the narrative section and contains only:

- identifying information for the subject parties;
- addresses of the subject parties;
- the fact that the SAR is filed solely because the party is an MRB; and
- the fact that the credit union has not detected any additional suspicious activity.

Subsequent (continuing) marijuana limited SARs must be filed each 120 days, with the same four elements of the original SAR, plus "details about the amount of deposits, withdrawals, and transfers since the last SAR." This presumably does not require actual daily transaction information, but it is unclear exactly what level of detail might be required.

Marijuana Priority SAR

If the credit union believes that activity of an MRB implicates one of the Cole Memo priorities or violates state law, it must file a Marijuana Priority SAR. The Marijuana Priority SAR includes all information that any ordinary SAR would include but also outlines which Cole Memo priorities the credit union believes are implicated and why. The Marijuana Priority SAR should be labeled as such in the narrative section.

Marijuana Termination SAR

If the credit union determines to stop serving an MRB, "in order to maintain an effective anti-money laundering program," it must file a Marijuana Termination SAR (labeled as such in the narrative section) and note in the narrative section the reasons for termination of the business relationship.

Continuing Due Diligence Requirements

In addition to initial account opening due diligence, credit unions serving an MRB must engage in ongoing due diligence to determine whether additional action should be taken or a Marijuana Priority SAR must be filed. The due diligence must include:

- ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- ongoing monitoring for suspicious activity; and
- refreshing information obtained as part of customer due diligence on a periodic basis.

The guidance lists 11 red flags that could indicate that an MRB is engaged in activity that implicates a Cole Memo priority or violates state law. The credit union must be vigilant in reviewing account activity for the presence of such red flags, and must file a Marijuana Priority SAR if the red flag (or other factors) leads the credit union to believe that a Cole Memo priority is affected or state law is violated. If the credit union decides not to file a Marijuana Priority SAR despite the presence of a red flag, the reasons for that decision should be documented.

Service Considerations

Although the guidance itself does not mention this, the accompanying Justice Department memo warns that financial institutions operating in states that lack “a clear and robust regulatory scheme” for MRBs are more likely to “risk entanglement” with the eight priorities set forth in the Cole memo. Similarly, the Washington DFI letter to banks and credit unions also notes that the new guidance applies to MRBs that are in compliance with Washington’s regulatory scheme. Thus, the starting point for considering service to MRBs in any state is an understanding of that state’s regulatory scheme and requirements, whether it is limited to medical marijuana or permits broader use.

Credit unions considering service to MRBs should carefully review the FinCEN guidance and the Cole Memo, along with the Memorandum to U.S. Attorneys issued February 14, 2014.

The FinCEN guidance document can be accessed here:

http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf

The February 14, 2014 Department of Justice Memorandum to U.S. Attorneys can be found here:

<http://dfi.wa.gov/banks/pdf/dept-of-justice-memo.pdf>

The original Cole Memo is available here:

<http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

P:\DOCS\NWCUA\01199\DOC\3LC2318.DOC