

Federal bank regulators issue joint guidance on hemp

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On Dec. 3 the federal bank regulatory agencies issued joint guidance on Providing Financial Services to Customers Engaged in Hemp-Related Businesses (Joint Hemp Guidance).¹ These agencies — the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board and Financial Crimes Enforcement Network (FinCEN) — issued the guidance jointly and in consultation with the Conference of State Bank Supervisors.

BACKGROUND ON THE CURRENT LEGAL STATUS OF HEMP

The guidance provides a reminder for banks of the legal status of hemp under the Agricultural Improvement Act of 2018 (the 2018 Farm Bill) and highlights of the key compliance requirements for banks that serve the hemp industry.

The 2018 Farm Bill removed “industrial hemp,” that is hemp with tetrahydrocannabinol (THC) levels of not more than 0.3 percent, from coverage under the federal Controlled Substances Act (CSA) and relegated the plant to regulation as an agricultural commodity.

Pursuant to the 2018 Farm Bill, the U.S. Department of Agriculture (USDA) issued an interim final rule implementing the statute, setting forth the regulatory regime under which hemp producers may act, and providing requirements and a mechanism for states to implement their own hemp regulations. See Interim Final Rule: Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58522 (Oct. 31, 2019).²

The USDA’s regulation affirms that there are certain requirements that all hemp producers must meet, including licensing requirements, maintaining information on the land on which the hemp is produced, procedures for testing the THC concentration levels for hemp, procedures for disposing of non-compliant plants, compliance provisions, and procedures for handling violations. 84 Fed. Reg. at 58523.

While hemp meeting the 2018 Farm Bill requirements is legal under federal law, states are still permitted to impose their own restrictions on intrastate production of hemp, provided that they are no less stringent than the federal requirements, including the state providing an absolute ban on intrastate production, possession or transportation (but not necessarily interstate transportation).

NEW JOINT HEMP GUIDANCE

The new interagency guidance confirms that banks are free to provide banking services to the hemp industry just as they may for any other agricultural commodity.

Specifically, the guidance affirms that banks are not required to file a Suspicious Activity Report (SAR) on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable law and regulations, such as the 2018 Farm Bill and the USDA hemp regulations discussed above.

The guidance also notes that “it is generally a bank’s business decision as to the types of permissible services and accounts to offer,” but as with any other customer, the bank must have a Bank Secrecy Act (BSA)/Anti-Money Laundering (AML) compliance program that is commensurate with the level of complexity and risks involved.

The guidance provides a reminder for banks of the legal status of hemp under the Agricultural Improvement Act of 2018 (the 2018 Farm Bill) and highlights of the key compliance requirements for banks that serve the hemp industry.

When deciding whether to serve hemp-related businesses, the guidance notes that banks must comply with applicable regulatory requirements for customer identification, suspicious activity reporting, currency transaction reporting and risk-based customer due diligence, including the collection of beneficial ownership information for legal entity customers.

Additionally, the guidance notes that the 2018 Farm Bill explicitly preserved the authority of the U.S. Food and Drug Administration (FDA) to regulate hemp-related products.

IMPACT FOR BANKING ACTIVITIES

While the new Joint Hemp Guidance is helpful, it is far from groundbreaking as it confirms the legal landscape and supervisory posture that most banks and their advisors have understood since December 2018 when the 2018 Farm Bill was passed.



The guidance confirms the important distinction as to BSA/AML treatment of hemp customers versus cannabis customers, namely that the 2014 FinCEN guidance on the application of SAR reporting requirements to cannabis customers still applies to such customers, but they would not apply to customers that are solely engaged in lawful hemp growth and cultivation activities.

Additionally, banks should not interpret from the Joint Hemp Guidance that providing banking services to hemp businesses is entirely risk-free, or even on par with the risks posed by customers involved in other agricultural commodities, such as wheat, soybeans or other common crops.

Importantly, while the continuously evolving legal and regulatory environment of hemp and hemp banking certainly has an impact on banks' compliance programs, the hemp industry also presents important opportunities for banks to serve a growing customer base.

Hemp is different because of its relatively new legal status, because many hemp customers may also be engaged in cannabis activities, and because the impact of customers that do not follow the highly technical requirements of USDA and state regulations may cause banks to inadvertently increase their compliance risk.

The timing of the Joint Hemp Guidance, following just more than a month after the USDA issued its hemp regulation, provides an opportunity for banks that have either already

started serving the hemp industry, or are considering doing so, to review and revise as necessary their current policies and procedures on hemp banking, as well as their documentation for on-boarding new hemp customers.

Importantly, while the continuously evolving legal and regulatory environment of hemp and hemp banking certainly has an impact on banks' compliance programs, the hemp industry also presents important opportunities for banks to serve a growing customer base.

By maintaining a robust compliance program, banks can reap the benefits of new industries, such as the hemp industry, while managing the costs and administrative burden of compliance.

Holland & Knight's attorneys and policy advisors are well versed in the complex legal issues affecting all aspects of the cannabis industry — including public policy, financial regulations, corporate and risk issues, and litigation. For more information about the Joint Guidance on Hemp and how it could specifically impact your organization, please contact the authors.

NOTES

¹ <http://bit.ly/2PIDInK>

² <http://bit.ly/2EDB7Vx>

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Highlights

- ✓ Several federal bank regulatory agencies, in consultation with the Conference of State Bank Supervisors, have issued joint guidance on Providing Financial Services to Customers Engaged in Hemp-Related Businesses.
- ✓ The new interagency guidance, issued on Dec. 3, 2019, confirms that banks are free to provide banking services to the hemp industry just as they may for any other agricultural commodity. Specifically, the guidance affirms that banks are not required to file a Suspicious Activity Report (SAR) on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable law and regulations.
- ✓ When deciding whether to serve hemp-related businesses, the guidance notes that banks must comply with applicable regulatory requirements for customer identification, suspicious activity reporting, currency transaction reporting and risk-based customer due diligence, including the collection of beneficial ownership information for legal entity customers.

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