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insights

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FinCEN guidance looks to enhance availability and transparency of financial services to hemp companies

On June 29, the Financial Crimes Enforcement Network (“FinCEN”) provided additional guidance for financial institutions that monitor hemp-related companies (the “Guidance”). Such Guidance provides a clarification that “is intended to enhance the availability of financial services for, and the financial transparency of, hemp-related businesses in compliance with federal law.”

As background, the Guidance explains that the United States 2018 Farm Bill removed hemp (as defined in the bill) from the definition of marijuana in the Controlled Substances Act and called for the creation of “a regulatory framework for the legal production of hemp.” Not to be confused with marijuana, hemp is defined in the 2018 Farm Bill as “the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis.” Despite passage of the 2018 Farm Bill, banks have remained leery of providing financial services to hemp companies, presumably due to hemp’s association with marijuana.

The FinCEN Guidance states that the analysis to determine compliance with the Bank Secrecy Act (“BSA”) and Anti-Money Laundering (“AML”) regulatory requirements for hemp companies is similar to the analysis for non-hemp companies, including the due diligence conducted, risk profile created and processes used to analyze such risk. Hemp companies should be treated just like any other company, pertaining to Suspicious Activity Reports (“SARs”) as well. Standard SAR procedures are to be followed by financial institutions analyzing hemp-related companies, as hemp is no longer classified as a Schedule I controlled substance under the Controlled Substances Act of 1970.

Finally, FinCEN’s updated Guidance clarifies that risk-based Customer Due Diligence (“CDD”) conducted by a financial institution pursuant to “appropriate risk based procedures”, will be similar for hemp companies and non-hemp companies, but highlights that, “as with any customer, FinCEN expects financial institutions to tailor their BSA/AML programs to reflect the risks associated with the customer’s particular risk profile and file reports required under the BSA.” As such, the risk profile for hemp companies should continue to be closely monitored, as they may be more likely to necessitate a SAR filing to the extent there is a close association or affiliation with marijuana-related activity. With respect to hemp growers, the Guidance states that financial institutions may confirm compliance with any applicable state, tribal or USDA licensing requirements by obtaining a written certification or attestation of compliance from the customer or by obtaining a copy of such license.

As described above, the Guidance issued by FinCEN provides additional clarity that will assist financial institutions in their oversight of hemp companies, and should facilitate greater availability of financial services. For more information regarding FinCEN’s updated guidance, please click here.

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