

# United States Senate

SENATE CAUCUS ON  
INTERNATIONAL NARCOTICS CONTROL  
HART SENATE OFFICE BUILDING, ROOM 818-C  
WASHINGTON, DC 20510

April 1, 2014

Ms. Jennifer Shasky Calvery  
Director  
Financial Crimes Enforcement Network  
U.S. Department of the Treasury  
P.O. Box 39  
Vienna, VA 22183

Dear Director Calvery:

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.

As you know, recently the states of Colorado and Washington became the first jurisdictions in the world to legalize the production, trafficking, possession and use of marijuana for recreational purposes. The Controlled Substances Act, however, still bans these activities under federal law.

Last August, the Department of Justice (DOJ) announced that it would not challenge these state laws, despite their obvious conflict with federal law. Additionally, the DOJ issued guidance to prosecutors concerning the enforcement of the Controlled Substances Act that would allow marijuana businesses in these states to operate, notwithstanding their violation of federal law. However, even after the DOJ issued this guidance, financial institutions refused to provide banking services to marijuana businesses. This is not surprising, given the participation of these businesses in illegal activity. In response, on February 14, 2014, FinCEN and the DOJ each issued guidance regarding the proceeds of illegal marijuana trafficking.

Like the memorandum it issued in August, the DOJ's recent guidance was couched in terms of prosecutorial or enforcement discretion. But such discretion may not be properly employed to *facilitate* illegal activity. Similarly, FinCEN's guidance appears focused on *assisting* those businesses that seek to inject the proceeds of criminal activity into the nation's financial system.<sup>1</sup> This turns FinCEN's mission on its head.

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<sup>1</sup> For example, FinCEN's guidance states that it "should enhance the availability of financial services for . . . marijuana-related businesses." Financial Crimes Enforcement Network, *Guidance: BSA Expectations Regarding Marijuana-Related Businesses*, FIN-2014-G001 (February 14, 2014). Moreover, in the press release accompanying the guidance you stated that "FinCEN seeks to move from the shadows the historically covert financial operations of

FinCEN's guidance purportedly "clarifies how financial institutions can provide services to marijuana-related businesses."<sup>2</sup> However, the guidance is dangerously misleading. Indeed, following the guidance may expose financial institutions to civil or criminal liability. Congress and the President may reconsider marijuana's legality, but until federal law is changed, selling marijuana, laundering marijuana proceeds, and aiding and abetting those activities all remain illegal. Far from *clarifying* the obligations of financial institutions, FinCEN's guidance appears to create uncertainty where none had existed beforehand.

To help Congress, financial institutions, and the American public understand both the basis and the real-world implications of FinCEN's guidance, please answer the following questions:

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?
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?
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?
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"?<sup>3</sup>
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?
6. Does FinCEN anticipate taking any steps to protect financial institutions from criminal prosecution by the DOJ if a financial institution follows its guidance and provides financial services to illegal drug traffickers? If so, what are those steps?
7. Does FinCEN know of any reason why Suspicious Activity Reports filed by a financial institution relating to an illegal marijuana business, perhaps with the name of the marijuana business redacted, may not be used as evidence against that

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marijuana businesses." Financial Crimes Enforcement Network, Press Release, *FinCEN Issues Guidance to Financial Institutions on Marijuana Businesses* (February 14, 2014).

<sup>2</sup> Financial Crimes Enforcement Network, *Guidance: BSA Expectations Regarding Marijuana-Related Businesses*, FIN-2014-G001 (February 14, 2014).

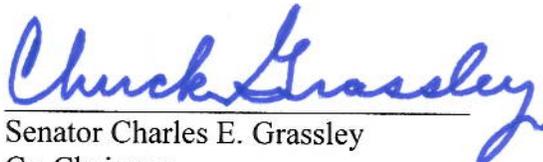
<sup>3</sup> See 31 U.S.C. §§ 5318(h) & 5322(a).

financial institution, including as a party admission under Federal Rule of Evidence 801(d)(2)?

8. How many financial institutions asked FinCEN for guidance about whether they could provide services to illegal marijuana businesses prior to the issuance of its guidance?

Thank you for your cooperation and attention in this matter. We would appreciate a response by April 15, 2014. Please number your answers in accordance with our questions. If you have any questions, please do not hesitate to contact Chris Lucas or David Bleich at (202) 224-5225, or Matt Bentrott at (202) 228-3081.

Sincerely,

  
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Senator Charles E. Grassley  
Co-Chairman

  
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Senator Dianne Feinstein  
Chairman