

Congress of the United States

Washington, DC 20515

November 14, 2023

The Honorable Janet Yellen Secretary
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Ave NW
Washington, DC 20220

The Honorable Andrea Gacki
Director
Financial Crimes Enforcement
Network
P.O. Box 39, Vienna, VA 22183

Dear Secretary Yellen and Director Gacki:

We write to request that the Financial Crimes Enforcement Network (FinCEN) update its out-of-date guidance on marijuana-related businesses. FinCEN's 2014 guidance¹ predates action by many states to legalize marijuana possession and sales, and it unnecessarily red-flags businesses whose owners have been engaged in marijuana activities that are no longer criminalized at the state level. The updated guidance should clarify that if a marijuana-related act has been expunged, pardoned, is no longer illegal under state law, or is not disqualifying for obtaining a state marijuana license or permit (i.e. "state-sanctioned marijuana activity"), then financial institutions should not consider that offense a "red flag" when conducting customer due diligence of marijuana businesses. This would be an important step to promote fairness in the provision of financial services to marijuana businesses that participate in state-sanctioned marijuana activity.

On February 14, 2014, FinCEN issued guidance titled "BSA Expectations Regarding Marijuana-Related Businesses."² That guidance directs financial institutions to consider various "red flags" before providing services to marijuana-related businesses. The red flags are intended to help identify if a marijuana-related business may be engaged in activity that violates state law or implicates one of the Department of Justice's marijuana-related enforcement priorities, as laid out in the DOJ's 2013 Cole Memo.³

One of FinCEN's red flags states:

Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.⁴

¹ Department of the Treasury Financial Crimes Enforcement Network, "BSA Expectations Regarding Marijuana-Related Businesses," Feb. 14, 2014, <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf> ("FinCEN 2014 Guidance").

² *Id.*

³ Department of Justice, "Guidance Regarding Marijuana Enforcement," Aug. 29, 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁴ Department of the Treasury Financial Crimes Enforcement Network, "BSA Expectations Regarding Marijuana-Related Businesses," p. 6, Feb. 14, 2014, <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf>.

This red flag would capture all past marijuana criminal records and involvement in the illegal purchase or sale of marijuana — regardless of whether the marijuana-related act is now state sanctioned. As a result, if a business owner, manager, or other related party has a conviction for simple marijuana possession, banks could view that conviction as a reason not to provide financial services — including banking services and loans to the business — even in states where marijuana possession is no longer illegal. As noted by Cat Packer, Vice Chair of the Cannabis Regulators of Color Coalition, there is real “concern[] that past marijuana criminal records, especially those that have been expunged or are for activity that has been pardoned or is no longer prohibited under state law, will . . . serve[] as an automatic indication that a business may be engaged in illegal activity.”⁵

Under this red flag guidance, a marijuana business owner with a marijuana conviction may be permitted to participate in a state licensing program on paper, but in practice may be unable to access a bank loan to grow her business because she is considered a high-risk customer. Others may be denied bank accounts and left to operate their businesses on a cash-only basis, exposing workers to safety risks. This disproportionately harms Black- and Brown-owned businesses, whose owners are more likely to have a marijuana-related conviction, though they are not more likely to have violated marijuana use laws.⁶

FinCEN’s red flags bake a penalty for non-violent marijuana activity into lending decisions — even as states overwhelmingly move to eliminate such penalties. Thirty-eight states now permit adult-use and/or medical-use marijuana programs.⁷ Moreover, 24 states have begun expunging, vacating, or sealing past marijuana criminal records, for some or all types of offenses.⁸ Additionally, 14 states have laws that allow individuals with past marijuana criminal records to participate in state-legal markets.⁹ State and local cannabis regulators across the country have raised FinCEN’s red flag policy as a significant issue impacting their efforts to responsibly and fairly license and regulate marijuana businesses.¹⁰ FinCEN should ensure its guidance does not impose barriers to the efforts of states to provide business opportunities to those with previous marijuana offenses.

⁵ Written Testimony of Cat Packer to the U.S. Senate Committee on Banking, Housing and Urban Affairs, May 11, 2023, <https://www.banking.senate.gov/imo/media/doc/Packer%20Testimony%205-11-23.pdf>.

⁶ American Civil Liberties Union, “A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform,” 2020, pp.29, https://www.aclu.org/wp-content/uploads/legal-documents/marijuanareport_03232021.pdf.

⁷ National Conference of State Legislators, “State Medical Cannabis Laws,” updated June 9, 2023, <https://www.ncsl.org/health/state-medical-cannabis-laws>.

⁸ NORML, “State Expungement Laws,” <https://norml.org/laws/expungement/>.

⁹ Network for Public Health Law, “Adult-Use Cannabis Social Equity Tool Kit,” p. 7-9, <https://www.networkforphl.org/wp-content/uploads/2022/09/Toolkit-Adult-Use-Cannabis-Revised-9-29-22-draft.pdf>.

¹⁰ Cat Packer, Shaleen Title, Rafi Aliya Crockett, Dasheeda Dawson, “Not a SAFE Bet: Equitable Access to Cannabis Banking, An Analysis of the SAFE Banking Act,” Ohio State Legal Studies Research Paper No. 721, Aug. 11, 2022, <https://ssrn.com/abstract=4188072>; Letter from Cannabis Regulators Association to Senate Committee on Banking, Housing and Urban Affairs, May 10, 2023, <https://www.cann-ra.org/news-events/cannra-comments-on-the-urgency-of-the-cannabis-banking-situation-in-states>.

FinCEN need not wait for new legislation to update its 2014 guidance. The 2014 guidance provides that the list of red flags “may be updated in future guidance.”¹¹ Nor should FinCEN wait for a decision by the Department of Justice on the rescheduling recommendation by the Department of Health and Human Services on marijuana’s placement in the Controlled Substances Act, as rescheduling would have zero impact on prior marijuana convictions at either the federal or state level. FinCEN can and should update its guidance now to ensure that the guidance does not impede state efforts to allow owners who were previously involved in the illegal purchase or sale of marijuana to participate in state-sanctioned marijuana activity. For example, the guidance could explicitly state that “any conviction for marijuana activity that has been expunged, pardoned, is no longer illegal under the law of the state where the business is located, or is no longer disqualifying for obtaining a state marijuana license or permit should not be considered an indication of criminal activity.”

FinCEN should similarly update its red flag that currently directs financial institutions to consider whether “[t]he business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.”¹² The updated guidance should clarify that these prior enforcement actions should not result in a red flag if they targeted marijuana activity that is now state sanctioned. These clarifications would help ensure that all marijuana business owners have fair access to banking services. Until FinCEN does so, these business owners will continue to face unnecessary barriers to accessing financial services, simply for acts now legal within their states.

In an effort to learn more about FinCEN’s efforts to address this problem and update its guidance, we request answers to the following questions by [DATE], 2023:

1. What steps, if any, is FinCEN taking to update its 2014 guidance in light of marijuana decriminalization, expungements, and/or pardons at the state level?
2. What steps, if any, is FinCEN taking to update its 2014 guidance in light of state laws allowing or prioritizing marijuana business licenses or permits for those with past marijuana-related convictions?
3. Is FinCEN planning to update the 2014 guidance to make clear that convictions for state-sanctioned marijuana activity should not be considered a “red flag”?
 - a. If so, what is FinCEN’s timeline for updating the guidance?
 - b. What stakeholders, if any, is FinCEN speaking with about updates to its guidance?
4. Has FinCEN studied the impact of the 2014 guidance on lending patterns, including trends in the size of marijuana businesses that receive bank loans and the race/ethnicity of business owners? If yes, what has FinCEN learned from studying the impact of the 2014 guidance?
5. Has FinCEN gathered data on the number of business owners who are adversely impacted by the red flag that directs financial institutions to consider owners’ criminal records and “connections to illicit activity”? If yes, how many businesses:

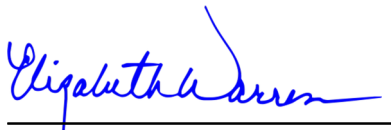
¹¹ Department of the Treasury Financial Crimes Enforcement Network, “BSA Expectations Regarding Marijuana-Related Businesses,” p. 5, Feb. 14, 2014, <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf>.

¹² *Id.* at 6.

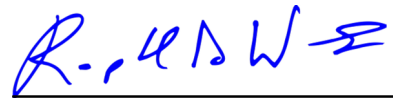
- a. Have been adversely impacted by a red flag, and what was the nature of the adverse impact for each case?
 - b. Were subject to the red flag but were not adversely impacted?
6. What are FinCEN's past efforts and future plans to monitor and promote fair access in the provision of financial services to state-sanctioned marijuana businesses and hemp businesses, especially for minority-owned, women-owned, veteran-owned, Tribal community-owned, and small businesses, as well as business owners with past marijuana criminal records? For example:
 - a. Has FinCEN established best practices for financial institutions to follow, including best practices to promote fairness when providing financial services, including when processing payments to state-sanctioned marijuana businesses and related service providers?
 - b. If not, is FinCEN considering establishing such best practices?
 - i. If so, what is FinCEN's timeline for issuing such best practices?
 - c. What specific steps has FinCEN taken to ensure compliance with President Biden's January 2021 Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government?

We look forward to your response and to working together on these issues.

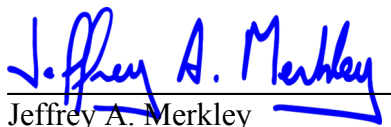
Sincerely,



Elizabeth Warren
United States Senator



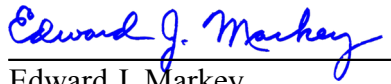
Raphael Warnock
United States Senator



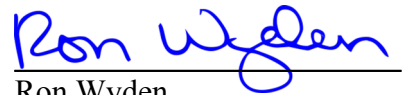
Jeffrey A. Merkley
United States Senator



Tina Smith
United States Senator



Edward J. Markey
United States Senator



Ron Wyden
United States Senator



Bernard Sanders
United States Senator



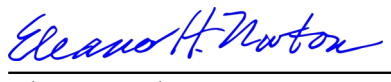
Cory A. Booker
United States Senator



Peter Welch
United States Senator



Earl Blumenauer
Member of Congress



Eleanor Holmes Norton
Member of Congress



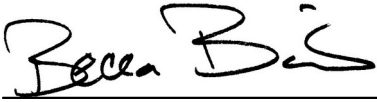
Jan Schakowsky
Member of Congress



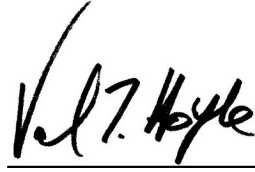
Barbara Lee
Member of Congress



Brian Schatz
United States Senator



Becca Balint
Member of Congress



Val Hoyle
Member of Congress



Katie Porter
Member of Congress



Amy Klobuchar
United States Senator



Chris Van Hollen
United States Senator