



# CBA Regulatory Compliance Bulletin

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## Federal Prosecutors Target Marijuana Dispensaries

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Although California's voter-approved Compassionate Use Act of 1996 allows seriously ill patients to use medical marijuana with a doctor's permission, federal prosecutors contend that federal laws criminalizing marijuana use, sale, or possession apply regardless of the purported "medicinal use" of marijuana.

In fall 2011, federal prosecutors in California commenced a crackdown on the state's medical marijuana industry. U.S. Attorneys in California began sending letters to certain marijuana dispensaries notifying them that despite California's law they are in violation of federal drug laws. Moreover, in an apparent attempt to bring additional pressure to bear, federal prosecutors have notified real property owners, landlords and lenders whose loans are secured by the real property that under federal law their real and personal property interests are subject to seizure and forfeiture to the United States without compensation to the property owners and free and clear of a lender's lien interest in the property.

All four U.S. Attorneys for California have sent such notices to property owners and banks in their districts. To date, the authors of this article are aware of at least such eight letters sent to banks by the U.S. Attorney for the Northern District of California threatening forfeiture of real property where dispensaries operate near schools

and parks. In a letter<sup>1</sup> from the California Attorney General Kamala Harris to legislative leaders in Sacramento dated December 21, 2011 in which the AG urged the legislature to clarify the state's marijuana laws for other reasons, a reference is made to U.S. Attorneys' focus on "major drug traffickers" as opposed to individuals whose actions were in "clear and unambiguous compliance" with state laws. (Quotes in original). In light of the known letters already sent, it is apparent that the U. S. Attorneys' prosecutorial discretion is both fluid and independent of states' laws and enforcement efforts.

This serious conflict between federal and California law is far beyond the control of any single property owner and lender holding a security interest in property targeted for forfeiture. Until this dispute is resolved by the courts or the legislatures, California banks should be focused on protecting their interests in real and personal property security in the face of federal seizure and forfeiture efforts.

If the U.S. Attorney's office notifies a bank that a medical marijuana dispensary operates from real property securing one of its loans, it is critical that the bank take documented steps to preserve its ability to invoke the "innocent owner" defense in any subsequent court action taken by the federal government to seize and cause forfeiture of the real property security. Federal law governing civil forfeiture actions provides a defense to "innocent owners" who acquire an interest in property that is used for an illegal purpose, provided the owner (or in a bank's case,

<sup>1</sup> The AG's letter can be viewed by clicking [here](#).

the secured lender): (1) did not know of the illegal conduct; and (2) upon learning of the conduct giving rise to the forfeiture, “did all that reasonably could be expected under the circumstances to terminate such use of the property.” If the real property owner or secured lender can meet this test, the real property can be protected from forfeiture. The purpose of the U.S. Attorney’s letter to property owners and lenders is an attempt to defeat their “innocent owner” defenses by expressly giving them notice of the illegal activity on the property. The notice will also have the effect of motivating property owners and lenders to terminate the illegal conduct.

After being notified, the bank should consider taking the following steps in response:

- *Determine the bank’s rights under all relevant loan documents.* Banks should review the applicable loan documents, including loan guaranties, and all other relevant documents affecting the real property, including the marijuana dispensary’s lease, to identify all parties’ rights to effect or encourage the prompt termination of illegal dispensary operations. Language in most loan documents, including many of the standard form loan documents, provide banks with multiple bases to declare an event of default due to unlawful conduct or to a real or prospective threat to the bank’s security.
- *Contact the borrower.* Once the bank has determined the scope and nature of parties’ rights under the applicable loan documents, the bank should contact the borrower to ascertain what the borrower intends to do and what, if anything, has been done, to remove the illegal marijuana dispensary. The borrower, as the landlord, will likely have more direct rights against its tenant that can be asserted in a more timely fashion. The borrower should be encouraged to vigorously

take actions to promptly terminate the illegal activity.

- *Foreclosure proceedings.* If the event of default is not cured or not likely of being cured in a timely fashion, the bank may be left with no alternative but to commence a foreclosure action, notwithstanding the usual concerns associated with the prospect of holding REO. Inasmuch as the commencement of a formal federal forfeiture action by the U.S. Attorney and obtaining an order of forfeiture may take some time, acting promptly after learning of the U.S. Attorney’s threat can be crucial to preserving the bank’s rights and putting it in a stronger position to take protective remedial action.
- *Other considerations.* Bank regulators will be especially interested in what the bank is doing to protect its security interest and the value of its loan. Be prepared to answer them. As actions are being taken, the bank or its counsel will want to establish close contact with the U.S. Attorney’s office to keep it informed of the bank’s remedial actions and the bank’s intention and efforts to avoid forfeiture by working to terminate the illegal conduct. Whether or not a bank has received notice from the U.S. Attorney’s office, if a bank is aware of the existence of a medical marijuana dispensary on its real property collateral, the bank should contact its counsel for advice in light of the concerted action by federal prosecutors and the facts and circumstances of its particular case.

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