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Don’t Bank on it Just Yet: Financial Services Uncertainty in the Cannabis Industry

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As of September 2018, nine states, including the District of Columbia, allow adult-use (recreational) marijuana and thirty-one states have adopted laws legalizing the sale and use of medical marijuana. The possession and sale of marijuana, however, remains illegal at the federal level due to the Controlled Substances Act’s classification of marijuana as a Schedule I narcotic alongside heroin, LSD, and ecstasy.

For a cannabis business operating within the bounds of state law seeking to enter the marijuana industry, the juxtaposition of marijuana’s quasi-legality raises important legal and practical concerns, one of the most pressing being access to banking. The Federal Bank Secrecy Act (the “BSA”), 31 U.S.C 5311 *et seq*, prohibits national financial and banking institutions from accepting money generated from the sale of cannabis, often forcing marijuana companies to operate on a cash-only basis and putting them at risk of criminal activity. The cannabis industry’s bout with banking has somewhat of a rocky history.

From 2011 to 2014, former Deputy Attorney General James Cole issued a trio of memos (“Cole Memos”), setting forth the federal government’s laissez-faire policy against enforcing federal marijuana laws in states that have legalized the drug in some way. The Cole Memos emphasized the federal government’s focus on preventing marijuana distribution to: minors or gangs; entry into states where marijuana remains illegal; using the drug as pretext to traffic other illegal drugs; driving under the influence; and growing on public lands or federal property. Cannabis companies who did not run afoul of the government’s concerns reasonably perceived themselves as being safe from federal prosecution.

Reassurances also stemmed from the Rohrabacher-Blumenauer Amendment (RBA), an amendment to the annual prohibitions bill that forbids the U.S. Department of Justice (DOJ) from using federal funds to go after state-approved medical marijuana operators, and the Financial Crimes Enforcement Network (FinCEN)’s 2014 guidelines for banks who conduct business with cannabis companies, which permits banks to do business with cannabis companies without violating federal regulations so long as the banks agree to certain procedures, such as ensuring that the business is duly licensed and registered and continuously monitored by the bank. Despite the FinCEN guidelines, most national banks continued to decline services to cannabis businesses because the time and cost of complying with the oversight and compliance procedures outweighed any fiscal benefit the bank would receive from the cannabis clients.

Nevertheless, marijuana businesses were getting by until the current Attorney General of the United States, Jeff Sessions, rescinded the Cole Memos earlier this year. Sessions issued new guidance giving individual U.S. Attorneys the discretion to decide if a marijuana company was aiding and abetting in criminal activity and should be prosecuted. Confusion ensued and the new directive chilled any headway cannabis clients were making with national banks who were now even more hesitant about touching marijuana money.

Presently, banks who wish to do business with marijuana companies face a lot of regulation and uncertainty. Cannabis businesses that have managed to obtain banking services need to understand that their banks are required to comply with anti-money laundering laws, which require national banks and credit unions to file Suspicious Activity Reports (“SARs”) with FinCEN if they suspect any of their account holders are engaged in or trying to cover up illegal activity. There are several types of SARs relevant to cannabis touching businesses: (1)

marijuana limited SARs where the company is not violating state law or a Cole Memo priority; (2) marijuana priority SARs where the bank believes the company is violating state law or a Cole Memo priority; and (3) marijuana-termination SARs, where the bank believes the company is a threat to anti-money laundering systems under the Bank Secrecy Act (BSA) and ceases to do business with the company. After the rescission of the Cole Memo, FinCEN, the Federal Deposit Insurance Corporation, and the National Credit Union Administration stated that the FinCEN marijuana guidance continues to control and is not dependent on the Cole Memos being legally enforceable. Even though the SARs are sent to the federal government, they are not being used to prosecute cannabis operators, but rather to keep tabs on who is engaging in a marijuana related business.

So how are banks reacting to the ever-changing legal climate? Many of the major national banks take the position that following the FinCEN guidelines would constitute an open violation of the Bank Secrecy Act, which is why they consistently refused to open their coffers to cannabis clients. FinCEN, however, urges that its guidelines are meant to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses." Conservative banks have stopped providing banking services to cannabis customers, as some unhappy clients experienced in Massachusetts, as a result of Sessions' actions. Other banks who have yet to start doing business with cannabis companies are likely to hold off from doing so until they see how U.S. Attorneys handle their new "discretion."

Many local, community, and credit union banks, however, who are already dealing with cannabis participants will likely stay in the market unless they see enforcement and prosecutorial activity from the U.S. Attorneys' offices or new guidance from FinCEN. The state of affairs, however, is headed towards legalization, regulation, and taxation, and many U.S. Attorneys, especially in those states that have legalized or decriminalized marijuana in some way, have disclosed their intention not to prosecute compliant cannabis companies opting instead to focus on more-important priorities at hand, such as the opioid crisis. Additionally, advocates, participants, and politicians are currently discussing various proposals to aid the cannabis banking bar such as the pioneering of state-owned banks, closed-loop payment processing systems functioning like prepaid debit cards, and privately-funded banks for the marijuana industry.

For marijuana businesses and operators looking to avoid pitfalls and to find a solution to the banking crisis, it is important to understand that banks are wary of doing business with cannabis companies having short or non-existent operating histories, limited financial information, and uncertain licensure statuses. The best approach with banks is transparency, honesty, and collateral. The more a bank understands your cannabis business, structure, and operation, the easier it will be for it to comply with the burdensome FinCEN guidelines. Expect a diligent and thorough investigation by the bank into the ownership and management team, the company's business affairs, financials, and regulatory compliance history. Be discreet and establish personal relationships with key bank personnel who will be responsible for overseeing your banking needs. Do not get discouraged and be prepared to get turned down several times before finding a suitable banking partner.

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