



Financial Services Employment Blog

Banking Marijuana Related Business: Are We There Yet?

By Stanley S. Jutkowitz

No. We are not there yet. Are we making progress? Maybe.

The biggest impediment to explosive growth in the marijuana industry is lack of access to banking and robust financial services. Because banks face the risk of prosecution for money laundering and aiding and abetting in drug trafficking, most banks will not bank marijuana related businesses (MRB).

Why would any bank risk prosecution by banking MRBs? In 2014, following the issuance of the Cole Memorandum, the Justice Department and the Department of the Treasury Financial Crimes Enforcement Network (FinCEN) issued non-binding guidance on how financial institutions could serve MRBs. (For a more complete analysis of the laws related to banking MRBs see our blog post [here](#).) The FinCEN guidelines called for fairly intensive, ongoing and expensive due diligence of any MRB customers, to the point where the risk/reward ratio for banks became inverted--high risk (jail, loss of banking license), low reward (low profit margins).

While most banks thought the risks far outweighed the benefits of having MRB customers, some financial institutions, mostly local banks and credit unions, however, saw in the FinCEN guidelines an opportunity and quietly began offering depository services to MRBs. [According to FinCEN](#) in 2017 there were over 300 financial institutions provide some form of banking services to MRBs. However, the vast majority of business in the industry is conducted in cash. For many businesses that touch the plant, this makes profit and loss statements questionable, taxing authorities nervous and potential investors dubious about valuations.

Since the publication of the FinCEN statistics, much has happened to banking related to the marijuana industry, some of it good, some bad and some ugly. Let's take them in reverse order.

Ugly

The ugly is the rescission of the Cole Memorandum by Attorney General Sessions in January of this year. The Cole Memorandum provided a uniform national approach to the enforcement of the Controlled Substance Act (CSA), namely a hands off approach to marijuana businesses that were in compliance with state law. The rescission of the Cole Memorandum put enforcement of the CSA at the discretion of individual US Attorneys, but subject to general Justice Department guidelines regarding criminal prosecution in general.

The Bad

The bad is the impact of Sessions' action. The rescission of the Cole Memorandum led to a great deal of fear and uncertainty in the banking industry. Many banks perceive an increased risk of prosecution for banking MRBs. This could result in fewer banks serving the industry and has resulted in banks withdrawing from the industry. One of the leading banks serving the Illinois medical marijuana industry is withdrawing from the industry and closing its accounts in May. Earlier this year, after the Cole Memorandum was revoked, a Florida bank serving the cannabis industry closed all its cannabis accounts. Although neither the Treasury Department nor the Justice Department has cracked down on banks serving the cannabis industry, more closures may follow.

The Good

The good is that new banks do continue to serve the industry, entrepreneurs are developing alternatives to traditional banking solutions and politicians at both the national and state level are working on legislation to make it legally safe for banks to serve the cannabis industry. Despite the rescission of the Cole Memorandum, FinCEN has not withdrawn its non-binding guidelines. This is important to the banking industry and is keeping the vast majority of financial institutions that serve the cannabis industry from closing their cannabis accounts or from withdrawing plans to serve the cannabis industry. One Maryland bank which announced plans to serve the cannabis industry continues to move forward with its plans in spite of Sessions' action.

Given the banking system a number of states are attempting to create an intrastate closed banking system that would not connect with the federal banking system. In California, the largest state in which recreational marijuana is legal, a bill has been introduced to create a limited purpose state charter bank license that provide limited banking services to the cannabis industry. State governments in West Virginia, Pennsylvania and Massachusetts are exploring solutions for their states' banking industry. At the federal level, a year ago a bipartisan group of Senators introduced the Secure and Fair Enforcement Banking Act to protect financial institutions that provide financial services to the cannabis industry. The group that introduced the bill is attempting to convince the Senate Committee on Banking and Housing Affairs to hold hearings on the bill.

While this is going on, alternative banking solutions are in the works. One solution, Safe Harbor Private Banking, a compliance solution originally developed at a Colorado credit union, has gotten a great deal of press. Late last year, Safe Harbor announced plans to team with CanPay to provide banking services and cashless payments to MRBs in Hawaii. Both Safe Harbor and CanPay provide services to banks in several states. Many other cashless solutions are on the market or are in development.

Despite the "good," the industry is still largely a cash business and will remain so until Congress provides nationwide protection for financial institutions that want to serve the cannabis industry.

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