

**MEDICAL MARIJUANA:
CONSIDERATIONS FOR ARKANSAS BANKS**

**CORPORATE & FINANCIAL
SERVICES ALERT**

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Last week Arkansas joined twenty-eight other states that have legalized some form of marijuana since 1996. Amendment 6 to the Arkansas Constitution passed by a vote of 53.2% to 46.8%, along with successful legalization efforts that same day in California, Nevada, Montana, Massachusetts, Florida and North Dakota. Sales of legal marijuana in the United States are expected to exceed \$7 billion in 2016. Arcview Market Research, a research firm based in Oakland, California, estimates that the industry will grow at a compounded annual rate of 31% over the next five years.

This Alert is provided to Clients and friends of the Firm. If you have questions regarding any of the items discussed, please contact one of the following attorneys:

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This Alert reviews the terms of Amendment 6 and particular challenges that banks in Arkansas will face in considering whether to provide services to these newly legal businesses.

Amendment 6 – Medical Marijuana in Arkansas

Amendment 6 (the “Amendment”) legalizes marijuana for medical use in Arkansas. Under the Amendment, a qualifying patient will be able to purchase 2.5 ounces of marijuana every fourteen days for personal medicinal use by obtaining a “written certification” from a physician stating that the person has a qualifying medical condition and may benefit from the medical use of marijuana. Qualifying conditions include cancer, glaucoma, Alzheimer’s disease and others.

The Amendment regulates how medical marijuana is cultivated and dispensed, each of which require a license. The application fees for dispensaries and cultivation facilities may not exceed \$7,500 and \$15,000, respectively. No individual may own an interest in more than one cultivation facility or more than one dispensary.

The Amendment requires the State to issue at least twenty dispensary licenses and eight cultivation facility licenses, but the State may not issue more than forty dispensary licenses and eight cultivation facility licenses. Furthermore, each county is limited to having not more than four dispensaries.

The Amendment also provides strict residency requirements for individuals involved in the marijuana trade. Under the Amendment, the individual(s) submitting an application to license a dispensary or cultivation facility, and sixty percent of the individuals owning an interest in a dispensary or cultivation facility, must be current Arkansas residents who have resided in the

state for the previous seven (7) consecutive years. Accordingly, a non-resident can own the majority of the ownership interest in the entity, provided that at least two Arkansas residents also maintain an ownership interest, regardless of how small. Dispensaries and cultivation facilities must be organized under Arkansas law.

The Amendment authorizes the Arkansas General Assembly to amend sections of the Amendment, except the sections legalizing medical marijuana and setting the number of dispensaries, by a two-thirds vote. The rules for determining how applications will be issued have not yet been decided. The Amendment states that the manner in which the Medical Marijuana Commission considers applications will be determined no later than one hundred and twenty days after the effective date of the amendment.

Considerations for Banks in Arkansas

(1) *Status under federal law.* Despite state action to legalize its use, marijuana remains a controlled substance under federal law. The federal Controlled Substances Act prohibits anyone, including financial institutions, from dealing with controlled substances or funds generated from their sale. The Bank Secrecy Act requires that Suspicious Activity Reports (SAR) be filed to report suspicion of illegal activity under federal law. Other federal rules also require that banks report certain activities or else put themselves at risk of civil and criminal penalties. Technically, a bank providing financial services to a marijuana business could face charges of aiding and abetting money laundering and racketeering.

(2) *Limited Federal Guidance.* In February, 2014, the Department of Justice (“DOJ”) issued a memorandum outlining its enforcement priorities relative to legal marijuana related businesses. These priorities include preventing distribution of marijuana to minors, preventing transfer of marijuana to states where it remains illegal, and preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels. The memo states that where a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the DOJ’s enforcement priorities, then “prosecution for these offenses may not be appropriate.”

The Financial Crimes Enforcement Network (“FinCEN”), which enforces the Bank Secrecy Act, also issued a guidance letter in conjunction with the DOJ. FinCEN’s guidance similarly focused on the DOJ enforcement priorities and heightened reporting requirements on banks serving marijuana businesses.

Although the DOJ and FinCEN actions provide limited guidance, neither prohibits prosecution for violations of federal law, the enforcement of which is under the control of the Executive Branch of the federal government. President-Elect Trump has not been entirely clear with his views on legalization. In an interview earlier this year, Trump seemed to indicate a permissive view of medical use but not recreational use.

(3) *Congressional Action.* In June, the Senate Appropriations Committee approved an amendment to the Financial Services and General Government funding bill that would prohibit federal bank regulators from taking enforcement action against banks for providing

financial services to legal marijuana businesses. This legislation was blocked by a House Committee shortly thereafter. No further federal action has been taken since that time.

(4) *Reality for Banks approached by marijuana businesses as potential customers.* The cultivation and dispensary facilities to be licensed under the Amendment will need bank accounts. Unfortunately, Marijuana remains illegal under federal law. The guidance issued by the Department of Justice and Financial Crimes Enforcement Network is not binding on the FDIC, Federal Reserve, Office of the Comptroller of the Currency, or any other federal agency. This means that institutions remain at risk that the bank's primary regulatory could choose to take action. With the upcoming transition in control of the Executive Branch, the continuation of the "relaxed" enforcement stance will be in question.

(5) *Enforcement Action and Compliance Burden.* The prospect of banking marijuana businesses turning into a regulatory nightmare is a reality. The *American Banker* reported earlier this year on the case of Millennium Bank, a \$75 million-asset bank in Des Plaines, Illinois. Millennium entered into a consent order with the FDIC and the Illinois Division of Banking which included allegations of violations of the Bank Secrecy Act. Sources close to the matter indicated that the allegations related to Millennium's relationship with marijuana businesses. While neither Millennium nor the regulators commented, the consent order required Millennium to increase staff levels in its Bank Secrecy Act and compliance personnel.

The report also identified MBank, located in Gresham, Oregon, as another small bank that experienced problems in banking marijuana businesses. MBank reportedly decided to close all of its marijuana business accounts because of an inability to maintain adequate resources and personnel to comply with federal reporting requirements.