



Banking and Medical Marijuana in Arkansas – It's Still Illegal

This November Issue 6, titled “The Arkansas Medical Marijuana Amendment of 2016”, was approved by a majority of Arkansas voters and will amend the Arkansas Constitution to allow the use and distribution of medical marijuana. However, the first sentence of the Amendment acknowledges that “marijuana use, possession, and distribution for any purpose remain[s] illegal under federal law . . .” Regardless of the change to the Arkansas Constitution, banks remain prohibited from offering banking services to those who operate medical marijuana dispensaries and cultivation facilities, and third parties that do business with such parties.

Controlled Substances Act

Marijuana is still a Schedule I Controlled Substance under the Controlled Substances Act, so any activity related to the use and sale of marijuana is illegal. The Bank Secrecy Act (“BSA”) prohibits any bank from knowingly assisting in processing the proceeds of an illegal transaction and requires the reporting of known or suspected criminal violations of federal law or a suspicious transaction related to a violation of the BSA through a Suspicious Activity Report (“SAR”). While 28 states and the District of Columbia have legalized the use of marijuana, either for medical purposes or for recreation, Congress has not removed marijuana as a Schedule I Controlled Substance or provided an exemption for banks offering services to marijuana-related businesses.

FinCEN Guidance

The only guidance for banks is from the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”), the organization responsible for overseeing SARs. On February 14, 2014, in conjunction with a memorandum by James M. Cole, the Deputy Attorney General for the Department of Justice (“DOJ”) (the “Cole Memo”), FinCEN released a guidance memorandum addressing how banks can provide services to marijuana-related businesses consistent with their BSA obligations. FinCEN reiterated that while marijuana remains

illegal, the DOJ’s enforcement actions pursuant to the Cole Memo should focus on the following priorities:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

If a bank wishes to offer services to a marijuana-related business, FinCEN recommends that banks conduct customer due diligence, including: (i) verifying the business is duly licensed and registered to sell marijuana; (ii) reviewing the license application and related documents submitted to the licensing authorities; (iii) requesting the available information about the business and related parties from the licensing and enforcement authorities; (iv) developing an understanding of the normal and expected activity for the business, including the products to be sold and the type of customers to be served; (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity; and (vii) refreshing information obtained as part of ongoing customer due diligence.

Banks doing business with known marijuana-related businesses in which one of the Cole Memo priorities is not implicated will still have to file a “Marijuana Limited” SAR, stating that the SAR is being filed solely because the customer is engaged in a marijuana-related business, and file continuing activity reports thereafter. If the bank determines at some point the marijuana-related business implicates one of the Cole Memo priorities or violates state law, it will need to file a “Marijuana Priority” SAR, and a “Marijuana Termination” SAR if the bank deems it necessary to terminate the relationship with the marijuana-related business. Even with the guidance from the DOJ and FinCEN, banks continue to refuse to provide services to marijuana-related businesses in states where marijuana use has been approved by state government because providing such services is illegal. To complicate matters further, an employee, landlord, vendor, or other third party contractor of a marijuana-related business is receiving the direct proceeds of an illegal activity, which is illegal. If a bank knows the funds received by such third parties are from a marijuana-related business, a bank would be participating in the illegal activity by allowing the funds to flow through the bank. Therefore many banks simply refuse to open accounts or close existing accounts with such third parties.

Prosecution of Medical Marijuana

Since medical marijuana was approved in California in 1996 the DOJ has continued to prosecute marijuana-related businesses, including medical marijuana dispensaries and cultivation facilities. However, in 2014 Congress passed a rider to an appropriation bill which restricted funds from the DOJ for any effort to restrict certain states from implementing their own laws authorizing the use, distribution, possession, or cultivation of medical marijuana. Because of the appropriation rider, the 9th Circuit Court of Appeals upheld a ruling that denied the DOJ’s right to prosecute a medical marijuana facility, provided the facility could show it complied with the applicable California law regarding the use and distribution of medical marijuana. *U.S. v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016).

Unfortunately this decision doesn’t give any relief for Arkansas banks wishing to offer banking services to marijuana-related businesses. First, the appropriations rider needs to be extended past 2016 and amended to include Arkansas for the DOJ restriction to be applicable in Arkansas. Second, since the decision

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was made in the 9th Circuit, it would not be applicable to courts in Arkansas at this time. Finally, there has been no legislation that would apply an exemption to the regulatory authority of the Federal Reserve, the OCC or the FDIC regarding this issue.

Conclusion

A majority of the states in the Union have authorized some form of marijuana use, but there is no concrete exemption for providing banking services to marijuana-related businesses. While it is not known whether the President-elect and his new administration wish to increase or decrease the prosecution of medical marijuana use and distribution, it is unlikely that the momentum for legal medical marijuana will stop at the state level. At some point Congress will need to act to change the laws concerning marijuana and banking. This issue will be addressed when it is deemed to be a priority by Congress. Bankers will have to actively engage their representatives if they wish to provide banking services to this new industry in the near future.

ABOUT THE AUTHOR



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