Why Michigan Marijuana Licensees (Probably) Can't Get Bank Accounts

By Elizabeth Anne Khalil

Marijuana businesses have a banking problem. The latest estimates indicate that fewer than 400 banks and credit unions in the U.S. actively provide financial services to state-legal marijuana businesses,[1] meaning the marijuana sector deals largely in cash. This is a direct result of the fact that marijuana remains illegal under the federal Controlled Substances Act; banks and credit unions, whether state or federally chartered, are expected to follow all applicable federal and state laws and not facilitate violations of law. To date, federal authorities—including the Department of Justice (DOJ) and banking regulators like the Federal Reserve, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation—have not officially forbidden financial institutions from serving state-legal marijuana businesses, but they also cannot give financial institutions free rein to serve these businesses or change the law to exempt financial institutions from the Controlled Substances Act.

As Michigan continues to license marijuana businesses, the dearth of banking services has tangible effects on both licensees and the state. These include the risk that large amounts of sitting cash will serve as targets for crime, and the administrative hassle of handling piles of dollar bills in financial transactions, including payments to the state for fees and taxes. There is no reliable solution to these issues as long as federal law remains unchanged.

Federal law constraints

The Controlled Substances Act is unambiguous: it is illegal to possess, manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, marijuana.[2] This is because marijuana is listed as a Schedule I drug, the most restrictive of five drug classifications under the Controlled Substances Act.[3] The act does not exempt an activity or modify a drug's scheduling simply because a drug is legal under state law.

Illegality under the Controlled Substances Act imposes obligations on financial institutions under the Bank Secrecy Act

and its implementing regulations.[4] The Bank Secrecy Act framework is premised on the concept that financial institutions play a crucial role in detecting and preventing crimes. To that end, the act's requirements include maintaining anti-money-laundering programs to detect, prevent, and report potential violations of law, including screening out current and potential account holders engaged in illegal activity and filing certain reports with federal authorities, such as currency transaction reports of cash transactions of more than $10,000 and suspicious activity reports of suspected violations of law.[5] By definition, marijuana businesses are engaged in activity that violates federal law and, as such, their banking transactions are subject to those laws and regulations.

Against this legal backdrop, it is not surprising that few financial institutions serve marijuana businesses and individuals involved with these businesses. Indeed, it is surprising that any do.

Federal tolerance of marijuana banking

The federal government has, to date, not asked courts to invalidate as preempted by the Controlled Substances Act all state laws allowing marijuana activity. This tolerance is actually the source of the marijuana banking problem: federal authorities have allowed marijuana businesses to exist, but without any legal safe harbor or other clear pathway for financial institutions to serve those businesses, financial institutions may reasonably hesitate to do so.

From a federal law enforcement perspective, support for marijuana businesses' access to the banking system should make sense: transactions conducted through financial institutions are tracked and reported in numerous ways under the Bank Secrecy Act framework, such as suspicious activity reports[6] and currency transaction reports.[7] Those filings are available to many governmental entities, including the DOJ and Internal Revenue Service,[8] who can then use the information to help identify crimes to investigate and prosecute. If marijuana-related transactions are conducted in the mainstream banking system, these agencies have a rich data set to use in recognizing patterns of drug-related activity and zeroing in on activities that may warrant particular focus. By contrast, keeping these transactions outside the banking system means keeping the transactions—and federal authorities—in the dark.

Despite potential benefits to law enforcement, law enforcement officials cannot change federal law. No bank or credit union has any explicit authority to serve marijuana businesses or any special immunity from the application of the Controlled Substances Act. Financial institutions working with state-legal marijuana businesses do so at their own risk. They rely on the discretionary forbearance of regulators and federal law enforcement authorities. As a result, these relationships are tenuous; at any time, that forbearance could end—regulators or law enforcement authorities could direct a financial institution to terminate the relationships.

In the current political environment, the future of federal enforcement approaches to marijuana banking—and state-legal marijuana activity more broadly—is more unclear than ever.

During the Obama administration, the DOJ issued a series of memoranda to U.S. Attorney's Offices, collectively known as the Cole Memoranda, advising against prioritizing prosecution of state-legal marijuana activity so long as none of a list of stated federal policy goals—such as preventing access to marijuana by minors or by organized crime (the "Cole Factors")—were implicated.[9] While these memoranda did not change the law or prevent any U.S. Attorney's Office from taking a particular action, they played an important role in that they stated certain policy priorities of the DOJ.

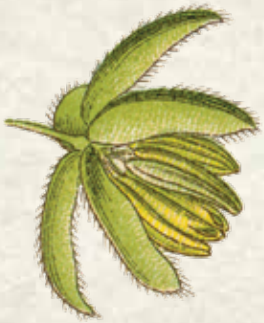
In February 2014, in conjunction with the DOJ's issuance of one of the Cole Memoranda, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN), which issues regulations under the Bank Secrecy Act and guidance on meeting the act's requirements, issued guidance to financial institutions on meeting the act's obligations while serving state-legal marijuana-related businesses.[10] The FinCEN guidance explicitly incorporates the Cole Memoranda in stating that financial institutions should take certain actions based on whether any of the Cole Factors are present.[11] For instance,

At a Glance

The illegality of marijuana under the federal Controlled Substances Act is the key obstacle to Michigan marijuana licensees' ability to obtain bank accounts.

No bank or credit union has any special immunity from the application of federal laws or any official dispensation to serve marijuana businesses.

Providing free and open access to banking services for marijuana licensees would require a change in federal law. No practical solutions can be structured around existing laws.



Some states have questioned whether creating a state-owned bank may provide a solution for marijuana licensees. The short answer is no; the mere fact that the state would be the owner and operator of the bank would not exempt the financial institution from compliance with federal law.

the FinCEN guidance creates three new types of suspicious activity reports for financial institutions to file regarding marijuana activity, and which of the three a banking institution must file depends in part on the presence of Cole Factors.[12] The FinCEN guidance does not, and cannot, state that it is legal for financial institutions to serve that sector in the first place, but it provides instructions for Bank Secrecy Act compliance for institutions that choose to do so or that otherwise encounter transactions involving marijuana.

FinCEN expected its guidance would facilitate the availability of banking services to state-legal marijuana businesses, but that effect has been muted. Based on anonymized data published by FinCEN, 28,651 special marijuana suspicious activity reports had been filed from the issuance of the guidance in 2014 through March 31, 2017.[13] FinCEN used that data to conclude that 368 depository institutions (banks and credit unions) are "actively banking marijuana businesses in the United States";[14] this is only a small share of the country's total depository institutions.[15]

Any comfort that financial institutions may have taken from the Cole Memoranda and the FinCEN guidance may have been shaken on January 4, 2018, when Attorney General Jeff Sessions abruptly announced the rescission of the Cole Memoranda.[16] Sessions stated that federal prosecutors deciding whether to take actions regarding state-legal marijuana activity are to be guided by the "well-established principles" that apply to any prosecutorial decisions, rather than the Cole Factors.[17] He did not state that federal prosecutors must begin aggressively prosecuting state-legal marijuana activity, but his action sent a signal that the DOJ may be less tolerant of this activity under the leadership of Sessions, long an outspoken critic of marijuana.

One—and only one—substantive restriction on federal prosecution of state-legal marijuana activity remains: the Rohrabacher-Blumenauer Amendment, a congressional amendment to the federal budget that limits the ability of the DOJ to use federally appropriated funds to interfere with states' *medical* marijuana frameworks.[18] However, that amendment will remain in effect only as long as it is renewed in federal appropriations legislation.

Given the withdrawal of the Cole Memoranda, it is unclear whether the FinCEN guidance will be amended or withdrawn; as of this writing it remains in place. It is also uncertain whether federal banking regulators will issue their own guidance in this area. The overall uncertainty of the future of federal forbearance may make financial institutions even less willing to risk serving the state-legal marijuana sector.

No magic fixes

Considering the clear constraints of the Controlled Substances Act and the murkiness of the outlook for federal enforcement in this area, some stakeholders have explored novel solutions to the banking issue. However, without a change to federal law, it is not possible to craft a true path to free and open mainstream financial services for the marijuana sector.

First, some states have questioned whether creating a state-owned bank may provide a solution for marijuana licensees.[19] The short answer is no; the mere fact that the state would be the owner and operator of the bank would not exempt the financial institution from compliance with federal law. Further, to be able to move funds to and from other financial institutions—to serve as more than a cash vault or closed-loop system—the bank would need an account on a widely used payment system, such as the system controlled by the Federal Reserve. The Federal Reserve has refused to grant account access to financial institutions serving marijuana entities that operate in violation of federal law.[20] Consequently, a state-owned bank would not be able to serve as much more than a secure place to store cash unless the Federal Reserve or other payment system were willing to allow participation in that system.

Second, nondepository institutions such as money transmitters may appear to provide bank-like services since they

have the ability to facilitate movement of money, but they do not provide a full array of banking services such as deposit accounts.[21] In fact, they typically need their own bank accounts to operate their businesses and face the same challenges as marijuana licensees in that their own banking relationships could be in jeopardy of termination if they accept marijuana-related funds. For now, some money transmitters may be willing to take the risk of conducting these transactions, but their ability to do so is as tenuous as that of the banks and credit unions that are taking the risk of serving the marijuana sector.

Third, and of particular risk, are purported solutions involving exchanging marijuana-related funds for other "clean" funds, such as when funds would be moved overseas and then back into the U.S. financial system, supposedly leaving behind their marijuana-related origins during the journey. This can constitute money laundering—a federal crime.[22] Using personal or other business accounts to transact marijuana-related business while concealing from the financial institution the true nature of the transactions also can constitute bank fraud—another federal crime.[23]

Ultimately, the only real solution is a change in federal law through an act of Congress to amend the Controlled Substances Act or, pursuant to a process described in the act, action by the Drug Enforcement Administration to change how marijuana is categorized under the act.[24] Unless and until there is a change in the law, marijuana licensees, the state, and federal authorities alike will face challenges: many transactions will remain in the shadows and hard to trace for law enforcement purposes, and licensees will find themselves with a great deal of cash on their hands. ■

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ENDNOTES

1. Financial Crimes Enforcement Network, *Marijuana Banking Update: Depository Institutions (by Type) Providing Banking Services to Marijuana Related Businesses* (March 2017) <https://www.fincen.gov/sites/default/files/shared/Marijuna_Banking_Update_Through_Q1_2017.pdf>. All websites cited in this article were accessed June 28, 2018.
2. 21 USC 841(a)(1).
3. 21 USC 812(c).
4. 31 USC 5311–31 USC 5330; 31 CFR Chapter X.
5. See, e.g., 31 CFR 1010 and 31 CFR 1020.
6. 31 CFR 1010.320.
7. 31 CFR 1010.310–31 CFR 1010.314.
8. 31 USC 5319 and 31 USC 310(b)(2)(B)(i).
9. US Dep't of Justice, Office of the Deputy Attorney General, *Memorandum for All United State Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014) <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>.
10. US Dep't of the Treasury, Financial Crimes Enforcement Network, *Guidance FIN-2014-G001: BSA Expectations Regarding Marijuana-Related Businesses* (February 14, 2014) <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.
11. *Id.* at p 2.
12. *Id.* at pp 3–4.
13. *Marijuana Banking Update* at p 2.
14. *Id.*
15. For example, there were 5,606 FDIC-insured banks in the United States as of March 31, 2018. See FDIC, *Statistics At a Glance* (March 31, 2018) <https://www.fdic.gov/bank/statistical/stats/2018mar/industry.pdf>.
16. US Dep't of Justice, Office of the Deputy Attorney General, *Memorandum for All United States Attorneys: Marijuana Enforcement* <https://www.justice.gov/opa/press-release/file/1022196/download>. See also US Dep't of Justice, Office of Public Affairs, *Justice Department Issues Memo on Marijuana Enforcement* (January 4, 2018) <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.
17. *Memorandum for All United States Attorneys: Marijuana Enforcement.*
18. Consolidated Appropriations Act, 2018, Pub L No 115-141 (March 23, 2018).
19. E.g., Koren, *State treasurer, attorney general team up to explore creating California pot bank*, Los Angeles Times (January 30, 2018) <http://www.latimes.com/business/la-fi-cannabis-bank-chiang-20180130-story.html>.
20. *Fourth Corner Credit Union v Federal Reserve Bank of Kansas City*, 861 F3d 1052 (CA 10, 2017). See also Khalil, *Fourth Corner Credit Union Obtains Pyrrhic Victory for Marijuana Banking*, Dykema Cannabis Law Blog (June 30, 2018) <https://www.cannabis-law-blog.com/fourth-corner-credit-union-obtains-pyrrhic-victory_063017>.
21. For example, Michigan's Money Transmission Services Act provides for licensure of businesses engaged in "money transmission activities," defined as "selling or issuing payment instruments or stored value devices or receiving money or monetary value for transmission." MCL 487.1003(c). That definition thus does not provide for money transmission licensees taking deposits and permitting the withdrawal of deposits through vehicles such as savings and checking accounts—and these activities are not the same as receiving funds for transmission. By contrast, Michigan's Banking Code provides that the powers of banks chartered under that law include the power to "[r]eceive deposits" and to "[p]ermit withdrawals of deposits." MCL 487.1401(d).
22. 18 USC 1956(a)(1)(B) and 18 USC 1956(a)(2).
23. 18 USC 1344.
24. 21 USC 811. The process involves the Drug Enforcement Administration commissioning a study by the Food and Drug Administration to support required findings that a drug does or does not meet the criteria for placement on a given Controlled Substances Act schedule. Under 21 USC 812(b)(1), the findings required for placement on Schedule I are that the drug has a high potential for abuse and no currently accepted medical use in treatment in the United States, and that "there is a lack of accepted safety for use of the drug or other substance under medical supervision." Under 21 USC 812(b)(2), required findings for Schedule II are that the drug has a high potential for abuse and "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and that abuse of the drug "may lead to severe psychological or physical dependence."