

8 Things You May Not Know About Marijuana Legalization and Banks

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The intersection of banking regulations and federal marijuana policy makes opening a bank account much more complicated than you might think for marijuana-related businesses in states that have legalized it for recreational or medical purposes. Some have said this quandary will solve itself, but if you look more closely, it becomes evident that the situation is not improving (nor likely to improve on its own), and Congress needs to act. Here are the 8 most important facts that are often overlooked about marijuana legalization and banks.

1. Banks can be convicted of money laundering for providing services to marijuana-related businesses.

According to longstanding federal law, any bank that provides a marijuana-related business with a checking account, debit or credit card, small business loan, or any other service could be found guilty of money laundering or conspiracy.¹ Nothing about this fact changed when 23 states legalized medical marijuana, nor when Colorado and Washington legalized marijuana for recreational use. Banks in those states can still be convicted of violating federal law for simply allowing a dispensary or other marijuana-related business to open an account—even if both the bank and the dispensary are following all of the laws in their state.

2. It's a big problem that marijuana-related businesses don't have access to banking services.

Because banks are generally unwilling to violate federal law without a guaranteed protection from both scrutiny of federal regulators and prosecution, most refuse to provide any kind of services to marijuana-related businesses.² As a result,

these businesses are forced to operate as all-cash operations —accepting no other form of payment and having no choice but to pay their taxes, employee salaries, and rent with literal bags of cash.³ This is a dangerous and untenable situation, leaving their businesses, employees, and neighbors at risk of falling victim to crime. It also makes the burgeoning legal recreational marijuana market much more difficult to regulate or tax effectively, and more susceptible to infiltration by corrupt or criminal enterprises.

3. The Obama Administration issued new guidance for banks, but it can't solve the real problem.

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) has issued guidance advising prosecutors of money laundering and other financial crimes not to focus their enforcement efforts on banks that serve marijuana-related businesses, so long as that business is legal in their state and none of the federal enforcement priorities are being violated (such as keeping drugs away from children and out of the hands of organized crime).⁴ The guidance also lays out a process for financial institutions to provide services to marijuana businesses but makes clear that they are doing so at their own risk. It requires banks to file Suspicious Activity Reports (SARs) with the government for every marijuana-related account, distinguishing between "marijuana limited" SARs and "marijuana priority" SARs (depending on whether it transgressed state law or implicated any of the federal enforcement priorities).

Despite this attempt to bring marijuana banking out of the shadows, in practice this guidance hasn't made banks much more willing to provide services to marijuana-related businesses. That's because it doesn't guarantee banks protection from prosecution, and it also requires them to undertake time-consuming and costly due diligence on any marijuana-related business. As a result, banks have been closing medical marijuana accounts in the 23 states where medical use is legal and refusing to open accounts for new

businesses that sell to the public because they are unwilling to take on the risk or the due diligence that would be required to ensure none of the federal priorities are being violated.⁵ After all, guidance is only guidance—it carries no force of law and can change overnight, without warning (for example, the most recent Department of Justice memo is the fourth on this subject since Attorney General Holder took office). And that means it can't provide the safe harbor banks are seeking.

4. Public safety, not profit, motivates the community credit unions who have gotten involved thus far.

With the threat of federal prosecution looming, the tiny profits associated with marijuana banking are a poor incentive to get into the business. The few credit unions who have agreed to work with marijuana producers are limiting those accounts to no more than 5% of their total deposits to avoid creating a liquidity risk.⁶ Since the government could change the rules any day and without notice, these institutions need to have enough cash in their vault to be able to return the full value of all their marijuana deposits in a single day while also servicing all of their other clients.⁷ And for those few banks who have decided to serve some kinds of marijuana-related businesses, they've had to spend countless hours of employee time preparing standards and procedures for doing so—often even dedicating one or several employees solely to that task for the foreseeable future. With all the upfront cost, little possibility of short-term returns, and no assurance the rules will remain consistent, the main stated motivation for those financial institutions who have decided to work with marijuana-related businesses is not profit but public safety—they are willing to take on the risk of federal prosecution in order to protect their communities from the threat of crime associated with an all-cash market.⁸

5. Banks are worried about more than just prosecution, but also

reputational risks and increased regulatory scrutiny.

In addition to prosecution for money laundering or abetting a criminal enterprise, banks are very worried about the reputational risk of banking marijuana-related businesses—they don't want media coverage, they fear pushback from customers, and they're worried they could even potentially be held civilly liable if something went wrong with a marijuana-business client. Exacerbating those concerns is the fact that the new FinCEN guidance requires them to submit SARs for every marijuana-related account they hold.⁹ In the eyes of the banks, filling out SARs on clients and still continuing those banking relationships raises concerns and invites intense scrutiny by auditors and examiners, among others—because they have then told the government repeatedly that their client may be doing something illegal. These reputational, regulatory, and civil risks compound their fears around entering this space under the current guidance.

6. There's no easy fix to this problem without Congressional action.

Given the way the banking industry is currently regulated, there is no easy way to address these problems except through an act of Congress. Some have suggested that investors could simply form a new bank with the sole purpose of banking only marijuana-related businesses. But in order to do so, they would need to get a charter and deposit insurance from the federal government—a tough sell with a business plan that relies entirely upon commerce that is a crime under federal law. Regulators could slow-walk the process for any new bank to get a charter, which can already take years even when unencumbered by controversy. And regulators would have reason to be cautious, since a limited use bank could fail overnight if the federal guidance were changed or enforcement tightened.

Others have suggested that perhaps a state-chartered bank could step in, but even those would likely need federal deposit insurance. A completely in-state bank like the Bank of North

Dakota (currently the only one) can technically go without federal deposit insurance, but it would still likely issue federally-insured loans or have some other federal or interstate interaction which would bring it under the jurisdiction of federal regulators. In addition, if the state bank required tellers to bank marijuana-related businesses, it could create a preemption problem by requiring state employees to do something that is explicitly against federal law. This would grant the federal government an open invitation to sue the state in ways the currently marijuana legalization schemes have been carefully crafted to avoid. In the area of banking, the federal government is so embedded that creating an effective work-around ranges somewhere between unlikely and completely impossible.

7. The new banking options popping up in Colorado and Washington aren't sufficient.

There's been recent media coverage of some new proposed solutions to this banking problem that are appearing in Colorado and Washington as of late, but they aren't sufficient to solve this problem. A small number of credit unions in Washington State have announced they will serve marijuana-related business—but they are limiting their services to only those at the front end of the market: producers and processors whose sales are limited to licensed distributors and can easily be tracked by the state (relieving the banks of the burden to do so directly).¹⁰ These credit unions won't serve dispensaries because they say the due diligence they would have to undertake to comply with the FinCEN guidance is simply too high a bar.¹¹ And what accounts they do open won't have access to debit or credit cards, be able to pay their bills online, or be allowed to make deposits at night.¹² That still leaves storefronts without the ability to open bank accounts and criminals with easy-to-identify targets for robbery.

In another move, Colorado recently passed a law authorizing the creation of "cannabis co-ops" which would function

without deposit insurance and be governed under state law by the Colorado financial services commissioner. However, this is unlikely to solve the problem either, because in order to provide checking accounts or credit card services, the co-ops would still need permission from the Federal Reserve—which they will be hard pressed to receive since they are actively violating federal law.¹³

8. There are many ways Congress could fix this.

The good news is that while Congress has to act to fix the banking problem, there are many ways it could do so. One solution would be the Marijuana Business Access to Banking Act (H.R. 2652) introduced by Congressmen Ed Perlmutter (D-CO) and Denny Heck (D-WA) last year, which would grant banks and other financial institutions immunity from federal criminal prosecution for serving marijuana-related businesses if they are following state law, as well as prohibiting Treasury from requiring banks to report a transaction as suspicious solely because it came from a marijuana-related business that is legal in the state. The bill would also prohibit regulators from terminating a bank's depository insurance because it serves legal marijuana-related businesses or incentivizing them not to provide such services.¹⁴

Another possible solution would be for Congress to enact a “waive but restrict” policy, giving the Attorney General the authority to grant waivers allowing states to act outside of federal law for a set period of time. That would give banks the peace of mind they need to provide legal marijuana-related businesses with the full panoply of banking services they need, knowing that so long as its state has a waiver, they would not be violating federal law.¹⁵

One fix that would *not* solve the banking problem would be to lower the classification of marijuana to something less than a Schedule I drug at the federal level. Though some have proposed this option, and it may solve other issues such as the inability to conduct medical research on the drug's

effects, it would only open the door for those who have a prescription—it wouldn't address the banking needs of those in Colorado, Washington, or other states that legalize recreational use.

In passing legislation to solve these looming problems, Congress could also restructure the reporting requirement for banks, perhaps eliminating the need to fill out SARs in states that have been granted a waiver but instead requiring that the bank keep certain records in-house, without having to file them with the federal government—similar to the FDIC rule for single source deposit pass-throughs. That process would alleviate subjectivity and reputational risk concerns while ensuring that the federal government can access the records if something goes awry.

END NOTES

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