

# Cannabis is legal in my state, why can't I find a BANK?

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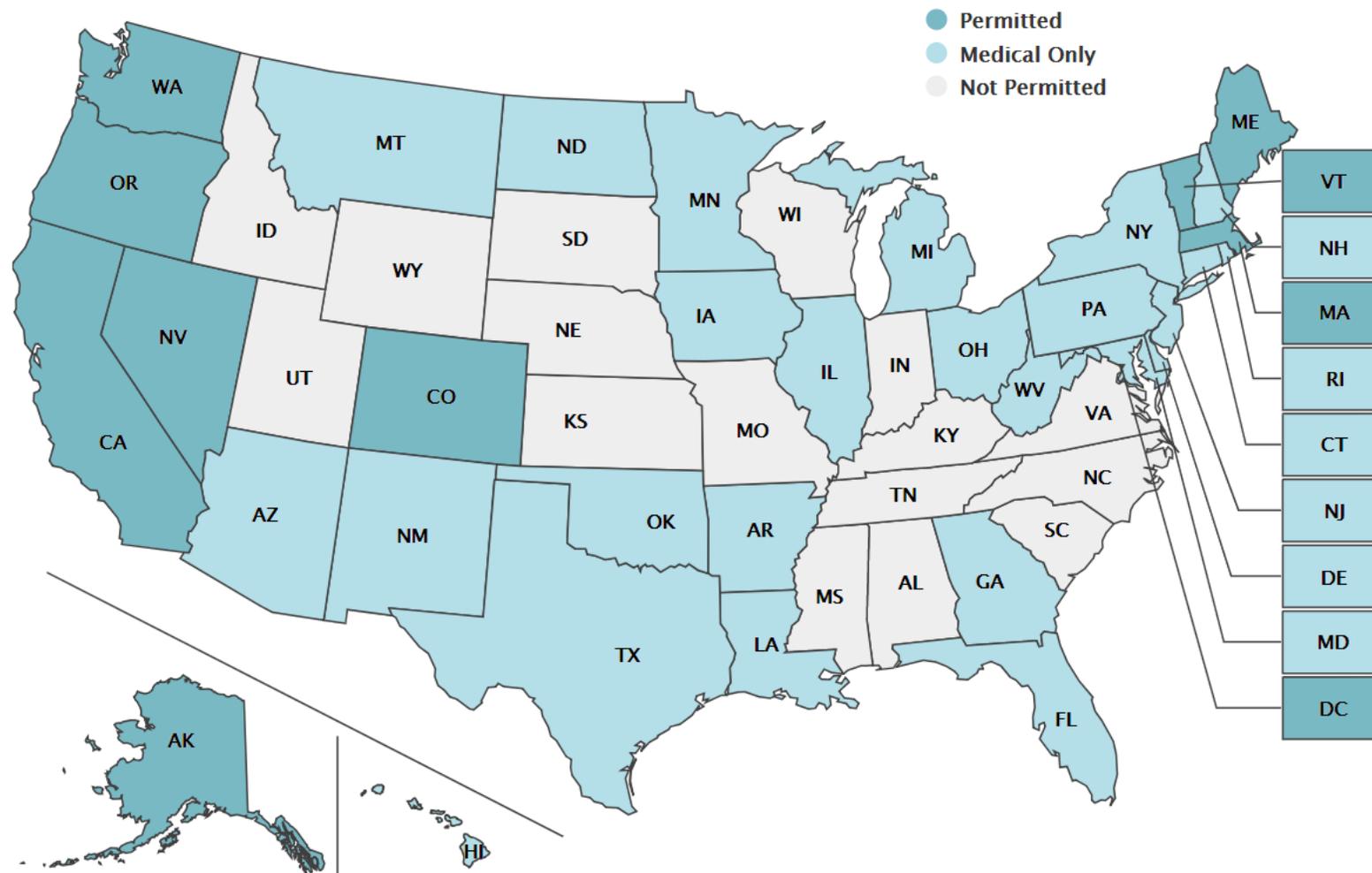
September 2018





# Topics

- Federal laws
- State landscape
- Case study - Hawaii
- What to expect when you open an account



# Overview of Federal Law: The Basics

- ▶ Controlled Substances Act (21 U.S.C. § 801 *et seq.*) ("CSA")
  - ▶ § 841: Makes it a crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance"
  - ▶ § 856: Makes it a crime to "manage or control any place, and ***knowingly*** and intentionally rent, lease, or make available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance"
- ▶ Money Laundering Statute (18 U.S.C. § 1956)
  - ▶ Elements:
    - ▶ Proceeds of specified unlawful activity ("SUA")
    - ▶ ***Knowledge*** that proceeds are from some type of felony
    - ▶ A financial transaction intended to conceal the proceeds or promote an SUA
- ▶ Money Spending Statute (18 U.S.C. § 1957)
  - ▶ Elements:
    - ▶ Engage or attempt to engage in a monetary transaction in the U.S.
    - ▶ By, through, or to a financial institution
    - ▶ ***Knowing*** that the transaction involves property valued at over \$10,000 and derived from an unlawful activity

# Aiding and Abetting (18 U.S.C. § 2)

- ▶ A person who "**aid**s, **ab**ets, counsels, commands, induces or procures" the commission of a federal crime "is punishable as a principal"
  - ▶ Elements:
    - ▶ Take an affirmative act in furtherance of a crime
    - ▶ With the intent of facilitating the crime's commission
- ▶ *U.S. v. Rosemond*, 134 S.Ct. 1240 (2014)
  - ▶ A defendant need only facilitate one component of a criminal offense to be liable; there is no need for a defendant to facilitate every element of an offense
  - ▶ "A person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission." *Rosemond*, 134 S.Ct. at 1249
  - ▶ Does not address whether third-party defendants who "incidentally facilitate a criminal venture rather than actively participate in it" (*i.e.*, gun store owner who sells gun to criminal, knowing but not caring how the gun will be used) is liable for aiding and abetting. *Id.* at 1249 n.8
    - ▶ Possible relevance to businesses that provide necessary support to marijuana dispensaries

# February 2016 GAO Report on DOJ Marijuana Enforcement

- ▶ Prompted by request from Sens. Grassley (R-Iowa) and Feinstein (D-Calif.) to review, among other things, "lessons learned from DOJ's enforcement efforts in response to states' medical marijuana laws"
  - ▶ DOJ has taken the following actions to monitor the effects of state marijuana legalization relative to the enforcement guidance set forth in the Cole Memo:
    - ▶ U.S. Attorneys conduct individual enforcement actions in states that have legalized marijuana and consult with state and local agencies to address concerns regarding effects of marijuana legalization
    - ▶ Office of the Deputy Attorney General ("ODAG") officials collaborate with, and assess information provided by, DOJ components and other federal agencies (*i.e.*, DEA)
  - ▶ DOJ has not identified how it would use data it collected to monitor "the effects of marijuana legalization relative to each of the eight marijuana enforcement priorities" in the Cole Memo
    - ▶ *e.g.*, DOJ collects reports from DEA and other health policy studies, but has not identified how it would use the information contained in the reports
    - ▶ *e.g.*, it is unclear how DOJ would use the collected data to determine whether the effects of state marijuana legalization necessitated federal action to challenge a state's regulatory system

# February 2016 GAO Report on DOJ Marijuana Enforcement, cont'd

- ▶ U.S. Attorneys and DEA officials in some jurisdictions have targeted the commercial marijuana industry by:
  - ▶ Sending "warning letters" to approximately 1,900 owners and lien holders of medical marijuana dispensaries from 2007 through 2013 in response to requests from civil leaders, municipalities, and law enforcement officials
    - ▶ Warning letters stated that DOJ may enforce CSA, even if conduct permitted by state law; notified recipients they could be subject to civil and criminal penalties; advised dispensaries to stop distributing marijuana
    - ▶ In the Central District of California, nearly 700 dispensaries closed after receiving warning letters
    - ▶ Some letters stated that dispensaries were illegal under both CSA and state law
- ▶ U.S. Attorneys conduct individual enforcement actions in states that have legalized marijuana and consult with state and local agencies to address concerns regarding effects of marijuana legalization

# FinCEN Expectations (02.14.14)

- ▶ Guidance was issued due to the recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice (“DOJ”) concerning marijuana-related enforcement priorities.
- ▶ This guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and sets out the various BSA reports to be filed with federal and state law enforcement priorities.
- ▶ They believed this guidance would enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

# FinCEN Considerations

- ▶ In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution.
- ▶ Use the appropriate CIP and CDD standard.
  - ▶ Verifying that the business is duly licensed and registered;
  - ▶ Reviewing the license application (and related documentation);
  - ▶ Requesting information about the business and related parties;
  - ▶ Developing an understanding of the normal and expected activity for the business
  - ▶ Ongoing monitoring for adverse information about the business and related parties;
  - ▶ Ongoing monitoring for suspicious activity; and
  - ▶ Refreshing CDD information on a periodic basis and commensurate with the risk.

# FinCEN SAR filings – Marijuana Limited

- ▶ Financial institutions providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a “Marijuana Limited” SAR.
  - ▶ Identifying the subject and related parties;
  - ▶ Addresses of the subject and related parties;
  - ▶ The fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and
  - ▶ Start with “MARIJUANA LIMITED” and describe the fact that no additional suspicious activity has been identified.
- ▶ Know when to upgrade to “MARIJUANA PRIORITY.”

# FinCEN SAR filing – Marijuana Priority

- ▶ Based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law.
- ▶ Start with “MARIJUANA PRIORITY” and describe in detail about the suspicious activity.
  - ▶ Identifying the subject and related parties;
  - ▶ Addresses of the subject and related parties;
  - ▶ Details regarding the enforcement priorities the financial institution believes have been implicated; and
  - ▶ Dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.

# FinCEN SAR – Marijuana Termination

- ▶ Used when a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain their BSA/AML program.
- ▶ Start with “MARIJUANA TERMINATION” and note in the narrative the basis for the termination.
- ▶ FinCEN encourages Section 314(b) voluntary information sharing if the financial institution becomes aware that the business is opening an account at another financial institution.

# FinCEN SAR – Red Flags

- ▶ A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law.
- ▶ The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating within the laws.
- ▶ The business is unable to demonstrate the legitimate source of significant outside investments.
- ▶ A customer seeks to conceal or disguise involvement in marijuana-related business activity by using a “consulting,” “holding,” or “management” company but is depositing cash that smells like marijuana.

## FinCEN SAR – Red Flags (con't)

- Publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

## FinCEN SAR – Red Flags (con't)

- ▶ The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- ▶ A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- ▶ A marijuana-related business's proximity to a school is not compliant with state law.
- ▶ A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

# DOJ Cole Memorandum (08.29.13)

- ▶ The Department's expectation is that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.
- ▶ If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

# DOJ Cole Memo – (08.29.13)

## 8 Priorities

- ▶ Prevent the distribution of marijuana to minors;
- ▶ Prevent revenue from sales to criminal enterprises, gangs, and cartels;
- ▶ Prevent the diversion of marijuana from state to state;
- ▶ Prevent marijuana to used as a cover/pretext for other illegal drugs or activity;
- ▶ Prevent violence and the use of firearms;
- ▶ Prevent drugged driving and other adverse public health consequences;
- ▶ Prevent the growing of marijuana on public lands; and
- ▶ Prevent marijuana possession or use on federal property.

# DOJ Cole Memo – Update 02.14.14

- ▶ Provides updated guidance to federal prosecutors concerning marijuana enforcement in the exercise of investigative and prosecutorial discretion under the CSA.
- ▶ The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.
- ▶ This guidance and any state or local law does NOT provide a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence.

# DOJ Cole memo – Update 02.14.14

- ▶ Financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, are more likely to risk activities that implicates the eight federal enforcement priorities.
- ▶ Financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers.
- ▶ Prosecutors will continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

# DOJ Cole memo – Rescinded 01.04.18

- ▶ In the memorandum, Attorney General Jeff Sessions directs all U.S. Attorneys **to enforce** the laws enacted by Congress and **to follow** well-established principles **when pursuing prosecutions** related to marijuana activities. This return to the rule of law is also a return of trust and local control to federal prosecutors who know where and how to deploy Justice Department resources most effectively to reduce violent crime, stem the tide of the drug crisis, and dismantle criminal gangs.

# State considerations

- ▶ Encourage financial institutions to take a risk-based approach in assessing individual customer relationships rather than declining to provide banking services to entire categories of customers.
- ▶ Institutions are expected to assess the risks posed by an individual customer on a case-by-case basis.
- ▶ Implement controls to manage the relationship commensurate with the risks associated with each customer.



# State considerations

- ▶ Banks are hesitant to provide certain types of banking services due to concerns that they will be unable to comply with BSA.
- ▶ It is not possible for a financial institution to detect and report all potentially illicit transactions.
- ▶ Isolated or technical violations, which occur within an otherwise adequate system of policies, procedures, and processes, generally do not prompt serious regulatory concern.
- ▶ The risk-based BSA/AML program established and maintained should allow the institution to appropriately manage customer accounts, while generally detecting and deterring illicit financial transactions.

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# Case Study – Hawaii solution

- ▶ **What makes this solution unique?**

This solution would establish the first **cashless** system for cannabis related services in the nation.

- ▶ This process utilizes financial technology (“FinTech”) and a financial institution to help deliver services in a manner that is fast and safe for consumers. It also addresses public safety in making the transactions cashless so that consumers and retailers do not need to handle and store cash for product. The system establishes a safer environment for medical cannabis-using patients and businesses to operate.

- ▶ Hawaii could be the sandbox to test this type of payment system as a safe way for consumers to buy product, and for cannabis dispensaries to use traditional financial services to legally conduct transactions such as paying wages and vendors, including taxes.



# Case Study – Hawaii solution

- ▶ **What is the Hawaii solution?**

The state has identified a Colorado credit union to provide limited financial services for Hawaii medical cannabis dispensaries on a temporary basis, and for a vendor to process point of sale transactions at the dispensaries.

- ▶ A retail dispensary consumer would need to voluntarily sign up with CanPay, a debit payment mobile application.
- ▶ When making a purchase, the consumer would use the mobile application to generate a QR code to facilitate payment from the patient's checking account to the dispensary. The QR code is for one-time use and will expire after 30 minutes.



# You found a bank – What to expect when you open the account. . .

- ▶ CIP – 10-25% ownership, executive officers
- ▶ CDD (new rules effective 5/11/2018)
- ▶ Current customer base
  - ▶ Customers
  - ▶ Private ATM
  - ▶ Armored cars
  - ▶ Security firms
- ▶ Currency transaction reporting (cash deposits)
- ▶ On-going monitoring (use of software, manual, frequency of monitoring)
- ▶ Fees



# You found a bank – Here's what the bank expects

- ▶ Maintain Reputation in the community
- ▶ Fines by bank regulators
- ▶ Enforcement by federal law enforcement
- ▶ Fees to cover compliance costs
  - ▶ Monitor current cannabis account and customer base
  - ▶ File Currency transaction reports (cash deposits)
  - ▶ On-going monitoring (use of software, manual, frequency of monitoring)
  - ▶ Continuous report filing to FinCEN
- ▶ Knowledgeable staff – from tellers to back office to execs to Board

# Congressional actions

- ▶ Omnibus appropriation bill – rider that continues to bar the DOJ from enforcing the federal marijuana ban in some circumstances.
  - ▶ Use, distribution, possession, or cultivation of medical marijuana
  - ▶ Extended Dec 7, 2018
- ▶ States Act: introduced June 7, 2018 Senators Cory Gardner (R-Colorado) and Elizabeth Warren (D-Massachusetts). House companion bill Reps Earl Blumenauer (D-Oregon) and David Joyce (R-Ohio)
  - ▶ The act would amend the Controlled Substances Act of 1970 to exempt from federal enforcement individuals or corporations in states who are in compliance with U.S. state laws
- ▶ Safe Harbor:
  - ▶ To address the lack of clarity for how banks can serve this industry, without the threat of forfeiture of assets or criminal penalties, results in many transactions occurring in cash.

# Conclusion

- ▶ Banks and other financial institutions may open accounts for high risk businesses such as medical marijuana related businesses based on the risk assessment and risk tolerance of the financial institution.
- ▶ Banks and other financial institutions must use the appropriate customer due diligence standards.
- ▶ Regulators will be examining banks for BSA/AML compliance.
- ▶ If violations are found, regulatory action will be taken.

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