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Financial Services for Marijuana Businesses

A number of states have adopted laws permitting marijuana sales and other marijuana-related activities, even though those same activities remain unlawful under federal drug and financial laws. Because of the legal risks under federal law, many financial institutions reportedly are unwilling to provide state-authorized marijuana businesses common banking products and services, such as debit or credit card payment services, electronic payroll services, and checking accounts. This, in turn, reportedly has stifled growth of state-authorized marijuana businesses and forced these businesses to operate exclusively in cash, raising concerns about, among other things, public safety and tax collection compliance.

This In Focus analyzes the legal liability that financial institutions risk by serving marijuana businesses given the discordant state and federal marijuana legal regimes. A more detailed analysis of and citations for the information in this In Focus are available in the “Financial Services for Marijuana Businesses” section of CRS Report R44782, *The Marijuana Policy Gap and the Path Forward*, coordinated by Lisa N. Sacco.

Overview of Federal Regulation of Marijuana

A number of federal laws prohibit activities involving the handling of both marijuana and money tied to marijuana. The federal Controlled Substances Act (CSA) criminalizes the sale, possession, and distribution of marijuana. Under the CSA, marijuana has “a high potential for abuse” with “no currently accepted medical use in treatment in the United States,” and may be lawfully used only for bona fide, federal government-approved research studies. CSA violators may be subject to imprisonment or criminal fines, and property used to grow marijuana or facilitate its sale or use may be confiscated by federal authorities through civil or criminal forfeiture proceedings.

Financial institutions that provide banking account, electronic payment, and other financial services to marijuana businesses would not typically possess, distribute, or manufacture marijuana in direct violation of the CSA. However, federal anti-money laundering (AML) laws criminalize the handling of *proceeds* derived from various unlawful activities, including marijuana sales in violation of the CSA. The Bank Secrecy Act (BSA) requires certain financial institutions to have policies and procedures in place both to ensure that their clients are not engaging in unlawful behavior, such as selling marijuana, and to aid law enforcement by reporting potentially illegal or otherwise suspicious activities. BSA and AML violations can result in severe civil or criminal penalties, as well as asset forfeiture and administrative enforcement actions initiated by federal financial regulators.

These legal risks are not theoretical. Financial institutions expend billions of dollars on BSA/AML compliance each year. And federal regulators reportedly have prioritized BSA and AML compliance to fight financial crime in recent years by increasing both the number of BSA/AML enforcement actions and the size of monetary penalties in these actions (see CRS Report R45076, *Trends in Bank Secrecy Act/Anti-Money Laundering Enforcement*, by Jay B. Sykes). To illustrate the potential severity of legal exposure applicable to financial institutions, HSBC Bank USA in 2012 entered into a legal settlement with the Department of Justice and federal banking regulators for AML and BSA violations that included asset forfeiture of \$1.256 billion, \$665 million in civil money penalties, and various remedial measures through an administrative enforcement action (see *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement*, Dept. of Justice, Press Release [Dec. 11, 2012]).

Federal Financial Laws and Marijuana Businesses

By providing financial services, financial institutions that handle the proceeds of marijuana business activities could be subject to severe penalties under criminal AML laws, the BSA, and federal asset forfeiture laws, as well as general banking regulatory administrative enforcement authorities.

Federal AML laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize the handling of financial proceeds that are known to be derived from certain unlawful activities, including the sale and distribution of marijuana. Violators of AML laws may be subject to fines and imprisonment. For example, a bank employee could be subject to a 20-year prison sentence and criminal money penalties under Section 1956 for knowingly engaging in a financial transaction involving marijuana-related proceeds with the intent to promote a further offense, such as withdrawing funds generated from marijuana sales from a business checking account to pay the salaries of medical marijuana dispensary employees. Similarly, a bank officer could face a 10-year prison term and criminal money penalties under Section 1957 for knowingly receiving deposits or allowing withdrawals of \$10,000 or more in cash that is derived from distributing and selling marijuana.

Moreover, federal authorities can confiscate through civil or criminal asset forfeiture proceedings all proceeds derived from and any real or personal property involved in or traceable to marijuana sales that violate federal law, including criminal AML laws, even if state law permits those marijuana sales. For example, if a bank provides a loan to a state-authorized marijuana dispensary, federal authorities could require the bank to forfeit the dispensary’s

loan payments on the grounds that such payments can be traced to federally prohibited marijuana sales.

Additionally, federal regulators can exercise administrative enforcement actions against financial institutions, their employees, and certain affiliated parties for violating the BSA or AML laws. For example, federal banking regulators (i.e., the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration) implement comprehensive supervisory regimes to ensure that depository institutions operate in a safe and sound manner and comply with applicable laws. To this end, banking regulators have strong, flexible administrative enforcement powers, which they may use against depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates that act unlawfully, including for engaging in marijuana-related activities that violate the BSA or AML laws. Banking regulators may, for instance, issue remedial measures through cease-and-desist orders, assess civil money penalties, and issue prohibition orders that temporarily or permanently ban individuals from working for depository institutions. In extreme cases, banking regulators also may revoke an institution's federal deposit insurance and take control of and liquidate a depository institution under certain circumstances, including a criminal conviction under the BSA or AML laws.

Furthermore, the BSA requires financial institutions to aid law enforcement in investigating and prosecuting those who violate federal laws, including the CSA. Under the BSA, financial institutions must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding transactions suspected to be derived from illegal activities, including marijuana sales. The BSA also requires depository institutions (e.g., banks, thrifts, and credit unions) and certain other financial institutions to establish and maintain AML programs designed to prevent institutions from facilitating money laundering and financing terrorist activity, and to ensure that the institutions' officers and employees have sufficient knowledge of their customers to identify when SARs should be filed. Bank personnel who willfully fail to file SARs can be subject to imprisonment of up to five years, and institutions that fail to implement a sufficiently rigorous AML program can suffer stiff criminal money penalties.

FinCEN Guidance to Financial Institutions

Although the federal banking regulators have yet to issue any formal guidance in response to state and local marijuana legalization efforts, in February 2014, FinCEN issued guidance on financial institutions' SAR reporting requirements when serving marijuana businesses. The guidance identified transactions that might trigger federal enforcement priorities, which include distributing to minors and supporting drug cartels or similar criminal enterprises, noting the following:

Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a

marijuana-related business would generally involve funds derived from illegal activity. [A] financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law) in accordance with this guidance and [FinCEN regulations].

The guidance advises financial institutions serving marijuana businesses to file one of the three types of SARs. A **marijuana limited SAR** should be filed when a financial institution determines, after exercising due diligence, that a marijuana business is not engaged in any activities that violate state law or implicate enforcement priorities outlined in the guidance. A **marijuana priority SAR** must be filed when a financial institution believes a marijuana business is engaged in activities that implicate enforcement priorities. Additionally, a **marijuana termination SAR** should be filed when a financial institution finds it must sever its relationship with a marijuana business to maintain an effective AML program. The FinCEN guidance also lists examples of "red flags" that may indicate that a marijuana priority SAR is appropriate, such as if a business fails to sufficiently document state law compliance.

As of June 30, 2019, FinCEN reported that it has received nearly 90,000 marijuana-related SARs and that over 700 depository institutions reported providing some form of financial services to marijuana-related businesses. However, the depth and breadth of financial services that depository institutions are providing marijuana businesses is unclear. Moreover, whether these depository institutions are serving businesses that are directly involved in cultivating and selling marijuana, or are only serving entities that are indirectly involved in the marijuana business (e.g., landlords renting office space to marijuana businesses) is uncertain.

Federal Legislative Proposals

Both the Senate Banking and House Financial Services Committees have held hearings in the 116th Congress on the challenges state-authorized marijuana businesses face given their lack of access to financial services. Members from both chambers have introduced bills to address these challenges. Specifically, S. 1200/H.R. 1595, the Secure And Fair Enforcement Banking Act of 2019 (SAFE Banking Act), are designed to (1) constrain federal banking regulator authority to penalize depository institutions for providing financial services to marijuana businesses complying with state laws; and (2) protect depository institutions and their personnel from some legal liability under the BSA, AML, and asset forfeiture laws when providing financial services to, or investing proceeds derived from serving, marijuana businesses complying with state laws. H.R. 1595, as amended, passed the House in September 2019 and was referred to the Senate Banking Committee. S. 1200 also has been referred to the Senate Banking Committee.

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