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## WOMEN IN THE LAW

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**TRIA Is Reauthorized—But Insurers'  
Insolvency Risks Not Addressed**

*And more*

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and Charles S. Aloviseti

**A**s cannabis businesses become more mainstream, banks are shedding their fears about the risks of lending to this growing industry.

# Introduction to Cannabis and Banking



Duffle bags of pungent smelling cash and tellers armed with copious amounts of Febreze—this is the quintessential image of the early days of cannabis banking following the release of the U.S. Department of the Treasury’s Financial

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Crimes Enforcement Network (FinCEN) guidance on February 14, 2014. While nearly seven years later, the FinCEN guidance's seven short pages remain the cornerstone of cannabis banking, which, for the purposes of this article refers to a cannabis-related business's ability to transparently access depository services. During this period, financial institutions' treatment of cannabis money has greatly evolved. This evolution is apparent in both the sophistication of various bank and credit unions' cannabis "Know Your Customer" due diligence programs and the steadily growing number of financial institutions that are safely and successfully servicing state-legal cannabis businesses, as reported by FinCEN.<sup>1</sup> Nonetheless, despite sweeping national support for federal legalization, and continued state-by-state legalization of the cannabis industry, regular access to banking services remains an obstacle for state-legal cannabis-related businesses, largely because of cannabis' federal status as a Schedule I substance under the CSA.

## Federal Policy

### The FinCEN Guidance and the Sessions Memo

On February 14, 2014, Deputy Attorney General James M. Cole released what is known as the 2014 Cole Memo. This memo, which coincided with the release of the FinCEN guidance, extended the discretionary protections and enforcement priorities in the earlier Cole memos to financial institutions servicing the cannabis industry.

The 2014 Cole Memo is one of the memos rescinded by Attorney General Jefferson Sessions in his January 4, 2018, letter.<sup>2</sup> To date, Attorney General Sessions' rescission of the Cole Memo has not affected the status of the FinCEN guidance, and the Department of the Treasury has given no indication that it intends to rescind the FinCEN guidance. Though it was originally intended that the Cole Memo and the FinCEN guidance would work in tandem, the FinCEN guidance is a stand-alone document that explicitly lists the eight enforcement priorities cited in the Cole Memo. Consequently, any authority the FinCEN guidance has remains intact.

The FinCEN guidance details the due diligence procedures financial institutions should undertake in onboarding and main-

taining cannabis-related clients to ensure that those businesses are compliant with applicable state law. Since the release of the FinCEN guidance, various states like California, New York, and Washington have created their own guidelines for cannabis-related banking services.<sup>3</sup> Likewise, numerous state governors and regulators continue to call on the federal government to facilitate the cannabis industry's access to banking services.<sup>4</sup>

While the rescission of the Cole Memo had an initial chilling effect on cannabis banking, it is unlikely that access to banking will cease altogether, as this is neither in the interest of financial institutions servicing the industry nor FinCEN. In order to best position themselves to obtain or maintain bank accounts, cannabis-related businesses should focus heavily on transparency and compliance. Specifically, cannabis-related businesses should ensure they properly maintain all required licenses and only deposit money into their business banks' accounts that can be traced back to either (1) a legitimate investment in the business or (2) the state-legal sale of cannabis. Finally, cannabis businesses should ensure that they can prove that they are fully complying with all applicable state and local laws.

### The SAFE Act

On September 25, 2019, the House of Representatives passed H.R. 1595, known as the SAFE Banking Act (SAFE Act). The SAFE Act, which had been proposed unsuccessfully in numerous prior sessions of Congress, seeks to create protections for depository institutions that provide financial services to state-legal cannabis-related businesses.

The SAFE Act generally prohibits a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business. Specifically, the bill prohibits a federal banking regulator from (1) terminating or limiting the deposit insurance or share insurance of a depository institution solely because the institution provides financial services to a legitimate cannabis-related business; (2) prohibiting or otherwise discouraging a depository institution from offering financial services to such a business; (3) recommending, incentivizing, or encouraging a depository institution not to

offer financial services to an account holder solely because the account holder is affiliated with such a business; (4) taking any adverse or corrective supervisory action on a loan made to a person solely because the person either owns such a business or owns real estate or equipment leased or sold to such a business; or (5) penalizing a depository institution for engaging in a financial service for such a business.

As specified by the SAFE Act, a depository institution or a Federal Reserve bank shall not, under federal law, be liable or subject to forfeiture for providing a loan or other financial services to a legitimate cannabis-related business.<sup>5</sup>

Although the SAFE Act made history by passing the House of Representatives, its fate in the Senate remains to be seen as this issue goes to press. This uncertain fate became even more precarious on December 18, 2019, when Senate Banking Committee Chairman Mike Crapo outlined his concerns regarding the SAFE Act and suggested provisions that would make the legislation unworkable.<sup>6</sup>

Nonetheless, the unprecedented bipartisan support for the SAFE Act is a testament to the growing support for cannabis banking at the federal level, which signals a green light to financial institutions considering serving the cannabis industry.

As of May 12, 2020, the SAFE Act language was included in the House version of an additional Coronavirus relief package called the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act).<sup>7</sup> As it currently stands, the SAFE Act language in the HEROES Act is largely, if not entirely, the same as the version that passed the House on September 25, 2019. The ultimate fate of the SAFE Act is uncertain. Once the full House passes this bill, it will be up to the Senate to acquiesce to the language—and there are questions about how much of an appetite the Senate has for passing the entire bill, putting aside the cannabis portion.<sup>8</sup>

## Challenges and Solutions

The cannabis industry's limited access to banking services is largely the result of financial institutions' fears of the loss of their insurance or account with the Federal Reserve, increased due diligence costs, and reputational risks. However, as discussed

below, these concerns have not created issues for the banks and credit unions that have chosen to provide services to state-legal cannabis businesses.

### **Insurance**

The Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Association (NCUA) have not been as vocal about cannabis banking as FinCEN. Nonetheless, both have long been aware of the FinCEN guidance and have shared the guidelines with their examiners and instructed them on how to determine whether financial institutions servicing cannabis businesses are complying with the FinCEN guidance, as evinced by the 2014 letters from the FDIC and NCUA to the Washington State Department of Financial Services.<sup>9</sup>

It should further be noted that no financial institution has ever lost its FDIC or NCUA insurance as a result of providing banking services to state-legal cannabis-related businesses in accordance with the FinCEN guidance.

### **Federal Reserve Account**

Another cause for hesitation by financial institutions considering offering services to cannabis-related businesses is their concern regarding losing their account with the Federal Reserve. Like the FDIC and NCUA, the Federal Reserve has not provided much public comment on the issue. However, the Federal Reserve has previously communicated that it too has incorporated the FinCEN guidance into its examination materials.<sup>10</sup> To date, no financial institution has lost its account with the Federal Reserve as a result of providing banking services to state-legal cannabis-related businesses in accordance with the FinCEN guidance.

### **Increased Diligence Requirements**

Financial institutions must perform due diligence on cannabis-related businesses both while onboarding the business and for the duration of the time such a business remains a client. While the details of onboarding and ongoing due diligence depend on each individual financial institution, all such diligence must adhere closely to the FinCEN guidance. As such, onboarding due diligence may be as simple as reviewing a cannabis business's licenses

and corporate documents, or as intensive as going through such a business's license applications and enforcement violations in detail.

Financial institutions are required by the Bank Secrecy Act (BSA) to file a suspicious activity report (SAR) for any business they believe willfully disguises activities or violates federal law. Since the cultivation, processing, and sale of cannabis for any reason remain illegal under federal law, banks must continue to file SARs when working with cannabis-related businesses, despite the fact that state laws regulate such activity.

The FinCEN Memo breaks SAR reporting for cannabis-related businesses into three groups based on risk level. The first type of SAR, called "MARIJUANA LIMITED," is to be filed for businesses a financial institution believes do not violate any of the federal government's eight priorities. In this case the SAR will be limited to identity and address information about the business. The filing institution is obligated to file the SAR solely because the subject is engaged in a cannabis-related business (and because no additional suspicious activity has been identified).

The second type of SAR, called "MARIJUANA PRIORITY," is to be filed for cannabis-related businesses a financial institution believes may be violating one or more of the federal enforcement priorities. In this case, the SAR must include, along with identifying and address information, comprehensive details on the enforcement priorities the financial institution believes have been violated and the dates, amounts, and any other details relevant to the suspicious activity.

The final type of SAR, known as "MARIJUANA TERMINATION," is to be filed for cannabis-related businesses with which a financial institution terminates their relationship due to continued violations of federal enforcement priorities, or other issues preventing the financial institution from maintaining an effective anti-money laundering compliance program. When this occurs, FinCEN urges the financial institution to share information about the business with other banks. These reports need not be filed if a financial institution terminates the relationship for unrelated reasons.

Additionally, the FinCEN guidance requires financial institutions to continuously monitor their cannabis-related clients for any of the "red flags" listed in the guidance. Unsurprisingly, such heightened due diligence can increase a bank's internal costs. To combat this issue, several third parties have developed compliance software or other products for financial institutions that service the state-legal cannabis industry. These products help financial institutions to navigate the regulatory compliance demands of servicing the cannabis industry and provide tools and resources for due diligence.

### **Reputational Risks**

Because of the stigma previously attached to cannabis, many financial institutions have been wary of working with cannabis businesses for fear of driving away their non-cannabis clients. However, as cannabis legalization gains greater national support, the reputational risks of banking for the cannabis industry continue to diminish. According to a recent study, financial institutions will likely strengthen their reputation and attract new customers by servicing cannabis businesses.<sup>11</sup> In fact, the majority of those surveyed indicated servicing big box stores like Walmart, the adult entertainment industry, and pharmaceutical, oil, and tobacco companies would reflect far more poorly on a financial institution than servicing state-legal cannabis businesses. In addition to the practical risks listed above, financial institutions that work with the cannabis industry are theoretically at risk for criminal or civil sanction as a result of the broad scope of drug laws in the United States.

### **Merchant Processing**

While an entire article could be dedicated to merchant processing, or lack thereof, in the cannabis industry, any discussion of cannabis banking would be incomplete without at least a mention of the topic. Although cannabis banking continues to progress, merchant processing, or, simply put, the ability to pay for cannabis products with a credit or debit card, remains largely impossible for cannabis businesses. This is due first and foremost to the fact that there is no Merchant Category Code (MCC) for cannabis goods

or services. An MCC is used to classify a business by the types of goods or services it provides—without an MCC, a business cannot process credit or debit card payments. Additionally, the major credit card networks continue to insist that cannabis-related transactions may not take place on their networks. Finally, financial institutions in the United States have almost unanimously refused to serve as the processing bank or the acquiring bank for merchants processing cannabis-related transactions.

While many companies have attempted to enable cannabis-related merchant processing, these attempts have been short lived, at best, and resulted in massive losses for users, at worst.<sup>12</sup>

## Hemp Banking

Guidance released on December 3, 2019, by a range of U.S. regulatory bodies specified that

[b]ecause hemp is no longer a Schedule I controlled substance under the Controlled Substances Act, [financial institutions] are not required to file a [SAR] on customers solely because they are engaged in the growth or cultivation of hemp, in accordance with applicable laws and regulations. For hemp-related customers, banks are expected to follow standard SAR Procedures and file a SAR if indicia of suspicious activity warrants.<sup>13</sup>

Financial institutions serving hemp-operators, therefore, will no longer have to comply with FinCEN's cannabis-specific SAR filing requirements, thereby saving the institutions a great deal of time and effort.

Although the guidance eased the SAR requirements applicable to hemp operators, it did stipulate that banks serving the hemp industry “must have a [Bank Secrecy Act/Anti Money Laundering] compliance program commensurate with the level of complexity involved.”<sup>14</sup> Additionally,

[w]hen deciding to serve hemp-related businesses, banks must comply with applicable regulatory requirements for customer identification, suspicious activity reporting, currency transaction reporting and risk-based customer due diligence, including the collection of beneficial ownership information for legal entity customers.<sup>15</sup>

## Conclusion

Although cannabis-related businesses still face challenges in accessing banking services, their ability to bank continues to improve. As more financial institutions shed their fears in light of the realization that federal banking regulators do not condemn cannabis banking, cannabis-related businesses are increasingly able to operate much like other “normal” businesses.

## Notes

- 1 According to FinCEN's 2Q2019 Marijuana Banking Update there were 713 depository institutions actively banking cannabis businesses throughout the U.S. as of June 30, 2019. [https://www.fincen.gov/sites/default/files/shared/291404\\_1st\\_Q\\_FY2020\\_Marijuana\\_Banking\\_Update\\_Public.pdf](https://www.fincen.gov/sites/default/files/shared/291404_1st_Q_FY2020_Marijuana_Banking_Update_Public.pdf).
- 2 “Marijuana Enforcement,” U.S. Dep't. of Justice, Office of the Attorney General, Jan. 4, 2018, <https://www.justice.gov/opa/press-release/file/1022196/download>.
- 3 “Cannabis Banking Guidance,” Cal. Dep't. of Business Oversight, Oct. 2, 2019, <https://dbo.ca.gov/wp-content/uploads/sites/296/2019/10/FINAL-DBO-Cannabis-Banking-Guidance-Memo.pdf>; “Guidance on Provision of Financial Services to Medical Marijuana & Industrial Hemp-Related Businesses in New York State,” N.Y. Dep't of Financial Services, July 3, 2018, <https://www.dfs.ny.gov/system/files/documents/2020/03/iil180703.pdf>; “Marijuana in Washington State - Financial Services Issues,” Wash. Dep't of Financial Inst., <https://dfi.wa.gov/banks/marijuana>; “Examination Procedures for Credit Unions with Member Accounts in the I502 Marijuana Business (LCB-licensed marijuana businesses) 2016 Update: Medical Marijuana Endorsements,” DFI, May 20, 2016, <https://dfi.wa.gov/documents/credit-unions/marijuana-exam-procedures.pdf>.
- 4 “Letter to Congressional Leaders,” DFI, June 13, 2019, <https://dfi.wa.gov/sites/default/files/06-13-19-letter.pdf>; “Marijuana and Banking Resources,” Penn. Dep't of Banking Securities, <https://www.dobs.pa.gov/Businesses/Pages/Marijuana-and-Banking-Resources.aspx> (last visited May 14, 2020).
- 5 H.R.1595 – Secure And Fair Enforcement Banking Act of 2019, Congress. gov, <https://www.congress.gov/bill/116th-congress/house-bill/1595?q=percent7Bpercent22searchpercent22percent3Apercent5Bpercent22SAFE+Banking+Actpercent22percent5Dpercent7D> (last visited May 14, 2020).

- 6 “Chairman Crapo Outlines Concerns with Cannabis Banking Legislation,” U.S. Senate Committee on Banking, Housing, and Urban Affairs, Dec. 19, 2018, <https://www.banking.senate.gov/newsroom/majority/chairman-crapo-outlines-concerns-with-cannabis-banking-legislation>.
- 7 “Health and Economic Recovery Omnibus Emergency Solutions Act,” U.S. House of Representatives, May 12, 2020, <https://docs.house.gov/billsthisweek/20200511/BILLS-116hr6800ih.pdf>.
- 8 Kyle Jaeger, “Marijuana Banking Access Included in House Leadership's Coronavirus Relief Bill,” *Marijuana Moment*, May 12, 2020, <https://www.marijuanamoment.net/marijuana-banking-access-included-in-house-leaderships-coronavirus-relief-bill/>.
- 9 “Letter to Mr. Scott Jarvis,” Nat. Credit Union Admin., July 18, 2014, <https://dfi.wa.gov/documents/banks/ncua-marijuana-letter.pdf>; “Letter to Mr. Scott Jarvis,” Fed. Deposit Insurance Corp., June 27, 2014, <https://dfi.wa.gov/documents/banks/fdic-bsa-letter.pdf>.
- 10 “Letter to Governor Jay Inslee,” Board of Governors of the Federal Reserve System, Aug. 13, 2014, <https://dfi.wa.gov/documents/banks/gov-inslee-interagency-response.pdf>.
- 11 <http://dhmresearch.com/wp-content/uploads/2016/12/DHM-Research-LTPR-Marijuana-Banking-White-Paper-December-2016.pdf>.
- 12 Complaint, First Data Merchant Services LLC v. MM Development Co., No. 1:19-cv-10964-PKC (S.D.N.Y. 2019); In the Matter of Linx Card, Inc., No. MT-18-0050 (Or. Dep't of Consumer Affairs and Business Serv., Div. Financial Reg. May 7, 2019).
- 13 “Agencies Clarify Requirements for Providing Financial Services to Hemp-Related Businesses,” Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, Office of the Comptroller of the Currency, and Conference of State Bank Supervisors, Dec. 2, 2019, <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191203a.htm>.
- 14 *Id.*
- 15 *Id.*

*The preceding article is adapted from a chapter of the forthcoming book by Charles S. Aloviseti and Cassia Furman of Vicente Sederberg LLP, The Cannabis Business: Understanding Law, Finance, and Governance in America's Newest Industry (Oxford and New York: Routledge, 2020).*

