

## The Cannabis Conundrum By Nicole Booth

Panic. That is what comes to mind when I think back to when Massachusetts first legalized medical marijuana in 2012. I prided myself on being the type of Bank Secrecy Act (BSA) officer who provided “yes, but first...” responses when faced with new risks that were all dolled up in a “great business opportunity” dress. I despised business lines that referred to the unsung heroes of compliance as the “no department” and the place where “good ideas go to die”. But with all of the horror stories flashing across the front pages of newspapers about Colorado’s uptick in crime and pools of cash with nowhere to go, not to mention the blinding lack of regulatory guidance, something I depended on like air to do my job—this was a totally different ball game.

Fast-forward seven years. There are now 11 states that have legalized recreational marijuana and 22 that have approved the use of medical marijuana. What hasn’t changed, however, is the federal standing on marijuana as a Schedule (I) controlled substance as well as a blinding lack of regulatory guidance. Adding more confusion to the cannabis conundrum, hemp cannabidiol (CBD) oils exploded onto the market in 2014 and have experienced exponential popularity and growth ever since. While business is certainly booming for these sectors, the banking industry has been left with more questions than answers.

One promising development that may provide financial institutions with both regulatory guidance and protection for offering services to an industry fueled by funds deemed to be criminal by federal law is the Secure and Fair Enforcement (SAFE) Banking Act. The bill, which is currently sitting with the Senate after being passed by the U.S. House of Representatives on September 25, 2019, aims to ensure that state-authorized and regulated cannabis businesses are not forced to operate as cash-only enterprises. Highlights of this legislation include a safe harbor for banks that provide services to marijuana- and hemp-related businesses and the development of “uniform guidance and examination procedures” by the Financial Institutions Examination Council (FinCEN). The safe harbor protects financial institutions from prosecution, loss of insurance, and undocumented pressure from regulators to terminate relationships with legitimate cannabis-related businesses and related individuals.

While the SAFE Act is a step in the right direction, many critics see it as a late attempt that continues to leave both financial institutions and the cannabis industry in limbo. For starters, the bill fails to address the contradictions between state legalization and federal law. More notably for both parties, federally-regulated card networks would still be unprotected. With marijuana funds still being deemed criminal on the federal level, there is little anticipation of the industry gaining access to the payments space. Even with the safe harbor, the financial industry is looking at a heavy compliance burden and the cannabis industry left dealing mostly in cash.

If you’re now envisioning marijuana dispensary owners piling cash into barrels and driving them out into the middle of a desert, à la Walter White in *Breaking Bad*, you might be interested to know that more than 630 financial institutions are actively providing financial services to

marijuana-related businesses. based on FinCEN's September 2019 *Marijuana Banking Update*. From the data obtained from the required Suspicious Activity Reports (SARs) filed, less than 10 percent of the SARs indicate foul play.

To successfully provide financial services to this industry, board-approved policies and an arsenal of controls to weed out (no pun intended) the bad players is just the beginning. Best practices and safeguards include:

- a program specific risk assessments;
- tailored training;
- monitoring systems capable of detecting suspicious activity related to cannabis transactions;
- board reporting;
- extensive due diligence; and
- continuous program oversight.

Even if your organization has made the decision to avoid the risk all together, there are still expectations that should be noted. Your board-approved policy should clearly document your stance on providing such services. Bad actors are likely to hide the true nature of their business to gain access to financial services. Therefore, training and processes to detect marijuana-related businesses at onboarding and beyond should be in place. These controls should also show up in your BSA risk assessment.

Overall, providing financial services to the cannabis industry can be rewarding for all parties involved; once you get past the initial panic. Ensuring your institutions risks have been properly identified and mitigated through continually assessed controls and oversight is paramount. Before pulling the trigger on offering services to the cannabis industry, institutions are encouraged to reach out to their regulator to inform them of their plans and receive their feedback. It's better to be fully transparent than providing regulators an unwanted surprise to unwrap during your next exam.

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