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Navigating the Bank Industry's Cannabis Problem

Despite the fact that thirty-six states have legalized cannabis in some form, the mainstream banking industry has been largely unable to provide services to lawful cannabis companies. This is because federal law still views marijuana as an illegal Schedule I drug subject to the Controlled Substances Act—on par with drugs such as heroin. 21 U.S.C.A. § 801 (1970).

This article provides an overview of the regulatory landscape applicable to cannabis banking and shows that current regulatory guidance actually authorizes banks to serve marijuana-related businesses. We then go through what banks must do to comply with current regulatory guidance when working with marijuana-related businesses, which will make clear why the mainstream banking industry remains reluctant to take on marijuana-related entities. Next, we discuss the status of current legislative efforts to reform the cannabis banking regulatory framework and analyze some of the challenges presented even if legislative overhaul occurs. Finally, we end with some discussion of practical considerations for legal practitioners advising clients on issues related to cannabis banking and the impact that the novel coronavirus (commonly referred to as COVID-19) has had on cannabis banking legislative proposals.

I. Cannabis Banking—the Current Regulatory Environment

In 2014, FinCEN issued guidance that: (i) instructed prosecutors to consider certain enforcement priorities with respect to Anti-Money Laundering (AML) and Bank Secrecy Act (BSA) offenses related to cannabis businesses, (ii) provided a due diligence checklist for financial institutions to assess when deciding whether to serve marijuana-related businesses, and (iii) articulated filing procedures for Suspicious Activity Reports (SARs) related to marijuana businesses. *See* Guidance, Dep't of Treasury Fin. Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), *available at* https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf (hereinafter the "FinCEN Guidelines"). This section will examine the FinCEN Guidelines, which remain in effect as of December 2020.

A.) The Cole Memorandum's Enforcement Priorities

On August 29, 2013, Deputy Attorney General James M. Cole issued to all United States Attorneys what became famous informal guidance for how the federal government would view marijuana businesses. *See* Memorandum from Deputy Att'y General James M. Cole, U.S. Dep't of Justice, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (hereinafter the "Cole Memorandum"). The Cole Memorandum instructs prosecutors to consider the following eight enforcement priorities with respect to enforcement of marijuana policy at the federal level:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These eight enforcement priorities serve as the foundation for the FinCEN Guidelines issued in February of 2014. In effect, if a marijuana-related entity seeking banking services from a financial institution implicates any of the Cole Memorandum's enforcement priorities, then that financial institution will have notification and filing obligations, as described in more detail below.

Notably, the Cole Memorandum was formally rescinded on January 4, 2018 by then Attorney General of the United States Jefferson B. Sessions, who curtly stated that the Cole Memorandum guidance was "unnecessary". *See* Attorney General Jefferson B. Sessions, U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Jan. 4, 2018), *available at* https://www.justice.gov/opa/press-release/file/1022196/download. Thus, the federal guidance underpinning the FinCEN Guidelines is no longer the active policy guidance of the United States Department of Justice, which understandably gives many financial institutions pause when deciding whether to bank marijuana-related entities.

B.) FinCEN's Due Diligence Requirements

The FinCEN Guidelines require a bank to conduct customer diligence, including:

i. verifying with the appropriate state authorities whether the business is duly licensed and registered;
ii. reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
iii. requesting from state licensing and enforcement authorities available information about the business and related parties;
iv. developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers);
v. ongoing monitoring of publicly available sources for adverse information about the business and related parties;
vi. ongoing monitoring for suspicious activity, including for any of the red flags described in FinCEN's guidance; and
vii. refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.

This customer due diligence is extensive and requires significant effort from financial institutions to remain compliant with the FinCEN Guidelines.

C) SAR Filings

In addition to being aware of the eight enforcement priorities and performing the due diligence tasks above, the FinCEN Guidelines created a three-tiered system for reporting the suspicious activities of marijuana-related businesses. A financial institution must file a suspicious activity report (SAR) if it "knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose." *See* FinCEN Guidelines. The FinCEN Guidelines also impose upon financial institutions banking marijuana-related businesses a quarterly obligation to file SARs identifying the type of commercial cannabis activity undertaken by their marijuana clients. FinCEN Guidelines, at 3.

Each tier of SAR filing is discussed below.

1)Marijuana Limited SAR Filings

Any bank working with a cannabis business that it reasonably believes—based on the extensive customer due diligence described above—does not implicate one of the enforcement priorities should file a "Marijuana Limited" SAR. In this form of SAR, the financial institution should provide the following: identifying information of the customer and related parties, including addresses, the fact the bank is making the filing solely because the customer is a marijuana-related business, and that the bank has not identified any additional suspicious activity. FinCEN Guidelines, at 3. Banks must continue to monitor cannabis clients falling into this category and conduct due diligence to detect any changes that might violate state law or implicate one of the enforcement priorities; in which case, the bank must file a Marijuana Priority SAR.

2)Marijuana Priority SAR Filings

A bank should file a "Marijuana Priority" SAR if it reasonably believes—based on the extensive customer due diligence above—that a marijuana-related business has implicated one of the enforcement priorities or violated state law. This SAR should include details regarding which enforcement priority may have been implicated and dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. FinCEN Guidelines, at 3.

3)Marijuana Termination SAR Filings

If a bank believes it must terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it must file a "Marijuana Termination" SAR and describe in the narrative the basis for the termination. Notably, if the financial institution knows that the business is moving to another institution, FinCEN urges the first institution to affirmatively alert the second institution. FinCEN Guidelines, at 3.

4)Determining the Appropriate SAR Filing

The FinCEN Guidelines also provide a number of "red flag" activities to help banks determine whether one of its cannabis customers is implicating the enforcement priorities set forth in the Cole Memorandum or is violating state law. Similar to the due diligence items above, the list of red flag activities is extensive and imposes hefty monitoring obligations on the bank. For example, red flags include whether the marijuana-related business is unable to show a legitimate source of outside investments or if the owner or manager of the business lives outside the state in which the business is located. FinCEN Guidelines, at 5-7.

D) A Note About Banking Hemp Clients

The nuances and differences between marijuana and hemp are beyond the scope of this article. But it is important for legal practitioners to understand the basic distinctions at a high level since hemp is treated differently under federal law and financial regulatory guidance. Hemp is defined as cannabis sativa L. with less than 0.3% tetrahydrocannabinol (THC) by dry weight that is produced in accordance with a United States Department of Agriculture approved regulatory plan. *See generally*, The Agricultural Improvement Act of 2018, Pub. L. No. 115-334 (2018); *see also*7 U.S.C.A. § 1639***o*** (2018).

Hemp is legal at the federal level and thus also occupies a less risky status than marijuana for financial regulatory purposes. On December 3, 2019, FinCEN, along with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Conference of State Bank Supervisors, released a statement clarifying the legal status of hemp and relevant requirements for banks under the BSA. *See* Joint Guidance, 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, Providing Financial Services to Customers Engaged in Hemp-Related Businesses (Dec. 3, 2019), *available at* https://www.fincen.gov/sites/default/files/2019-12/Hemp%20Guidance%20%28Final%2012-3-19%29%20FINAL.pdf. This statement explained that banks do not have to file the three tiers of SARs described above for hemp-related businesses so long as these customers operate properly under an approved federal or state program. *Id.*

On June 29, 2020, FinCEN expanded on the Joint Guidance above and discussed more specific requirements for financial institutions when banking hemp-related businesses. See Guidance, Dep't of Treasury Fin. Crimes Enforcement Network,

FinCEN Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers (June 29, 2020), *available at* https://business.cch.com/bfld/FinCEN-FIN-2020-G001-06292020.pdf. This guidance provides that financial institutions working with hemp-related businesses must conduct customer due diligence (CDD) as they would with any other business. *Id.* Proper CDD requires financial institutions to obtain basic identifying information about their customers through the use of a customer identification program, including beneficial ownership collection and verification. *Id.* When banking hemp growers specifically, the financial institution should confirm the customer's legal status as a grower "by either obtaining (1) a written attestation by the hemp grower that they are validly licensed, or (2) a copy of such license." *Id.* Financial institutions may have to go beyond these requirements when working with hemp growers depending on the risk created by such customer. The June 29, 2020 Guidance suggests that, in addition to obtaining proof of the hemp grower's legal status, financial institutions may have to also request crop inspection or testing reports, license renewals, updated attestations from the business, or correspondence with the state, tribal government, or USDA. *Id.*

The June 29, 2020 guidance confirms that financial institutions that bank hemp-related businesses do not have to file the three tiers of SAR's applicable to cannabis-related businesses. *Id.* However, as with all customers, financial institutions must report any suspicious activity. Some examples of suspicious activities for hemp-related businesses include:

- A customer appears to be engaged in hemp production in a state or jurisdiction in which hemp production remains illegal.
- A customer appears to be using a state-licensed hemp business as a front or pretext to launder money derived from other criminal activity or derived from marijuana-related activity that may not be permitted under applicable law.
- A customer engaged in hemp production seeks to conceal or disguise involvement in marijuana-related business activity.
- The customer is unable or unwilling to certify or provide sufficient information to demonstrate that it is duly licensed and operating consistent with applicable law, or the financial institution becomes aware that the customer continues to operate (i) after a license revocation, or (ii) inconsistently with applicable law.

Id. If a hemp-related business also conducts marijuana-related activities, then any financial institution banking such customer must apply the much more stringent 2014 FinCEN Guidelines for banking marijuana-related businesses, including the three tiers of SAR filing. *Id.* However, if such customer does not commingle the proceeds of its hemp and marijuana businesses, or the proceeds for each business are identifiable, then the 2014 FinCEN Guidelines only apply to the marijuana-related business. *Id.* In addition to conducting CDD and filing SAR's, financial institutions must report currency transactions in connection with hemp-related businesses as they would for any other customers. *Id.* For example, financial institutions are required to report all currency transactions above $10,000 in aggregate on a single business day. *Id.*

The joint guidance as well as the recent guidance from FinCEN should help financial institutions get more comfortable working with hemp and hemp-derived cannabinol (CBD) businesses. The June 29, 2020 guidance confirms that financial institutions should treat hemp-related businesses the same as any other customer, meaning the financial institution should conduct CDD, file SAR's, and report certain currency transactions. However, banks working with hemp-related businesses will still have to perform additional due diligence to ensure that the business is actually dealing in hemp (i.e., that the product is less than 0.3% THC and was produced under a USDA approved regulatory program).

II. Why Banks Are Reluctant to Serve the Cannabis Industry

Financial institutions' reluctance to bank marijuana-related cash can be distilled into three primary problems. First, banks fear the stigma associated with the cannabis industry. For over seventy years, marijuana was illegal and most often associated with lowly street dealers and drug cartels. This long-lasting, negative stigma remains a powerful association that could drive public backlash.

Second, because marijuana remains an illegal Schedule I Controlled Substance, accepting cash from firms that directly serve the marijuana industry or "touch the plant" presents significant legal risks. Most notably, banks face significant federal penalties and adverse regulatory action tied to the BSA and AML statutes. Put simply, if bank regulators decide that a financial institution taking cannabis cash runs afoul of federal BSA and AML statutes, the penalties could be enormous.

Lastly, while FinCEN has provided guidance that authorizes financial institutions to bank marijuana-related business cash,

the administrative cost and burden of complying with this guidance makes banking cannabis cash cost-prohibitive. As outlined in the previous section, current guidance from FinCEN recommends banks implement burdensome and complex due diligence tactics when working with marijuana-related businesses, such as verifying that the business is properly licensed, reviewing the company's license application, and ongoing monitoring obligations through a three-tier Suspicious Activity Report (SAR) filing system.

Because complying with the FinCEN Guidelines is so burdensome, and because of the substantial potential penalties for any financial institution deemed to run afoul of AML and BSA statutes, most financial institutions to date have declined to take on the risk and administrative burden associated with doing business with marijuana-related entities. As of June 30, 2019, there are approximately 553 banks and 162 credit unions providing banking services to marijuana-related entities. See Fin. Crimes Enforcement Network, Marijuana Banking Update (2019) at 1, *available at* https://www.fincen.gov/sites/default/files/shared/287473_3Q_FY2019_Marijuana_Banking_Update_Public.pdf.

And even these financial institutions that initially elected to serve marijuana-related businesses have frequently reversed course and ceased working with the marijuana industry because of the high costs and regulatory burden. *See, e.g.*, Anna Codutti, Encentus backing out of cannabis banking in Oklahoma, Tulsa World (Sep. 30, 2019), https://www.tulsaworld.com/news/local/marijuana/encentus-backing-out-of-cannabis-banking-in-oklahoma/article_e6aaf690-b7dd-5c59-84e2-b122fe2c3ce7.html.

III. Legislative Efforts to Solve the Bank Industry's Cannabis Problem

A) The SAFE Banking Act

While the current marijuana banking regulatory landscape is far from desirable, there have been significant legislative efforts to overhaul the bank industry's cannabis program. On September 25, 2019, the Secure and Fair Enforcement (SAFE) Banking Act of 2019 passed the U.S. House of Representatives by an impressive margin of 321 to 103. *See* H.R.1595—Secure And Fair Enforcement Banking Act of 2019, Congress.Gov, *available at* https://www.congress.gov/bill/116th-congress/house-bill/1595/actions?q={ %22search%22:[%22SAFE+Banking+Act%22]} &KWICView=false (last visited Mar. 2, 2020). The SAFE Banking Act attempts to solve the cannabis industry's banking problem by providing a regulatory safe harbor to financial institutions working with legitimate marijuana-related businesses. *See generally* Secure And Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (2019) (hereinafter, the "SAFE Banking Act").

Specifically, the SAFE Banking Act clarifies the regulatory landscape significantly by prohibiting a federal banking regulator from taking certain adverse or corrective supervisory actions against financial depository institutions that offer services to lawful cannabis companies. H.R. 1595. The bill would also require FinCEN to develop guidance on how to prepare SARs for cannabis-related businesses that would be tied to the goals and guidance provided in the SAFE Banking Act (as opposed to, presumably, the Cole Memorandum). Beyond clarifying the regulatory landscape, the bill expressly provides what activities financial institutions can support. H.R. 1595. For example, Section 3 of the SAFE Banking Act addresses AML statutes directly, providing that transactions conducted with cannabis-related businesses will not be considered proceeds from unlawful activity solely because the transaction is connected to a lawful cannabis business. Section 4 of the bill protects financial institutions' interest in collateral that any banking client uses in the cannabis business by immunizing financial institutions from civil and criminal forfeiture provisions. Finally, Section 7 of the bill requires the Financial Institutions Examination Council ("FIEC") to develop procedures and policies for depository institutions to follow when conducting business with lawful cannabis operators. Federal banking regulators would then be required to issue guidance and examination procedures that are consistent with the FIEC's framework.

While the SAFE Banking Act may be a step in the right direction, the authors believe it is far from an ideal solution to the cannabis industry's lack of access to financial services because it fails to sufficiently address financial institutions' primary rationales for declining to do business with the marijuana industry. For one, the SAFE Banking Act does nothing to alleviate the negative stigma a financial institution may face for banking marijuana-related cash.

Second, and more importantly, the SAFE Banking Act does not appear to resolve the administrative burdens associated with

qualifying for a legal safe harbor. For example, the Act only protects financial institutions that work with "cannabis-related legitimate businesses," defined, in Section 14 of the Act, as businesses engaged in activities involving cannabis pursuant to a law legalizing cannabis in their state. This language appears to impose a duty on financial institutions to ensure that cannabis-related businesses are legitimate, i.e., following the laws of their state. Presumably, then, the protections afforded by the Act would do nothing to preclude adverse regulatory action against a financial institution if the proffered basis for that action is that one or some of the financial institution's banking clients did not meet the definition of a "cannabis-related legitimate business."

Moreover, the Act calls for no less than three different forms of new regulatory rules and guidance. H.R. 1595, 116th Cong. §§ 6, 7, 11 (2019). While the substance of the foregoing tiers of rules and guidance is not yet known, presumably it will have to clarify what financial institutions must do to verify that clients are either (i) "cannabis-related legitimate business," or (ii) hemp businesses authorized under the 2018 Farm Bill (i.e., businesses producing hemp containing no more than 0.3% THC and in compliance with a United State Department of Agriculture-approved regulatory plan). Getting such verification would be difficult since every state has different regulatory programs in place for both marijuana and hemp (to the extent that a state has such a regulatory program in place at all). And even if financial institutions are able to verify that clients are legitimate under the Act, there will presumably still be burdensome ongoing SAR compliance requirements (which could be similar to current, onerous FinCEN Guidelines).

Unfortunately, even if the SAFE Banking Act would help to solve financial institutions' cannabis banking woes, the likelihood of the Act becoming law anytime soon appears to be slim despite the Act's success in the House of Representatives. In December of 2019, Mike Crapo (R., Idaho), the chairman of the Senate committee on banking with jurisdiction over the SAFE Banking Act in the Senate, stated that he remains opposed to marijuana legalization and that he does not believe the SAFE Banking Act, as written, does enough to address his concerns about marijuana. United States Senate Committee on Banking, Housing, and Urban Affairs, Chairman Crapo Outlines Concerns with Cannabis Banking Legislation (Dec. 18, 2019), https://www.banking.senate.gov/newsroom/majority/chairman-crapo-outlines-concerns-with-cannabis-banking-legislation. Mr. Crapo controls the voting agenda for the Senate banking and finance committee and thus serves as a major obstacle to the SAFE Banking Act's passage. Notably, Senator Crapo hails from Idaho, which is one of the small minority of states with no form of lawful marijuana or hemp.

In a statement detailing his concerns with the SAFE Banking Act, Senator Crapo has proposed revising the act to include a potency cap of 2% THC on cannabis products for businesses to be eligible for financial services. Senator Crapo also suggested that financial institutions would be precluded from working with marijuana-related entities that produce certain types of marijuana products, such as edibles and high-potency THC vaping products. Senator Crapo's proposed revisions to the SAFE Banking Act also include implementing strict procedures for ensuring cannabis-related funds are not being used to finance illicit activities, which would create significant compliance obligations for financial institutions attempting to serve marijuana-related businesses. United States Senate Committee on Banking, Housing, and Urban Affairs, Chairman Crapo Outlines Concerns with Cannabis Banking Legislation (Dec. 18, 2019), https://www.banking.senate.gov/newsroom/majority/chairman-crapo-outlines-concerns-with-cannabis-banking-legislation.

The bottom line: it appears unlikely that the SAFE Banking Act will pass anytime soon. And even if it does, a version of the bill incorporating Senator Crapo's concerns would present vague and burdensome compliance requirements that would likely scare off financial institutions and eliminate the bill's underlying purpose to increase cannabis businesses' access to meaningful financial services.

B) State-Level Attempts to Solve the Cannabis Banking Problem

As if this all weren't confusing enough, state-level regulators have weighed in on the cannabis banking issue, further muddying the waters. States such as California, Nevada, and New York, have all seen legislative efforts to protect financial institutions doing business with lawful marijuana companies or provide cannabis businesses with some form of access to financial services.

For example, California and Nevada regulators have been working toward state-level solutions that would pave the way for financial institutions in those states to serve lawful cannabis businesses. *See, e.g.*, California Senate Bill 51 (SB 51)

(authorizing private banks and credit unions to apply for limited-purpose state charters in order to provide depository services to cannabis companies); Nevada Assembly Bill 466 (creating a pilot program for a closed loop payment system for Nevada licensed marijuana businesses that could reduce marijuana businesses' reliance on cash transactions).

Ultimately, because most financial institutions are subject to some form of significant federal regulatory oversight and because marijuana remains federally illegal, the authors do not expect State-level solutions will prevail nor do we believe such efforts would persuade many financial institutions to start doing business with marijuana-related businesses.

IV. The Impact of COVID-19 on the SAFE Banking Act

The SAFE Banking Act has passed in the House of Representatives for a second time. This time it has passed as part of a larger piece of legislation meant to address the public health and economic impacts of the COVID-19 pandemic: the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act. The HEROES Act passed in the House by a 208-199 margin. H.R. 6800—The Heroes Act, Congress.Gov, *available at* https://www.congress.gov/bill/116th-congress/house-bill/6800/all-actions?overview=closed&KWICView=false (last visited June 1, 2020). Among other things, the HEROES Act includes the SAFE Banking Act's provisions to address the cannabis industry's problem with accessing banking.

However, the HEROES Act, like the SAFE Banking Act as its own piece of legislation, appears to face insurmountable hurdles in the Republican-controlled Senate. Republicans have criticized the HEROES Act as a whole, but Republican Majority Leader Mitch McConnell has also harshly criticized the inclusion of the SAFE Banking Act in particular. Sarah Hansen, *Money For Wildlife And Banking For Cannabis Companies: Here's What Democrats Tacked Onto The Latest Stimulus Bill*, Forbes (May 15, 2020), https://www.forbes.com/sites/sarahhansen/2020/05/15/money-for-wildlife-and-banking-for-cannabis-companies-heres-what-democrats-tacked-onto-the-latest-stimulus-bill/#1811ba174b04. McConnell remarked that the bill included the word "cannabis" more times than "job." *Id.* He also described the bill as reading "like the Speaker of the House pasted together random ideas from her most liberal members and slapped the word 'coronavirus' on top of it." *Id.* Based on comments like these, the HEROES Act, including the SAFE Banking Act, is unlikely to be passed in the Senate, at least not in its current form.

V. The Impact of the Election and Congressional Changes on the SAFE Banking Act

As mentioned in Section IV above and throughout this article, the SAFE Banking Act has faced stiff opposition in the Republican-controlled Senate, particularly from Senate Banking Committee Chair Mike Crapo. However, there appears to be broad support for the SAFE Banking Act even in a Republican Controlled Senate if the bill can make it out of the Senate Banking Committee. Senator Crapo is term limited as the chair of the Senate Banking Committee and many believe that the likely incoming committee chair, Pennsylvania Republican Pat Toomey, is more open to cannabis banking reform than Senator Crapo. Jeff Smith, *New US Senate panel chair could boost prospects for cannabis banking reform* Marijuana Business Daily (November 18, 2020), https://mjbizdaily.com/new-us-senate-panel-chair-could-boost-prospects-for-cannabis-banking-reform/. Indeed, Toomey, who hails from a state with a robust medical marijuana program, recently stated in an interview with Politico that he was "sympathetic to the idea that people who are involved in (the) cannabis industry – in an entirely legal fashion, in the state in which they operate – ought to be able to have ordinary banking services. That's my starting point, and then there's a lot of details to work out, but I am open to that." Id.

No matter what happens in the Georgia Senate race, this most recent election demonstrated that the recreational use of marijuana is becoming more widely accepted. Now that Arizona, Montana, New Jersey and South Dakota have legalized cannabis for recreational use, fifteen states have approved it for recreational use. Alicia Wallace, *Legal Weed Won Big in the Election*, CNN Business (November 6, 2020), https://www.cnn.com/2020/11/06/business/cannabis-election-win/index.html The authors view this as a sign that Americans are becoming more widely accepting of cannabis use, which could lead to the SAFE Banking Act passing in the future.

VI. Basic Guidance for Legal Practitioners—Helping Cannabis Clients Navigate Banking Challenges

For all the reasons outlined above, most cannabis companies endure significant challenges to obtain even basic access to banking and financial services. For legal practitioners, it is important to understand how cannabis companies' lack of access to banking can affect their activities and the legal advice practitioners give their cannabis clients. This section of the article provides some general practice tips for attorneys advising cannabis-related businesses related to banking and financial services issues.

First, legal practitioners advising clients in the cannabis space should get familiar with the basic regulatory framework underlying the bank industry's cannabis problem. Practitioners should also become familiar with the local banking environment as some states do have meaningful banking options for cannabis operators. For example, in Ohio, there are some state-chartered banks and credit unions that will bank cannabis client cash under programs designed to comply with the current FinCEN Guidelines. These services come with higher account and transaction fees, which the financial institutions impose to offset the extra costs incurred running compliance on cannabis-related businesses' accounts. In Nevada, by contrast, there are few if any banking options available to cannabis companies.

Second, understand that if your cannabis client operates in a jurisdiction without meaningful access to financial services, the business often must operate all-cash businesses. Clients operating under all-cash scenarios should maintain strict and detailed cash management policies. For all-cash clients, security is also a paramount concern. Many states now have various security companies and transportation specialists that are available to assist cannabis-related businesses with limited banking options to securely transport and distribute cash to other company locations or even other jurisdictions with cannabis banking options. Legal practitioners should endeavor to understand what options are available locally for their clients.

Third, make sure you understand how your cannabis client is banking or storing its cash. Sometimes, cannabis clients have sensitive banking arrangements. Don't jeopardize those relationships by being uninformed.

Fourth, it is important for legal practitioners to understand that some financial institutions have even been reluctant to work with non-plant touching ancillary businesses working with marijuana companies. For example, if a business sells equipment to licensed medical marijuana dispensaries, some financial institutions will not knowingly bank the cash from the company selling equipment to cannabis businesses. This is because the money paid by the dispensary to the equipment selling company is technically proceeds from a federally illegal transaction. Be aware of potential consequences associated with accepting payment from marijuana-related entities and how that can impact even non-plant touching businesses' banking options.

Lastly, stay up to date on the latest developments related to cannabis banking issues both at the federal and local level. The cannabis industry remains among the most rapidly developing and complex legal environments in the United States. Failure to stay informed of industry changes could have significant and devastating consequences to clients and legal practitioners alike.

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