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Banks Remain Cautious About Medical Marijuana

Commentary by Lewis Cohen

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Voters in Florida have approved Amendment 2, which amends the state Constitution to allow for medical uses of marijuana.

The vote brings the number of states that have legalized either medical or recreational use of marijuana to 28. Yet banks remain resistant to providing financial services to the cannabis industry in those states where its use has been legalized.

As a result, licensed nurseries and dispensaries remain mostly all-cash businesses, making legal marijuana sales and distribution difficult for states to regulate, tax and monitor.

A decades-old federal ban on the manufacture, distribution and use of marijuana products continues to cast doubt in the financial services community, even in states where medical or recreational manufacture, distribution and use has been legalized.

In February 2014, the Treasury Department's Financial Crimes Enforcement Network issued guidance to banks, clarifying how financial institutions can provide financial services to marijuana-related businesses consistent with their Bank Secrecy Act obligations. The guidance has done little, however, to alleviate concerns.

The 2014 FinCEN guidance requires financial institutions which choose to provide financial services to marijuana-related businesses to conduct thorough customer due diligence prior to opening an account and to closely monitor transactions which are conducted through the financial institution.

This includes:

- Verifying the proper licensing and registration of the business
- Reviewing the license application and related documentation submitted to the state by the prospective customer
- Requesting any available information from state licensing and enforcement authorities about the business and related parties
- Developing an understanding about the normal and expected activity of the business, including product types to be sold and types of customers to be served
- Ongoing monitoring of publicly available sources for adverse information about the business and related parties
- Periodically updating the information obtained as part of the initial due diligence process.

The obligation to conduct "ongoing monitoring" includes the obligation to file regular Suspicious Activity Reports, or SARs, with FinCEN and to continue filing SARs reporting the amount of deposits, withdrawals and transfers through the customer's account for the duration of the relationship.

Banks are required to be vigilant in their monitoring activities and to escalate their reporting (and in an appropriate case, terminate the relationship) in the event of an unexpected increase in deposits, withdrawals or funds transfers.

As a result, the cost of doing business with marijuana-related industries remains high for financial institutions willing to provide financial services, and the risks associated with a failure to maintain an adequate level of monitoring and vigilance have proven to be unacceptable to the majority of banks maintaining offices in those states where some form of marijuana use has been legalized.

Compliance Programs

Notwithstanding these challenges, it is estimated that approximately 30 percent of licensed marijuana-related businesses have secured banking services in those states where some form of marijuana use has been legalized.

In January 2015, the Federal Deposit Insurance Corp. issued a statement saying, "Financial institutions that can properly manage customer relationships and effectively mitigate risks are neither prohibited nor discouraged from providing services to any category of customer accounts or individual customer operating in compliance with applicable state and federal law."

In May, the state of Washington's Department of Financial Services, Division of Credit Unions, published an examination manual for credit unions providing financial services to state-licensed marijuana-related businesses.

Banks which have successfully implemented programs for banking marijuana-related businesses in Washington, Oregon and Colorado have done so by maintaining rigorous — and expensive — compliance programs coupled with appropriate service fees which permit the relationship to be profitable.

With an increasing number of states, including Florida, electing to legalize marijuana for either medical or recreational use, the substantial revenues being generated by the industry in those states where its use has been legalized and the desire of law enforcement and regulatory agencies for transparency in the industry's financial transactions, pressure will continue to mount on Congress and individual state regulatory agencies for clear guidelines which will remove lingering uncertainty for the financial community.

Lewis R. Cohen, Esq. is a partner with Cohen Nicoleau in Miami. He focuses on banking, real estate and finance. Contact him at lewis.cohen@cohen-nicoleau.com.