

Banking Marijuana Related Businesses; by A. Lyle Elias



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Publisher & Editor in Chief

April, 23 2017

Marijuana Related Businesses (MRB) have created a banking and payments industry conundrum; quasi-legal businesses that cannot access the same financial services that are taken for granted by other merchants and consumers alike. The Schedule 1 Drug classification of marijuana (aka cannabis) and the long standing federal ban on growing cannabis (e.g. Hemp) puts a mounting number of states that have legalized recreational and/or medical use of marijuana in direct conflict with federal laws. However, the Department of Justice (DOJ) and federal law enforcement's hands-off policy thus far has allowed for MRBs to operate, although there is a cloud that hangs over them and financial institutions that do business with them. In spite of the Cole Memo published by the DOJ, and the subsequent Financial Crimes Enforcement Network (FinCEN) guidance to banks that do provide financial services to MRBs, uncertainty over possible federal enforcement actions and the "Uber-compliance" requirements have kept most banks on the sidelines.

The election of President Trump and subsequent appointment of Attorney General Sessions, who has publicly expressed his opposition to legalization of marijuana, combined with Trump Administration signals on opposition to any form of recreational marijuana, has further muddied the waters and led to multiple closures of bank accounts as well as access to electronic payments. Even independent deployers placing ATMs in MRB dispensaries unbeknownst to their sponsoring banks, has created an MRB ATM grey market that will come back to haunt the ATM industry when the inevitable crack downs by federal regulators. This will inevitably cast a shadow of ATM money laundering, albeit on the part of a few bad actors. Ultimately it is the unsuspecting bank sponsors that will bear the consequences for non-compliance, but the ATM industry will undoubtedly be dragged through the mud by public media.

In spite of the uncertainty and compliance risks, more financial institutions are servicing the marijuana industry, but depositories have terminated 5,650 accounts at an increasingly rapid clip. The data shows incremental improvement for a previously locked-out industry, but the gains are not keeping pace with the industry's exponential revenue growth. Between June 2016 and September 2016, U.S. financial institutions terminated roughly 8.8 accounts per day, up from a rate of 7.5 terminations per day from November 2015 to May 2016. At the same time, the number of depositories servicing the industry has increased 15.6% year over year.

Recently a letter signed by 10 U.S. senators to Jamal El-Hindi, the director of FinCEN, requesting guidance on how banking services might be offered to "indirect businesses" that serve MRBs. The letter came at the prompting of U.S. Senator Elizabeth Warren, D-Mass, a member of the Senate Banking Committee that oversees federal monetary policy, banking regulation and issues affecting the U.S. currency. Sen. Ron Wyden (D.-Ore.) and Rep. Earl Blumenauer (D-Ore.) have introduced a package of three bills that would lead to federal regulation of cannabis and "provide certainty for state-legal marijuana businesses." The bills would also eliminate the tax code's 280E rule, which the industry considers an unfair tax. Rep. Jared Polis (D- Colo.) also introduced the Regulate Marijuana like Alcohol Act. Hopefully the new administration will bring more clarity to this contentious issue that surrounds this still largely unbanked multibillion-dollar industry.

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