

PRESENTATION BY

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ON

**MARIJUANA BANKING IN NEVADA**

BEFORE THE

GOVERNOR'S ADVISORY PANEL FOR CREATION OF A  
CANNABIS COMPLIANCE BOARD

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## **STATUS OF BANKING MARIJUANA INDUSTRY IN NEVADA**

With Nevada's legalization of medical marijuana in 2015 and the legalization of recreational marijuana in 2017, the need for access to financial institution services has become paramount. The high cash and high compliance issues of medical and recreational operations create public and legal safety challenges that in part need to be addressed by access to financial institution deposit and payment services.

The business decision for a depository institution (bank, credit union or thrift) to offer financial services to marijuana related businesses is a very precarious one, and to date has stalled Nevada institutions from doing so.

- Legal-wise, although Nevada law has legalized the production and sale of marijuana for medical and recreational purposes, federal law still makes possession and use of marijuana illegal. All federally insured banks, credit unions and thrifts are subject to federal law, whether the institution is a national charter or state-chartered. Violation of federal law could subject a financial institution to regulatory enforcement, loss of its deposit insurance and its charter. This inherent conflict of state and federal law creates issues for which there are no easy resolutions.
- Business-wise, the cost-benefit and risk-reward analysis does not pencil out well; that is, banking marijuana is generally high cost and risk, with low benefit and reward.

## **THE ISSUES**

The issue of marijuana-related businesses accessing banking services is a growing concern in our state. Cash only businesses pose a risk to public safety as well as impede state's attempts to regulate or tax these businesses.

It is important that everyone involved understands and recognizes that all banks are federally regulated, whether state-chartered or nationally chartered. Marijuana and related activities are not legal at the federal level. Federal law technically prohibits banks from transactions involving marijuana related monies.

## **FEDERAL CONTROLLED SUBSTANCES ACT**

The core issue is that, regardless of state law, the federal Controlled Substances Act prohibits everyone, including banks, from dealing with controlled substances or the proceeds from them. Banks, and any financial institution that connects to the payment system (checks, ATMs, credit/debit cards, internet banking, wire transfers, etc.), are subject to these federal laws and regulations, regardless of their ownership (private, public, state-owned.)

## **FEDERAL BANKING LAWS AND REGULATIONS**

Some of the federal laws and regulations that impact banks include the Bank Secrecy Act (BSA), which requires banks to watch for Anti-Money Laundering (AML) violations in customers' deposit accounts. Failure to properly file a Suspicious Activity Report (SAR), Currency

Transaction Report (CTR), or fully comply with the federal Know Your Customer (KYC) doctrine, can result in criminal and civil penalties including incarceration for involved employees. Compliance with the voluminous, intense technical requirements and related pitfalls involves huge effort and expense, and the risk of error raises serious consequences.

#### STATE – FEDERAL LAW CONFLICT

The state legalization versus federal prohibition has created an insurmountable conflict for many businesses that would potentially serve marijuana and related businesses. The conflict is the problem and ultimately the only definitive solution is for Congress to remove the conflict. Due this conflict, banks can face regulatory criticism in examinations, regulatory actions, criminal prosecution for various crimes, threats to public safety (i.e. robbery of cash-heavy customer on property), potential federal prosecution of bank personnel for infractions, and issues to the bank's image or reputation.

#### WHY BANKING MRBS IS STALLED IN NEVADA

The “risk – reward” and “cost – benefit” analysis by most depository institutions in the country and Nevada has concluded that the risk and cost of providing financial services to marijuana related businesses far exceeds the reward or benefit of doing so for the following reasons:

- **Risk**

Regardless of legal issuances such as the now revoked U.S. Attorney General Office Cole Memo and the Financial Crimes Enforcement Network (FinCEN) guidance on reporting marijuana transactions, financial institutions still face a lot of uncertainty if they offer banking services to marijuana-related businesses. The federal statutory risks include violations of the Controlled Substance Act, USA Patriot Act, Bank Secrecy Act, Racketeer Influenced and Corrupt Organizations Act and other federal statutes.

The only way to completely eliminate the risk of criminal prosecution for financial institutions providing financial services to marijuana related businesses is if Congress changes federal statute. Because marijuana is illegal under federal statute, guidance alone isn't enough. In order for most financial institutions to be completely comfortable providing services to marijuana businesses, the federal statute must be changed by Congress.

- **Cost**

All financial institutions are subject to the requirements of the Bank Secrecy Act. Under the BSA, financial institutions must report to the federal government any suspected illegal activity which would include any transaction associated with a marijuana business. These reports must be filed even though the business is operating legitimately under state law.

The Financial Crimes Enforcement Network (FinCEN) guidance sets extensive requirements for financial institutions to meet if they want to offer bank accounts to marijuana businesses. The expectations set forth in the guidance are extensive and require financial institutions to

adopt procedures to closely scrutinize all activities of a marijuana business, including verifying the business does not sell to minors and that no marijuana sold by the business is taken to a state where possession is still illegal. This is a level of scrutiny that is far beyond what is expected of any normal banking relationship. The cost of establishing a compliance infrastructure to completely satisfy the guidance expectations is prohibitive for most institutions.

In addition to the legal considerations of offering banking services to marijuana related businesses, the logistical considerations of servicing this high cash volume industry include extensive arrangements for armored car services, central vault services and cash shipment services.

Ultimately, offering any particular banking products or services to customers, including marijuana related businesses, is a business decision based the risks associated with offering the service and the costs necessary to effectively manage these risks.

### **POTENTIAL SOLUTIONS**

Ensuring the safety and soundness of the financial system and of the depository institutions operating within it is of utmost public concern. A depository financial institution is always the safest place to store money and financial institutions want to keep their communities and small businesses safe. The issue of providing financial services to marijuana businesses demonstrates the valuable role a financial institution account plays in the effective and efficient operation of all businesses. Access to financial institution accounts minimizes risk from maintaining large cash deposits, would let marijuana businesses access the card payment systems with their many benefits, and would be a safer and more secure way to operate.

In view of all the foregoing, the Financial Institutions Division has been developing and pursuing possible solutions to the issues we have been discussing:

- **Nevada based depository financial institution(s)** makes the business decision that the risks and costs of providing services to marijuana business(s) is outweighed by the rewards and benefits of doing so.

*To date, no Nevada state-chartered bank, credit union or thrift has made the decision to provide financial services to marijuana related businesses.*

- **Nevada legislation that authorizes a depository institution** for the purposes of providing financial services to marijuana related businesses. This was partially accomplished in 2015 by AB 480 that reauthorized privately insured thrifts in NRS 677.

*Since its passage, a couple of organizing groups have sought to establish a privately insured thrift under AB480 Sections 101.3-7 that re-authorize privately insured thrifts in Nevada. In order to establish a viable privately insured thrift that can service the marijuana industry, a proposed institution must be able to raise sufficient initial capitalization, secure private insurance of deposits and probably have access to the payments system through the Federal*

*Reserve Bank (FRB). These challenges have proven challenging, but at least one organizing group is close to meeting statutory requirements for a charter.*

- **Out of state financial institutions** that currently bank marijuana related businesses (MRBs) begin providing banking services to Nevada MRBs.

*The FID has been in discussion with, and is facilitating, proposals for a couple of out of state financial institutions to begin servicing Nevada MRBs.*

- *As of February 2019, an Arizona national bank that services medical marijuana in the Phoenix area has opened a branch in Las Vegas and is servicing several large marijuana related businesses, with plans to expand that customer base over time.*
- *A Colorado credit union that extensively services marijuana related businesses in that state has applied to branch into Nevada and begin servicing our cannabis industry. Upon approval, this financial institution could be up and running in southern Nevada in 30 days.*
- **The introduction of federal work-around bills** and the states' efforts to provide solutions highlight the conflict and the importance of resolution. Federal legislation aimed at the issues created by state level legalization of marijuana, including the Strengthening the Tenth Amendment Through Entrusting States Act ("STATES Act") and the Secure and Fair Enforcement Banking Act ("SAFE Banking Act"). These bills acknowledge some of the issues and legal challenges created by conflicting treatment of cultivation, production, distributions and sales of marijuana between federal and states' laws, including Nevada state laws which legalize medical and recreational use.

**STATES Act** would amend the Controlled Substances Act to provide for a new rule regarding the application of the Act to marijuana, and for other purposes, creates a broadly defined safe-harbor for all providers serving marijuana-related enterprises.

**SAFE Banking Act** would prohibit a federal banking regulator from penalizing a depository institution solely because the institution provides financial services to a legitimate marijuana-related business.

The removal of the federal-state law conflict or providing a "safe harbor" will allow depository institutions to decide if servicing the marijuana industry fits their business model and risk profile, and alleviate the concerns over the provision of services to businesses that have indirect relationships to the industry.

*The Nevada Financial Institutions Division has been signatory to state regulators' letters to Congress in support of legislation to resolve the marijuana banking issues at the federal level.*

## **SOLUTIONS NEED TO BE COST-EFFECTIVE**

Regardless of what solutions to providing banking services to marijuana related business come to fruition, the solution has to be economically feasible. The marijuana industry, like any other business, will only be willing to pay so much for a banking solution. Due to the high costs of compliance, those institutions that have ventured to provide banking services to MRBs are pretty much break-even at a high cost. Other business solutions also come in at a very high cost. What the market will bear is an integral part of the equation for any proposed solution.

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