

Marijuana Banking

Presented by Financial Standards Group, Inc.

U.P. MCUL Chapter of Credit Unions

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Marijuana Banking: Presentation Overview

- ▶ Michigan Marijuana Law
- ▶ Federal Marijuana Law
- ▶ State vs. Federal Charters
- ▶ Marijuana Banking Risks
- ▶ Marijuana Banking Rewards
- ▶ Marijuana and GAAP
- ▶ FinCEN Guidance
 - ▶ Priorities
 - ▶ Due Diligence
 - ▶ SAR Reporting
- ▶ The Future (pending federal legislation)

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

▶ Provides for the legal licensing of “Marihuana Establishments”:

▶ Identifies six ‘legitimate’ licensed marijuana business entities:

1. Marijuana Grower (Class A, B, or C) - a person licensed:

- ▶ to cultivate marihuana,
- ▶ sell or otherwise transfer marihuana to marihuana establishments.

2. Marijuana Microbusiness - a person licensed:

- ▶ to cultivate not more than 150 marihuana plants,
- ▶ process and package marihuana,
- ▶ sell or otherwise transfer marihuana to individuals who are 21 years of age or older or to a marihuana safety compliance facility, but not to other marihuana establishments.

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

▶ Marijuana Establishments - cont.

3. Marijuana Processor - a person licensed:

- ▶ to obtain marijuana from marijuana establishments
- ▶ process and package marijuana
- ▶ sell or otherwise transfer marijuana to marijuana establishments

4. Marijuana Retailer - a person licensed:

- ▶ To obtain marijuana from marijuana establishments
- ▶ to sell or otherwise transfer marijuana to marijuana establishments and to individuals who are 21 years of age or older.

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

▶ Marijuana Establishments - cont.

5. Marijuana Secure Transporter - a person licensed:

- ▶ to obtain marijuana from marijuana establishments in order to transport marijuana to marijuana establishments

6. Marijuana Safety Compliance Facility - a person licensed:

- ▶ To test marijuana, including certification for potency and the presence of contaminants.

- ▶ ALSO: Any other type of marijuana-related business licensed by the department.

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

▶ Licensing

- ▶ [Section 9.5] - Provides for state licenses to be effective for 1 year, unless specifically issued for a longer term [Section 9.5]
- ▶ [Section 9.6] - For the first 24 months after this law became effective, only medically licensed marijuana growers are able to submit for an application to a marijuana establishment, with the exception of Marijuana Safety Compliance Facility

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

- ▶ Licensing
- ▶ [Section 6.3] - Permits municipalities to require municipal licenses (but may not impose requirements that conflict with MRTMA)
- ▶ [Section 6.1] - Permits municipalities to prohibit Marijuana Establishments within their legal boundaries / jurisdictions
 - ▶ U.P. municipalities that have expressed their desire to prohibit Marijuana Establishments:
 - ▶ Sault Ste Marie
 - ▶ Norway
 - ▶ Ironwood
 - ▶ Caspian
 - ▶ Pentland Township
 - ▶ St. Ignace
 - ▶ Ishpeming

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

▶ Restrictions

- ▶ [Section 4.1(b)] - Prohibits transfer of marijuana or marijuana accessories to a person under the age of 21
- ▶ [Section 4.1(f)] - Prohibits cultivating marijuana plants if the plants are visible from a public place without the use of binoculars, aircraft, or other optical aids or outside of an enclosed area equipped with locks or other functioning security devices that restrict access to the area;
- ▶ [Section 5.1(a)] - Prohibits an individual possessing, selling, or transporting over 2.5 ounces of marijuana (~140 joints) outside their home
- ▶ [Section 11(g)] - Prohibits an establishment from transporting 15 ounces (~840 joints) of marijuana at a time

Michigan Marijuana Law

Michigan Regulation and Taxation of Marijuana Act (MRTMA)

- ▶ Restrictions
- ▶ [Section 17] - “Nothing in this act purports to supersede any applicable federal law, except where allowed by federal law.”

Federal Marijuana Law

The Controlled Substances Act of 1970

- ▶ Title 21 of the U.S. Code*: Food and Drugs
 - ▶ Chapter 13
 - ▶ Subchapter I
 - ▶ Part B
 - ▶ §812
- ▶ **Classifies Marijuana as a Level I hallucinogenic drug**
- ▶ **Dealing in Marijuana is therefore a federal crime**

*The United States Code is a consolidation and codification by subject matter of the **general** and **permanent** laws of the United States. It is prepared by the Office of the Law Revision Counsel of the United States House of Representatives.

Federal Marijuana Law

Money Laundering

- ▶ **Title 18 of the U.S. Code: Crimes and Criminal Procedure**
 - ▶ Part I
 - ▶ Chapter 95
 - ▶ §1956 **Laundering of Monetary Instruments**
 - ▶ (a)(1) **Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-**
 - ▶ (A)(i) **with the intent to promote the carrying on of specified unlawful activity; or**
 - ▶ (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
 - ▶ (B) knowing that the transaction is designed in whole or in part-
 - ▶ (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
 - ▶ (ii) to avoid a transaction reporting requirement under State or Federal law,

Federal Marijuana Law

Money Laundering

- ▶ What §1956. *Laundering of Monetary Instruments* means:
 - ▶ Accepting deposits from marijuana related businesses (MRBs) constitutes “money laundering,” even if these deposits are segregated from the Credit Union’s general assets.

Marijuana Federal Law

▶ Money Laundering Penalties:

▶ Title 18 of the U.S. Code: Crimes and Criminal Procedure

▶ Part I

▶ Chapter 95

▶ §1956(a)(1) **Laundering of Monetary Instruments** (cont.)

▶ Fines not to exceed \$500,000, or twice the amount of illegal deposits, whichever is greater

and/or

▶ Imprisonment up to 20 years

State vs. Federal Charters

▶ Federal Charters:

- ▶ Your Organizational Certificate states:
- ▶ “We hereby request approval of this organization certificate; we hereby apply for insurance of member accounts; **we agree to comply** with the requirements of said Act, with the terms of this organization certificate and **with all laws, rules, and regulations now or hereafter applicable to Federal Credit Unions.**”

State vs. Federal Charters

▶ Federal Charters:

- ▶ Your Organizational Certificate states:
- ▶ “The term of this credit union's existence shall be perpetual: Provided, however, **that upon the finding that this credit union is bankrupt or insolvent or has violated any provision of this organization certificate**, of the bylaws, of the Federal Credit Union Act including any amendments thereto or thereof, or of any regulations issued thereunder, **this organization certificate may be suspended or revoked** under the provisions of Section 120(b) of the Federal Credit Union Act.”

State vs. Federal Charters

▶ Federal Charters:

▶ Title 12 of the U.S. Code: Crimes and Criminal Procedure

▶ Chapter 14: The Federal Credit Union Act

▶ Subchapter I

▶ §1772d(a)(1)(A)

- ▶ **If a credit union has been convicted of any criminal offense under section 1956 or 1957 of title 18, the Attorney General shall provide to the Board a written notification of the conviction and shall include a certified copy of the order of conviction from the court rendering the decision.**

State vs. Federal Charters

▶ Federal Charters:

▶ Title 12 of the U.S. Code: Crimes and Criminal Procedure

▶ Chapter 14: The Federal Credit Union Act

▶ Subchapter I

▶ §1772d(a)(1)(B)

- ▶ After receiving written notification from the Attorney General of such a conviction, **the Board shall issue to such credit union a notice of its intention to terminate all rights, privileges, and franchises of the credit union and schedule a pretermination hearing.**

State vs. Federal Charters

▶ Federal Charters:

- ▶ Conclusion: You can lose your charter.

State vs. Federal Charters

▶ State Charters:

▶ Michigan Credit Union Act 215 of 2003:

- ▶ 490.387(1) A domestic credit union that is not a corporate credit union shall apply for and maintain insurance of member share accounts and member deposit **accounts from an agency of the federal government** that provides that insurance.
- ▶ This refers to the National Credit Union Administration (NCUA)

State vs. Federal Charters

▶ State Charters:

▶ Michigan Credit Union Act 215 of 2003:

- ▶ 490.387(2) A credit union that is denied a commitment for insurance of its share and deposit accounts by the insuring federal agency or that is given notice by the insuring federal agency of the agency's intent to terminate insurance of the credit union's shares and deposits shall either:
 - ▶ dissolve,
 - ▶ merge with another credit union that is insured by an agency of the federal government,
 - ▶ or apply in writing to the commissioner within 30 days after the denial or notice for additional time to obtain an insurance commitment.

State vs. Federal Charters

▶ State Charters:

▶ Michigan Credit Union Act 215 of 2003:

- ▶ 490.387(3) The commissioner shall grant a credit union described in subsection (2) 1 or more additional periods of time to obtain or reinstate an insurance commitment **if the commissioner receives satisfactory evidence that the credit union has made or is making a substantial effort to meet the conditions required by the insuring federal agency** for issuance of an insurance commitment.

State vs. Federal Charters

▶ State Charters:

- ▶ Conclusion: You can lose your insurance, which would likely lead to dissolution or merger.
- ▶ Why would you lose your insurance?
- ▶ The NCUA has set precedence by refusing to insure a Credit Union attempting to charter, for the purpose of servicing marijuana businesses.

Marijuana Banking Risks

▶ Fourth Corner Credit Union (4CCU):

- ▶ Colorado state-chartered Credit Union
- ▶ Created in 2014, to provide banking services to compliant state licensed cannabis and hemp businesses
- ▶ Denied a master account with the Federal Reserve Bank
- ▶ Denied share insurance from the NCUA

Marijuana Banking Risks

▶ Fourth Corner Credit Union (4CCU):

- ▶ Sued the Federal Reserve Bank of Kansas City in 2014
- ▶ Decided in June 17, 2017:
 - ▶ The Credit Union was granted a master account, but was required to amend its field of membership and business plan, to focus on servicing only groups advocating for the legalization of marijuana, but not marijuana businesses themselves.
- ▶ Conclusion: The Federal Reserve Bank has the authority to deny a Credit Union access to the Federal Reserve based on servicing marijuana businesses - even if state licensed.

Marijuana Banking Risks

▶ Fourth Corner Credit Union (4CCU):

- ▶ Sued the National Credit Union Administration in 2015
- ▶ Case dismissed June 25, 2018:
 - ▶ The Court ruled that upon the amendment of the Credit Union's field of membership and business plan, the original case was no longer applicable.

Marijuana Banking Risks

▶ Fourth Corner Credit Union (4CCU):

- ▶ NCUA response to 4CCU's request for a federal court mediation order:
- ▶ **“Because Plaintiff (4CCU) has repeatedly stated in court lings that it no longer intends to serve marijuana-related businesses unless it becomes lawful to do so under federal law, Plaintiff's application for insurance and the Defendant's (NCUA) denial of the same [is] no longer present a live case or controversy.”**

Marijuana Banking Risks

▶ Fourth Corner Credit Union (4CCU):

- ▶ Conclusion: The NCUA has the authority to deny share insurance based on servicing marijuana businesses - even if state licensed.

Marijuana Banking Risks

- ▶ **Choosing not to service Marijuana Establishments DOES NOT protect the Credit Union from all risks.**
- ▶ **Risks are present even if you don't service Marijuana Establishments!**

Marijuana Banking Risks

- ▶ **What constitutes a Marijuana Establishment?**
 - ▶ Addressed in the MRTMA
- ▶ **What constitutes a Marijuana Related Business?**
 - ▶ Only a Marijuana Establishment?
 - ▶ An entity that supports a Marijuana Establishment?
 - accountants, lawyers, vendors, suppliers, landlords, etc.
- ▶ **No legally accepted definition**

Marijuana Banking Risks

- ▶ **Small Business Association (SBA) definitions:**
 - ▶ [SBA] borrower[s] may not lease space to a business that is engaged in any activity that is illegal under federal, state or local law.
 - ▶ This applies to both Direct and **Indirect** Marijuana Businesses.

Marijuana Banking Risks

- ▶ **Small Business Association (SBA) definitions:**
 - ▶ “Direct Marijuana Business” -- a business that grows, produces, processes, distributes, or sells marijuana or marijuana products, edibles, or derivatives, regardless of the amount of such activity.

Marijuana Banking Risks

- ▶ **Small Business Association (SBA) definitions:**
 - ▶ **“Indirect Marijuana Business”** -- a business that derived any of its gross revenue for the previous year (or, if a start-up, projects to derive any of its gross revenue for the next year) **from sales to Direct Marijuana Businesses** of products or services that could reasonably be determined to support the use, growth, enhancement or other development of marijuana.
 - ▶ Examples include businesses that provide:
 - ▶ Provide testing services
 - ▶ Sell grow lights or hydroponic equipment
 - ▶ Sell smoking devices, pipes, bongs, inhalants, or other products that may be used in connection with marijuana

Marijuana Banking Risks

- ▶ **Credit Unions should consider these factors in performing due diligence on new and existing member accounts, even if the Credit Union prohibits servicing Marijuana Establishments themselves.**

Marijuana Banking Rewards

- ▶ ~\$12 Billion industry in 2018 in North America:
 - ▶ ~10.4 Billion from the United States
 - ▶ North American industry forecasted to grow up to \$24.5 Billion by 2022
 - ▶ Mostly cash
- ▶ Low competition:
 - ▶ Only 486 Financial Institutions servicing MRBs nationwide
 - ▶ Only 111 of these institutions are Credit Unions
- ▶ Future loyalty:
 - ▶ The Credit Unions taking the risk to serve this sector today, are likely the banking choice for the industry if/when it becomes federally legal tomorrow.

Marijuana Banking Rewards

- ▶ (Currently) Low chance of being prosecuted:
 - ▶ To date: 0 Credit Unions prosecuted for marijuana association
- ▶ “Bankers often ask whether there are examples of cases when a bank has been prosecuted [for servicing marijuana businesses]. While the answer appears to be no, the real question banks should be [asking is] whether the bank is willing to be the first test case.”
 - ▶ Robert Rowe, from the *ABA Banking Journal*
 - ▶ ‘*Compliance and the Cannabis Conundrum*’, published September 11, 2018

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Auditing Standards 2405: Illegal Acts by Clients
- ▶ Paragraph 2:
- ▶ **The term *illegal acts*, for purposes of this section, refers to violations of laws or governmental regulations.** Illegal acts by clients are acts attributable to the entity whose financial statements are under audit or acts by management or employees acting on behalf of the entity. Illegal acts by clients do not include personal misconduct by the entity's personnel unrelated to their business activities.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Auditing Standards 2405: Illegal Acts by Clients

- ▶ Paragraph 14:

- ▶ The auditor should consider the effect of an illegal act on the amounts presented in financial statements including contingent monetary effects, such as fines, penalties and damages. **Loss contingencies resulting from illegal acts that may be required to be disclosed should be evaluated in the same manner as other loss contingencies.** Examples of loss contingencies that may arise from an illegal act are: threat of expropriation of assets, enforced discontinuance of operations in another country, and litigation.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ **GAAP Terminology:**
- ▶ **Probable:** The future event or events are likely to occur.
- ▶ **Reasonable Possible:** The chance of the future event or events occurring is more than remote but less than likely.
- ▶ **Remote:** The chance of the future event or events occurring is slight.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Loss Contingencies: Recognition: General Rule
- ▶ FASB 450-20-25-2: “An estimated loss from a contingency shall be accrued by a charge to income if both of the following conditions are met:
 - ▶ a. Information available before the financial statements are issued or available to be issued ...indicates that it is **probable** that an asset had been impaired or a liability had been incurred at the date of the financial statements. Date of the financial statements means the end of the most recent accounting period for which financial statements are being presented. It is implicit in this condition that it must be **probable** that one or more future events will occur confirming the fact of the loss.
 - ▶ b. The Amount of the loss can be reasonably estimated.”
- ▶ FASB 450-20-25-8: Business Risks - “General or unspecified business risks do not meet the conditions for accrual [*in Paragraph 420-20-25-2*], and no accrual for loss shall be made.”

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Loss Contingencies: Recognition: General Rule
- ▶ FASB 450-20-25-2: Interpretation
- ▶ If the loss and **probable** and estimable: the loss should be ACCRUED.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Unrecognized Contingencies
- ▶ FASB 450-20-50-3: “Disclosure of the contingency shall be made if there is at least a **reasonable possibility** that a loss or an additional loss may have been incurred and either of the following conditions exist: -
 - ▶ a. An accrual is not made for a loss contingency because any of the conditions in paragraph 450-20-25-2 are not met.
 - ▶ b. An exposure to loss exists in excess of the amount accrued pursuant to the provisions of paragraph 450-20-30-1.”
- ▶ FASB 450-20-50-4: “The disclosure in the preceding paragraph shall include both of the following:
 - ▶ a. The nature of the contingency.
 - ▶ An estimate of the possible loss or range of loss or a statement that such an estimate cannot be made.”

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Unrecognized Contingencies
- ▶ FASB 450-20-50-3: Interpretation
- ▶ If the loss is **reasonably possible** and the estimated loss is greater than what has been accrued (or no accrual has been made), the loss should be DISCLOSED.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Litigation, Claims, and Assessments
- ▶ FASB 450-20-55-10: “The following factors should be considered in determining whether accrual and/or disclosure is required with respect to pending or threatened litigation and actual or **possible** claims and assessments:
 - ▶ a. The period in which the underlying cause (that is, the cause for action) of the pending or threatened litigation or of the actual or possible claim or assessment occurred
 - ▶ b. The degree of probability of an unfavorable outcome
 - ▶ c. The ability to make a reasonable estimate of the amount of loss.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Assessing Probability of the Incurrence of a Loss
- ▶ FASB 450-20-55-14: “With respect to unasserted claims and assessments, an entity must determine the degree of probability that a suit may be filed or a claim or assessment may be asserted and the possibility of an unfavorable outcome. If an unfavorable outcome is **probable** and the amount of loss can be reasonably estimated, **accrual of a loss is required** by paragraph 450-20-25-2. For example:
 - ▶ b. An investigation of an entity by a governmental agency, if enforcement proceedings have been or are likely to be instituted, is often followed by private claims for redress, and the probability of their assertion and the possibility of loss should be considered in each case.
- ▶ FASB 450-20-55-15: “If the judgment is that assertion is **not probable**, **no accrual or disclosure would be required.**”

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Assessing Probability of the Incurrence of a Loss
- ▶ FASB 450-20-55-10,14-15: Interpretation
- ▶ If a claim is **probable**, the estimated amount of loss should be ACCRUED.
- ▶ If a claim is NOT **probable**, no ACCRUAL or DISCLOSURE is necessary.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ Conclusion:
- ▶ Servicing MRBs or marijuana establishments, in and of itself, may require financial statement disclosure of a contingent loss, depending on the following:
 - ▶ Professional interpretation of term “reasonably possible”
 - ▶ The professional emphasis given to:
 - ▶ FASB 450-20-50-03 (Reasonably Possible) vs.
 - ▶ FASB 450-20-55-15 (Not Probable)

Marijuana Banking Risks: Marijuana & GAAP

- ▶ FASB 275-10-50-1
- ▶ All of the disclosures required by this subtopic shall be included in the basic financial statements. **Reporting entities shall make disclosures in their financial statements about the risks and uncertainties existing** as of the date of those statements in the following areas:
 - ▶ a. **nature of operations**, including the activities in which the entity is currently engaged if principal operations have not commenced.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ FASB 275-10-50-2: Nature of Operations/Activities
- ▶ If an entity has commenced planned principal operations, **the entity's financial statements shall include a description of the major products or services the reporting entity sells or provides** and its principal markets, including the locations of those markets ...
- ▶ Not-for-profit entities' (NFPs') disclosures should briefly describe the principal services performed by the entity and the revenue sources for the entity's services.

Marijuana Banking Risks: Marijuana & GAAP

- ▶ **FASB 275-10-50: Risks and Uncertainties - Disclosures**
- ▶ **Interpretation & Conclusion:**
- ▶ **Credit Unions must disclose the fact that one of their services and revenue sources is from servicing federally illegal marijuana establishments/businesses.**

Marijuana Banking - FinCEN Guidance

- ▶ FinCEN, does not condone the servicing of MRBs, but acknowledges the reality that it occurs, and has set up guidelines to assist Credit Unions in reporting these types of transactions.
- ▶ FinCEN guidance is based on 2 memorandums issued by the Department of Justice on August 29, 2013, and February 14, 2014, collectively referred to as “The Cole Memo.”

Marijuana Banking - FinCEN Guidance

- ▶ The Cole Memo:
 - ▶ Recognized the limited resources of the Department of Justice in pursuing marijuana-related crimes, and identified 8 critical priorities which department officials should focus when prosecuting cases.
 - ▶ Rescinded January 4, 2018

Marijuana Banking - FinCEN Guidance

Priorities

► The Cole Memo Priorities:

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

Marijuana Banking - FinCEN Guidance

Priorities

► The Cole Memo Priorities: (cont)

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

Marijuana Banking - FinCEN Guidance

Due Diligence

- ▶ Your Credit Union is responsible for adequate member due diligence!
- ▶ FinCEN suggested due diligence includes:
 1. Verifying with the appropriate state authorities whether the business is duly licensed and registered;
 2. Reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
 3. Requesting from state licensing and enforcement authorities available information about the business and related parties;

Marijuana Banking - FinCEN Guidance

Due Diligence

► FinCEN suggested due diligence includes: (cont.)

4. 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);
5. Ongoing monitoring of publicly available sources for adverse information about the business and related parties;
6. Ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and
7. Refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.

Marijuana Banking - Due Diligence

► MCUL Suggested Framework: (as of June 4, 2018)

1. Obtain appropriate legal counsel, and have legal counsel present the plan to the Board of Directors
2. Use a Board-approved policy when addressing MRBs.
 - a) What types of MRBs will be serviced
 - b) Update Credit Union risk assessments
3. Update Credit Union bylaws
4. Implement procedures for staff opening MRB accounts, including
 - a) Ensuring proper licensing with the Michigan Department of Licensing and Regulatory Affairs (LARA)

Marijuana Banking - Due Diligence

▶ MCUL Suggested Framework: (cont.) (as of June 4, 2018)

5. Development of an enhanced monitoring account program for MRBs
 - a) Staffing resources - a staff solely dedicated to MRBs
 - b) Utilize Anti-money laundering software
 - c) Have a third party vendor assist with tracking MRB activity
 - ▶ “Seed to Sale”
 - ▶ “Know your customer”
 - d) Onsite inspections
 - ▶ Ongoing maintenance
 - ▶ Dedicated staff assigned to specific MRBs - constant communication with the business

Marijuana Banking - Due Diligence

▶ MCUL Suggested Framework: (cont.) (as of June 4, 2018)

6. Evaluate and enhance branch security
 - a) Updated cameras that can see dollar bill denominations
 - b) Additional vault cameras
 - c) Security guard
7. Review agreement with armored car service
 - a) You need to confirm that the Credit Union's armored car service will transport cash from MRBs.
 - b) *FSG Inc. recommendation: Review agreement with your depository financial institution; confirm they are willing to accept cash from MRBs*

Marijuana Banking - Due Diligence

► MCUL Suggested Framework: (cont.) (as of June 4, 2018)

8. Work very closely with Credit Union examiners and regulators
9. The Credit Union must have a firm exit strategy, in the event
 - a) Something occurs at the federal level, such as the U.S. Department of Treasury* or FinCEN indicating financial institutions are no longer permitted to work with MRBs, or
 - b) The Credit Union's regulator requires the Credit Union to exit, or
 - c) *FSG Inc. recommendation: Any other situation requiring the Credit Union to abandon the program.*

**Note: The U.S. Department of Treasury has already indicated financial institutions are not federally permitted to work with MRBs*

Marijuana Banking - FinCEN SAR Guidance

▶ FinCEN requirements:

- ▶ Even if all initial and ongoing due diligence is performed, FinCEN requires a Suspicious Activity Report (SAR) to be filed on MRB transactions.
- ▶ These are reported as:
 - ▶ Marijuana Limited SARs
 - ▶ Marijuana Priority SARs
 - ▶ Marijuana Termination SARs

Marijuana Banking - FinCEN SAR Guidance

- ▶ **Suspicious Activity Report (SAR) Filing**
 - ▶ **Marijuana Limited SARs:** filed on a marijuana establishment due only to the fact that they are a marijuana establishment
 - ▶ **Marijuana Priority SARs:** filed on a marijuana establishment that the Credit Union believes is violating one of the Cole Memo priorities
 - ▶ **Marijuana Termination SARs:** filed on a marijuana establishment with whom the Credit Union is closing the account.
 - ▶ **Limited and Priority SARs are filed every 90 days**

Marijuana Banking - FinCEN SAR Guidance

Red Flags identified by FinCEN

Marijuana Limited vs. Marijuana Priority

1. A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
 - a) The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
 - b) The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
 - c) The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
 - d) The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
 - e) The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.

Marijuana Banking - FinCEN SAR Guidance

Red Flags identified by FinCEN

Marijuana Limited vs. Marijuana Priority

1. A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include: (cont.)
 - f) Deposits apparently structured to avoid Currency Transaction Report (“CTR”) requirements.
 - g) Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
 - h) Deposits by third parties with no apparent connection to the accountholder.
 - i) Excessive commingling of funds with the personal account of the business’s owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
 - j) Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
 - k) Financial statements provided by the business to the financial institution are inconsistent with actual account activity.
 - l) A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.

Marijuana Banking - FinCEN SAR Guidance

Red Flags identified by FinCEN

Marijuana Limited vs. Marijuana Priority

2. The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
3. The business is unable to demonstrate the legitimate source of significant outside investments.
4. A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a “consulting,” “holding,” or “management” company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.

Marijuana Banking - FinCEN SAR Guidance

Red Flags identified by FinCEN

Marijuana Limited vs. Marijuana Priority

5. Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
6. The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
7. A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

Marijuana Banking - FinCEN SAR Guidance

Red Flags identified by FinCEN

Marijuana Limited vs. Marijuana Priority

8. The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
9. A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
10. A marijuana-related business's proximity to a school is not compliant with state law.
11. A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

Marijuana Banking - A Reminder

- ▶ Adherence to all FinCEN required due diligence provides **NO LEGAL DEFENSE** if prosecuted by the Justice Department!

Marijuana Banking - A Reminder

- ▶ “This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA.” - Department of Justice Memo dated August 29, 2013
- ▶ “Nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves and important federal interest.” - Department of Justice Memo dated February 14, 2014

Marijuana Banking - The Future

- ▶ “Secure And Fair Enforcement Banking Act of 2017” or the “SAFE Act of 2017”
 - ▶ House Bill 2215: would make it permissible for Credit Unions to service marijuana establishments on a federal level, in such states where it has been made legal
 - ▶ Passed The House Financial Services Committee on March 28, 2019, by a vote of 45-15
 - ▶ Vote advances this legislation to the full House, but no action has yet been scheduled
- ▶ “Secure and Fair Enforcement Banking Act” or the “SAFE Banking Act”.
 - ▶ Senate Bill 1152: would make it permissible for Credit Unions to service marijuana establishments on a federal level
- ▶ Final Approval of both pieces of legislation still pending as of 3/31/19

Marijuana Banking - Questions



Marijuana Banking - Questions

Further Questions, or to request a copy of this presentation, please contact:

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