

## *Cannabis Clients Lack Banking Options Amid Onerous Federal Requirements*

# Navigating Today's Wild West

By Mia Getlin



Racketeer Influenced and Corrupt Organizations Act (RICO) and unlicensed money transmitter statutes.

By risking civil and criminal prosecution, a bank risks its banking charter and its stock price. For the typically conservative banking industry and its shareholders, these risks keep the vast majority of banks out of this market, even as the federal government has issued guidance aimed at opening up banking services to cannabis businesses.

### **Cole Memo Paves Way**

On Aug. 29, 2013, Deputy Attorney General James M. Cole issued a memorandum to all U.S. attorneys general regarding enforcing federal law against cannabis businesses. This memorandum, widely known as the Cole Memo, laid out eight enforcement priorities that would guide the U.S. Department of Justice's enforcement of the Controlled Substances Act against cannabis businesses, and guidance to its assistant U.S. attorneys to use their resources to enforce the same priorities. The enforcement priorities are designed primarily to protect the public, thwart criminal enterprises and prevent diversion into the black market. The Cole Memo continues to provide the framework of state recreational cannabis programs, which build their laws and rules largely around the enforcement priorities. Even after its rescission in January of last year, the Cole Memo is the security blanket for the industry.

The Cole Memo was followed on Feb. 14, 2014, by another Cole memorandum titled, "Guidance Regarding Marijuana Related Financial Crimes," which was intended to increase access to banking services by the industry. Similar to the Cole Memo, this memorandum set out the department's enforcement priorities,

but did not pre-empt federal law or provide any guarantee that financial institutions responsibly serving state-compliant cannabis companies would be safe from enforcement of financial crimes.

The 2014 memorandum was released alongside guidance from the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). These two publications were intended to provide financial institutions with confidence to serve the industry. The requirements of the FinCEN guidance include filing Suspicious Activity Reports (SARs), which are otherwise filed only when the bank detects potentially suspicious activity that may be related to organized crime or terrorist organizations, on all cannabis banking customers.

The inherent violation of federal law along with the lack of any guarantee that federal law will not be enforced — and the 2018 rescission of the Cole Memo by then-Attorney General Jeff Sessions — have the overwhelming majority of financial institutions steering a wide berth around all cannabis businesses. Those that do serve the industry charge high fees due both to the onerous customer oversight and reporting requirements, and the lack of competition. The number of banks and credit unions that allow cannabis accounts has steadily risen, but many areas still have few to no banking options, and often the ones that are available are prohibitively expensive.

### **Hemp and Ancillary Businesses**

Meanwhile, ancillary and industrial hemp businesses seeking banking relationships often find themselves wading through more confusing policies than those that apply to recreational cannabis businesses.

The Oregon cannabis industry is the modern-day Wild West. Every day, employees of hundreds of legally licensed cannabis businesses drive all over the state with bags of cash, hoping to deposit them into *the* bank (for many, there really is only one option) before any ill luck befalls them. That is assuming they can afford to bank at all.

Navigating the cannabis industry's legal landscape is complicated, not just for business owners and the attorneys representing them, but for financial institutions servicing the industry as well. Financial institutions accepting funds from state-legal, federally illegal cannabis businesses typically charge exorbitant fees for their services — for good reason. Aside from having to set up robust oversight and compliance departments to manage their cannabis accounts, these banks and credit unions operate in open violation of federal laws, such as the Bank Secrecy Act,

In states with robust recreational cannabis rules that follow the Cole Memo priorities (such as Oregon), customers typically can easily satisfy a bank's cannabis customer application and requirements because they already jumped through similar hoops to get their licenses from the Oregon Liquor Control Commission. Industrial hemp businesses in Oregon do not need recreational cannabis licenses, however, and the Oregon Department of Agriculture registration process for hemp is little more than filling out a form and paying a fee. This means these companies often find themselves unable to meet the requirements credit unions put on all cannabis customers.

To the banking system, cannabis is cannabis, but to the customer and the state, industrial hemp is very different from cannabis that contains THC at levels higher than 0.3 percent. Recently, Oregon credit unions have developed new policies for industrial hemp customers that are much more attainable for most businesses,

though many still do not fit the mold of a bankable cannabis company.

The 2018 Farm Bill legalized industrial hemp in December (and now we wait for the Farm Bill-compliant state programs), so banks might begin to treat the industry as just another agricultural industry.

Ancillary businesses often have to bank with cannabis-friendly credit unions as well after bigger financial institutions shut down accounts for customers whose deposits may have flowed from cannabis companies, even though these businesses never touch the plant. This applies to attorneys and law firms whose accounts are closed by financial institutions that learn that invoices are being paid with money from federally illegal sources.

### Limited Options

In Oregon, most cannabis companies that bank do so with Maps Credit Union. Maps, Salal Credit Union and Wauna Credit Union serve the industry with robust compliance frameworks. Services do

## Till Tap Makes a Comeback

By Grant Engrav

A man armed with a pistol walks into a store and demands all the money in the till and the two safes in the back ... and it's all legal. The man isn't a criminal; he's actually a sheriff's deputy with a badge and a writ of execution with instructions from the county clerk to "levy on currency that is in the possession of the judgment debtor, and deliver the proceeds to the court." The maneuver is colloquially called a "till tap," and it had largely fallen out of favor in the judgment collection world due to its dependence on the judgment debtor having cash on hand. The cash-based reality imposed upon Oregon businesses in the marijuana industry, however, has breathed new relevancy into the maneuver.

A marijuana business, and possibly its owners, will likely not have a bank account to garnish due to banks choosing to avoid the cannabis industry. They will have cash, though, particularly if the judgment debtor is a retail business. In contemplating when and how to execute a till tap, the judgment creditor's mind bizarrely should think very much along the lines of someone performing a heist — the essential questions being: When will the debtor have the most cash on hand? When is payroll? Maybe April 21 — the day after what cannabis culture considers a national holiday — is when business owners have the most cash on hand.

ORS 18.887 is the statute that authorizes the till tap. It is worth mentioning that the statute and its use is expansive. Not all business owners are willing to open a safe when asked. It is, therefore, a completely acceptable practice for the creditor's attorney to arrange a locksmith to attend the execution of the writ and work with the sheriff's deputies to open a safe as long as the details have been signed off by the court and are in the sheriff's instructions.

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not come cheap, however, and the cost of banking — including account fees, cash deposit fees and setup fees — dwarf those seen outside of the industry. This leads many businesses to continue operating in cash. One owner of a retail and wholesale business said he does not bank because “I refuse to (expletive deleted) pay. Refuse!” However, fees rise and fall, as do application processing times, cash deposit options, methods of meeting field of membership and other bank requirements, and available account types.

Attorneys who stay informed of these changes serve their clients well by pointing them to their best banking match. Cannabis companies often try operating with a traditional bank account until the financial institution catches on and closes the account. While the consequences of this tactic are typically minimal, attorneys must avoid advising their clients to conceal the source of their funds, as doing so violates anti-money-laundering statutes.

### Cash Considerations

Even those businesses that have bank accounts often deal with large volumes of cash. They face difficulties and high expenses creating and maintaining relationships with merchant services companies for processing debit and credit cards. They also have limited branch options for their deposits because branches need to have sufficient vaults to accept large cash deposits, which means cannabis businesses often have to transport their cash long distances to the available locations.

Operating in cash brings inconveniences and legal hurdles related to accounting, payroll and paying taxes. Clients often struggle with maintaining accurate books and records. They often make trips to the Internal Revenue Service and Department of Revenue to make tax payments in cash, although not in change. I know one Oregon cannabis company that showed up with more than \$20,000 in change and was turned away.

Operating in cash also puts business owners and their employees in unnecessary danger. That the industry lacks sufficient banking options is common knowledge, making businesses and their employees obvious targets for robberies.

Another consequence is that state agencies have a uniquely difficult time in

collecting taxes from businesses that operate solely on a cash basis.

Lack of banking threatens ancillary businesses, investors and creditors as well, when they find themselves handling large amounts of cash or have trouble collecting amounts due, or even getting proper accountings.

### Potential New Legislation

All this might change if Congress passes the Strengthening the Tenth Amendment through Entrusting States (STATES) Act or the Secure and Fair Enforcement (SAFE) Banking Act of 2019. Either one of these bills, if passed and signed into law, would likely remove the risk the banking industry faces for accepting cannabis accounts. The SAFE Banking Act of 2019 would prohibit federal regulators from taking action against financial institutions servicing state-legal cannabis companies, and the STATES Act would have far broader positive implications for the industry. President Donald Trump has expressed support for the STATES Act, and the SAFE Banking Act of 2019 has broad bipartisan support.

Attorneys need to stay ahead of potential banking options for their clients. Attorneys serving cannabis clients need to stay informed of changes to the list of credit unions and banks that will take cannabis clients, what types of cannabis clients they will take and what their policies are. Cannabis clients, especially those that are cash-intensive or do not establish banking relationships, need to have great bookkeepers, accountants and CPAs, preferably with experience in the unique tax issues that affect the industry, and at the very least, with the interest and willingness to learn.

As the industry matures and chips away at its negative stigma, banking options will continue to improve with or without changes in federal guidance, though not likely in a straight line. But with marijuana, the line is never straight anyway. ■

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