MATCH OR CLASH? – MARIJUANA RELATED BUSINESSES AND FINANCIAL INSTITUTIONS

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With the adoption of laws permitting the growth and distribution of medical marijuana in a limited capacity, Florida has nevertheless embarked on a journey that is fraught with uncertainty. This blog will focus on one of those uncertainties –marijuana-related businesses, financial implications and banking.

The uncertainty is a result of the Federal Controlled Substances Act ("CSA") that prohibits the manufacture, distribution or dispensation of marijuana. There is no distinction between recreational and medical marijuana in the CSA. Since financial institutions are reluctant to engage in financial transactions that are prohibited by federal law, as is the case with marijuana, marijuana-related businesses have little or no access to financial services. The term "marijuana-related businesses" while used by the Feds, is as yet undefined but could include cultivators, processing operations, medical dispensaries and retail store. It could also include, however, other ancillary businesses, such as those involved with consumption devices, product packaging, information technology, insurance services and even delivery services.

The question is what are financial institutions to do when approached by marijuana-related businesses and the money generated from these "state legalized businesses?" The matter must be viewed under the light of state and federal regulators who nationwide view marijuana-related businesses as "high risk." Accepting a "high risk" business as a banking client subjects a financial institution to heightened scrutiny by state and federal regulators. Financial institutions have tried and failed to obtain any degree of immunity from the federal government. The federal government has, however, provided "guidance" in the form of three "Cole Memoranda."

While Cole Memorandum #2 (Guidance Regarding Marijuana Enforcement – 08/29/13) provides guidance in the form of enforcement priorities to guide the Department of Justice's ("DOJ") enforcement of the CSA, it does not create a legal defense to a violation of the CSA.

Cole Memorandum #3 (Guidance Regarding Marijuana Related Financial Crimes – 02/14/14) sought to further address the matter and provided a guide to DOJ's enforcement of financial crimes statutes (Money Laundering; Unlicensed Money Remitter; and, Bank Secrecy Act) and reiterated that in enforcing the financial crimes statutes, prosecutors should apply the enforcement priorities of the earlier memoranda.

FinCEN ("Financial Crimes Enforcement Network") also issued a "guidance memorandum" – Bank Secrecy Act Expectations Regarding Marijuana-Related Businesses (02/14/14) – the purpose of which was "to clarify customer due diligence expectations and BSA reporting requirements for financial institutions providing services to marijuana businesses in light of state laws legalizing certain marijuana-related activity and DOJ marijuana-related enforcement priorities."

Understandably, financial institutions were still left with uncertainty because they were not afforded any safe harbor guarantees for transacting with a marijuana-related business in a state in which it has been legalized to some degree; and, the DOJ clearly specified that the CSA, Bank Secrecy Act, laundering statutes, and the unlicensed money remitter statute would remain in effect despite state legalization efforts.

The regulators in some states, such as Washington and Colorado have affirmatively offered guidance to their financial institutions, while other state regulators, including those in Florida, have been hesitant to offer guidance lest it is misconstrued as information that could be used as a legal defense should state or federal action be taken. In addition, Florida's state regulator cannot issue any "guidance" that would have the effect of law as is the case in some states. Coupled with these, the FDIC has not indicated it would modify its annual examination of a financial institution if that institution decides to accept as a banking client a marijuana-related business, and may focus on how the institution accounts for the heightened risk of banking these businesses to address safety and soundness, BSA and anti-money laundering components of an examination.

As the former General Counsel of the Florida Office of Financial Regulation, essentially, "the Florida Regulator," this was one of the most novel issues with which I and my office grappled due to the many uncertainties and lack of unequivocal federal guidance.

With the Presidential election in November, and the possibility of staff turnover in federal agencies, state regulators and marijuana-related businesses will be monitoring future developments of this evolving issue. Financial Institutions will be particularly interested in monitoring developments on the state regulator level, including legislation, and will continue to ask "how can marijuana-related businesses be banked in the absence of state guidance and with the uncertainty of federal oversight?"

For more information on this topic, please contact the author, Colin Roopnarine, on the firm's Government and Regulatory team.

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