

Report In Accordance with HB 4094
Department of Consumer and Business Services

Executive Summary

It is difficult for marijuana-related businesses to obtain, and then maintain, depository and related banking services. Federal law, specifically the Controlled Substances and the Bank Secrecy Acts, make it illegal for financial institutions to offer services to marijuana-related businesses. Federal entities have issued various pieces of guidance meant to assure financial institutions that if they uphold their reporting responsibilities under the Bank Secrecy Act and ensure that the enumerated federal enforcement priorities are not implicated, they can offer services to the industry. However, the fact remains that doing so would technically be aiding in a violation of federal law. The parameters for federal prosecution are laid out in memoranda from the U.S. Department of Justice and Department of Treasury. How to avoid regulatory penalties is less clear and poses a significant threat to financial institutions. Federal and state regulators can downgrade institutions' ratings, require increased supervision and control, levy civil penalties, and bar institution executives from holding jobs in the financial sector. These are the things that unnerve financial institutions.

Financial institutions are subject to dual regulatory authorities: state and federal regulators. Federal regulators examine banks and credit unions for their safety and soundness to prevent damage to the financial system or respective deposit insurance fund. State regulators oversee state chartered institutions to ensure safe and sound operations and prevent consumer harm. State regulators examine for compliance with federal laws such as the Controlled Substances Act and Bank Secrecy Act (BSA) because violating federal law is an inherently unsafe practice. The guidance from the federal government regarding canna-businesses has been fairly consistent up to this point: it is possible to offer financial services to marijuana related businesses so long as BSA due diligence and reporting are strictly adhered to and special attention is paid to indications of interstate trafficking, criminal enterprise or black market participation, and selling to minors. The recent election, and announcement of presidential cabinet members, has cast doubt upon whether the previous policy stances will continue under the new administration. A number of potential cabinet members are hostile to marijuana and state cannabis legalization efforts.

State regulators have no jurisdiction over federally chartered institutions. Some large national financial institutions have expressly stated that they cannot and will not violate federal law by serving the cannabis industry. Institutions that have been serving the industry have largely been state-chartered credit unions and smaller community banks. Concentrating, in a few financial institutions, deposits subject to federal forfeiture due to a change in executive policy, is not a safe and sound management model. To avoid concentration of deposits, marijuana related deposits need to be distributed amongst various financial institutions. Conducting the enhanced due diligence required by the federal guidance requires substantial compliance resources – personnel, software, expertise. Institutions must assess the cost of providing services, the risk of administrative or criminal sanction, reputational risk, and develop policies and procedures to ensure that accounts will not implicate enforcement priorities. Where state or federal regulators do not actively support serving the industry, a board is more likely to decide against accepting deposits. Clear communication with regulators, in states with strong administrative and enforcement programs, may contribute to a higher percentage of financial institutions serving the cannabis industry.

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Oregon's recreational marijuana program is still in the process of coming fully on-line. As marijuana related businesses are licensed and engaged with the seed-to-sale tracking database, financial institutions will have data which can be used to demonstrate that they are only providing services to businesses working within the state's rigorous regulatory scheme. Licensing and inspection, product tracking, testing, labeling and package requirements, and transparent financial trails should be effective in preventing:

- Sales to minors
- Trafficking marijuana or other drugs
- Cartel or bad actor involvement
- Increased violent crime and firearm usage in connection with marijuana
- Preventing growing and production on federal lands
- Preventing adverse public health consequences

However, until the regulatory protections are fully in place, financial institutions may only rely upon their own enhanced due diligence to ensure that no prospective depositor is stepping into one of the federal enforcement priority areas. Without specific reassurances from regulators regarding adequate policies, many financial institutions will not take the risk. The uncertainty surrounding the continuation of current federal policies is likely to have a chilling effect on financial institutions that may have otherwise been willing to accept cannabis-related accounts. Until the in-coming administration either accepts or repudiates current guidance neither cannabis businesses nor financial institutions can be sure that they will not be subject to federal prosecution.

The marijuana industry faces several barriers to obtaining depository and related financial services: legal, social, and contractual. Ultimately, the underlying federal legal status of marijuana needs to change in order to fully ensure the industry has access to depository and related financial services. Even after changes at the federal level, there will remain a social perception or moral objection to marijuana that will prevent some boards from approving their institutions to serve the industry. Outreach, communication, and general support for financial institutions seeking to serve the industry may facilitate the provision of depository services, provided there is no change at the federal level. Increased familiarity with regulator expectations may act to assure financial institutions that regulators will not penalize them for accepting marijuana-related deposits. This will, in turn, inform other financial institutions' risk assessments and facilitate greater access to depository services. The realization of a full state administrative and enforcement scheme may also facilitate the provision of depository services to the industry. The full force of state controls will help institutions to more reliably determine that they are not implicating the federal enforcement priorities and will reduce on the costs of the required enhanced due diligence.

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