

The Impact of Marijuana Reclassification on Banking Services for Businesses

The Department of Justice's move to reclassify marijuana as a less dangerous drug, on which it began formal proceedings on May 16, will not legalize state-level adult use and medical marijuana unless it's produced, sold, and used within the regulations of the Controlled Substances Act (CSA). Banks and other financial institutions may have questions about how these changes could affect their ability to service cannabis businesses.

Cannabis stores and products that operate in four-fifths of states are regulated by state rules and are not in compliance with the CSA or the Food and Drug Administration (FDA). Financial institutions must remember that rescheduling these products from Schedule I to Schedule III drugs does not change the fact that cannabis operations remain federally illegal.

Risk Tolerance

The marijuana industry often struggles to find financial institutions to service their deposit, payment, and lending needs. While more marijuana businesses have reportedly been successful in obtaining at least depository services in recent years, not all cannabis-related businesses can even deposit cash in bank accounts. Given the ongoing federal illegality of marijuana-related transactions, financial institutions must develop a deep understanding of marijuana laws and regulations to service these businesses. This should include researching money laundering laws, money transmitter laws, the Bank Secrecy Act, and the guidance of the Department of Justice and the Financial Crimes Enforcement Network (FinCEN).

In addition to requiring significant expertise, this practice also needs a healthy risk tolerance. For example, financial institutions often must determine whether a potential customer is a cannabis-related business by determining "how close" they are to a federally illegal marijuana-related transaction in their daily operations. If a financial institution does elect to bank the industry, it must have strong internal procedures to ensure compliance with relevant federal and state laws, including anti-money laundering. In certain scenarios, the financial institution may be required to file suspicious activity reports and must understand the nuances of such filings as they relate to cannabis and cannabis-related industries.

State-Legal Businesses

There has been no report of a financial institution's charter being revoked for banking cannabis in compliance with February 2014 FinCEN guidance—the most recent available on how financial institutions can serve federally illegal cannabis businesses. But a decision to serve the marijuana industry has some risks. Certain money laundering and racketeering violations could result in loss of status as a federally insured depository institution, as well as civil seizure and forfeiture of assets. The fear of enforcement has consistently proven a substantial barrier to banking institutions servicing marijuana-related businesses.

These laws serve important functions in combating the black market and illegal drug trafficking, but their applicability to state-legal marijuana industries is frustratingly unclear. FinCEN has suggested it won't enforce regulations against compliant financial institutions. But other agencies such as the DOJ, and even private parties under the authority of the Racketeer Influenced and Corruption Organizations Act of 1970, are still free to take action against marijuana-serving financial institutions that FinCEN declines to prosecute. Following rescheduling, financial institutions may be more likely to take the risk of banking marijuana-related businesses, but exposure to federal anti-money laundering and racketeering laws will persist.

Legislative Solutions Needed

Financial institutions still need more federal action—such as the passage of the SAFER Banking Act—to “fully serve” the cannabis industry. Although that bill passed the Senate Banking Committee in September 2023, little relevant progress has occurred in Congress since then.

The same day the DEA announced the proposed rescheduling of marijuana, the American Bankers Association said, “Cannabis would still be largely illegal under federal law, and that is a line many banks in this country will not cross. The solution is the bipartisan SAFER Banking Act, which would allow banks to provide services to the cannabis industry in those states where it's now legal.”

Rescheduling marijuana from Schedule I to Schedule III doesn't close this gap. The reclassification is a step forward, but without further legislative action, many financial institutions will remain hesitant to fully engage with the cannabis industry. The complexities and risks associated with federal regulations continue to pose significant challenges.

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