
Frequently Asked Questions: Marijuana and Banking

Why are marijuana businesses having difficulty getting bank accounts?

Approximately 20 states have authorized usage of marijuana for medical purposes and two states — Colorado and Washington — authorized recreational use in November 2012. However, federal law still makes possession and use of marijuana illegal.

All banks are subject to federal law, whether the bank is a national bank or state-chartered bank. At a minimum, all banks maintain federal deposit insurance which requires adherence to federal law. Violation of federal law could subject a bank to loss of its charter.

The Department of Justice in August 2013 issued its third memo to address the current conflict between state and federal law (<http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>). It is important to recognize that the memo stresses that marijuana is still illegal under federal law.

All banks are subject to the requirements of the Bank Secrecy Act. Under the BSA, banks must report to the federal government any suspected illegal activity which would include any transaction associated with a marijuana business. These reports must be filed even though the business is operating legitimately under state law. The Department of the Treasury, which has oversight of the BSA, is considering changes to regulations which might alleviate the requirement to file Suspicious Activity Reports on every transaction involving a state-authorized business but it has not yet issued anything.

The federal banking regulators have not issued guidance for banks on this issue.

What are the federal and state barriers to banks offering accounts for marijuana businesses?

Financial institutions face significant risk for violating federal law if they offer banking services to marijuana-related businesses. The federal statutory barriers include the Controlled Substance Act, USA Patriot Act, Bank Secrecy Act, Racketeer Influenced and Corrupt Organizations Act and other federal statutes.

Has legislation been introduced to harmonize state and federal laws on marijuana possession and use?

In Congress, the Marijuana Businesses Access to Banking Act of 2013 (H.R. 2652) was introduced by Rep. Ed Perlmutter (D-CO). The bill would create protections for depository institutions that provide financial services to marijuana-related businesses authorized under state law. The bill currently has 24 co-sponsors from 12 states but has not made it out of committee.

Why aren't customers allowed to use their debit and credit cards at marijuana businesses?

Merchants — including marijuana businesses — must have a relationship with a bank in order to allow the merchant to process payments through debit and credit cards, because the proceeds from a debit or credit card transaction must be deposited into a bank account for the merchant. The same restrictions that prevent banks from offering other types of accounts for marijuana businesses also apply for processing credit and debit card payments. Once a bank identifies the true nature of the merchant's business as a marijuana business, an account is likely to be turned down or quickly terminated.

Are banks increasing measures of compliance to make sure their clients are not involved in marijuana businesses?

To comply with the Bank Secrecy Act and other regulatory requirements, banks exercise due diligence before establishing any account relationship to be certain the customer is who they say they are and to ensure there are no barriers to creating the account. At the same time, banks also monitor personal and business customer accounts to assure that no prohibited relationships exist. Systems are also set to watch for unusual or suspicious transactions for further investigation. The expectation that banks will monitor for and report potentially suspicious transactions has increased steadily over the years.

What do banks do when they suspect personal or business accounts are being used to bank a marijuana business?

Banks are increasingly closing accounts when they detect it's a marijuana business. Because banks risk prosecution for violating federal law, they are also assessing account relationships that are even peripherally related to marijuana businesses and discontinuing those relationships, too. It is important to recognize that banks are held to a high standard of compliance through regular examination. It is also important to recognize that federal officials, not only from the Department of Justice but bank regulators as well, emphasize the importance that banks must comply with all applicable laws – and this includes federal laws against marijuana.

Does the industry hope the laws are reworked to let banks do business with marijuana businesses?

For some banks, particularly those in states where usage is legalized for medical or recreational purpose, this may be seen as a legitimate small business with growth potential just like any other small business. However, the industry has not taken a position on the issue and under current federal laws; bankers see too much risk to get involved in this business.

Will a guidance memo be enough for banks to offer bank products and services for marijuana businesses?

Because marijuana is illegal under federal statute, guidance alone isn't enough. There's a great deal of guidance that banks would want to see in terms of banking with these types of businesses but guidance alone doesn't change the fundamental prohibition. In order for banks to be comfortable banking marijuana businesses, the federal statute must be changed by Congress.

It's also important to recognize that while guidance for marijuana businesses might help, guidance also can be changed overnight. Similarly, even though regulatory modifications would be less subject to change, regulations cannot overturn federal statute – only Congress can change the law. The only way to eliminate the risk of criminal prosecution for banks is if Congress changes federal statute.

Are banks concerned about the risks that confront marijuana businesses because they are forced to hold large amounts of cash if they cannot access banking services?

Yes. A bank is always the safest place to store your money and banks want to keep their communities and small businesses safe. This problem demonstrates the valuable role a bank account plays in the effective and efficient operation of all businesses. For example, access to bank accounts minimizes risk from maintaining large cash deposits, would let marijuana businesses access the card payment systems with their many benefits, and would be a safer and more secure way to operate. However, banks are unable to offer these products and services because every bank has to abide by federal law, which states that marijuana is illegal.

What can FinCEN (the Financial Crimes Enforcement Network, a division of the U. S. Department of the Treasury) and other regulators do that would let banks offer products and services for marijuana businesses?

Under the Bank Secrecy Act, which is administered by FinCEN, all financial institutions must file a report of suspicious activity. FinCEN has the authority to determine that a suspicious activity report is not useful for detecting criminal or terrorist activity and that reporting certain transactions is not needed. At best, though, while FinCEN might suspend the filing of SARs for transactions involving a business that is legal under state law, a bank would still be subject to all other aspects of federal law. Similar to these issues banks have experienced with money services businesses (MSBs) and embassies, a bank that offered services for a marijuana business would still be subject to extensive scrutiny to ensure that its customer did not stray from the narrow confines of what is considered legitimate. And, since it would still be an illegal enterprise under federal law, no bank would be granted certain protection from prosecution.

What can you say about progress by DOJ and Treasury at this point that would let banks offer products and services for marijuana businesses?

In several speeches and testimony, representatives from the Department of Justice have indicated that they are exploring regulatory guidance that would let banks provide bank accounts for marijuana businesses. ABA has been

involved in high level discussions with Treasury, which is responsible for compliance with the Bank Secrecy Act, but so far those discussions do not appear likely to provide sufficient protection for banks so that the banks will feel comfortable offering products and services to marijuana businesses.

Separately, the Department of Justice has been consistently telling banks that they must do more to adhere to existing law, emphasizing that the Department will not tolerate banks that violate federal law. And, under federal law, marijuana is illegal. Since the Attorney General cannot change federal law, his recent statements on creating new regulations that will allow these businesses to use the banking system sends a very mixed message to the industry.

Can you say what the practical solution, short of Congressional action, looks like?

Until the federal law is changed, there simply isn't one. The risk would stay the same no matter what rule or regulation is issued. When coupled with extremely heightened expectation for scrutiny of the customer and the extremely risky nature of the business from a legal perspective, banks have elected to just say no.