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The Unintended Consequence to Legalizing Marijuana Use: The Banking Conondrum

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THE UNINTENDED CONSEQUENCE TO LEGALIZING MARIJUANA USE: THE BANKING CONUNDRUM

FLORENCE SHU-ACQUAYE*

ABSTRACT

Marijuana is legal for either medicinal or recreational use in many states. However, the cultivation, use, possession, and sale of marijuana is illegal under federal law. Thus, a State that has legalized the use of marijuana is in direct conflict with federal law. This Article analyzes the problem legitimate marijuana businesses and financial institutions face regarding revenue from the cultivation and sale of marijuana. Specifically, this Article examines the risks a financial institution faces when in business with a legitimate marijuana business. Further, this Article recommends that Congress should act to create federal consistency in regulations concerning financial institutions that are in business with legitimate marijuana businesses.

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INTRODUCTION

In the United States, medical marijuana use has been legalized in twenty-three states and the District of Columbia.¹ Recreational use of marijuana has also been legalized in Colorado, Washington, Oregon, and Alaska.² Whether it be legalized for medical purposes or for recreational use, under federal law, the cultivation, use, possession, and sale of marijuana is illegal. Marijuana was outlawed pursuant to the Controlled Substances Act (“CSA”), enacted in 1970, which declared that marijuana

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¹ Jeffery Stinson, *States Find You Can’t Take Legal Marijuana Money to the Bank*, PEW CHARITABLE TRUSTS (Jan. 5, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/5/states-find-you-cant-take-legal-marijuana-money-to-the-bank>.

² *Id.*

had no accepted medical use, and classifies it as a Schedule I drug (the most dangerous category), along with heroin, LSD, and ecstasy.³ Such status has been upheld even in the face of radical social changes in favor of legalization. For example, in the 2005 case of *Gonzales v. Raich*, the United States Supreme Court held that the Commerce Clause permits Congress to prohibit the local cultivation and use of marijuana—even though the cultivation and use complied with California State law.⁴ Likewise, the DEA has steadily opposed the use of marijuana for medical or recreational purposes, pointing to its official classification as a Schedule I substance.⁵ This means that although state laws legalizing marijuana may become effective within states, it is still a violation of federal law to possess or grow marijuana, and the federal government can still prosecute any person or entity in violation of such laws. The Office of National Drug Control Policy of the White House provides the following definitions for state nationalization standards of marijuana: (1) “medical marijuana” refers to state laws that would allow one to defend the self against criminal charges for marijuana possession, if that person can prove a medical need under state law; and (2) “marijuana decriminalization” refers to state policies, including local governments that reduce penalties for possession and use of small quantities of “marijuana from criminal sanctions to fines or civil penalties.”⁶ Marijuana legalization, furthermore, refers to “laws or policies that make possession and use of marijuana legal under state law.”⁷ So “while a state may choose to decriminalize, medicalize, or even legalize marijuana, it still would not

³ *Controlled Substances Schedule*, DOJ, DEA, OFFICE OF DIVERSION CONTROL, <http://www.deadiversion.usdoj.gov/schedules> (last visited Jan. 22, 2016); see also Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won't Solve Advocates' Medical Marijuana Problem*, 58 WAYNE L. REV. 81, 83-84 (2012). All Schedule I narcotics are considered by the DEA to have no approved medical use, and a high potential for abuse.

⁴ See *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005). California passed the “Compassionate Use Act” in 1996, which allowed for the use of medical marijuana. *Id.* at 7. The defendants were using marijuana properly under the Compassionate Use Act, and both were growing marijuana plants at home for their own use. *Id.* Federal DEA agents seized and destroyed their marijuana plants. *Id.* The defendants were compliant with state laws when arrested, but guilty under federal law at the time. *Id.* The defendant sued the Attorney General, arguing that Congress exceeded its interstate commerce clause authority in legislating the behavior of a local citizen consuming a locally grown herb in his own home. *Id.* The Supreme Court held that the Commerce Clause authorized Congress to prohibit the local cultivation and use of marijuana in compliance with California law. *Id.* at 22.

⁵ See DEA, THE DEA POSITION ON MARIJUANA 1 (Jan. 2011), http://www.dea.gov/docs/marijuana_position_2011.pdf. Prior to the passage of any of the state medical marijuana law, the issue of marijuana’s classification as a Schedule I substance was addressed in the 1994 case of *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994), with the court upholding the DEA’s test to classify marijuana as a Schedule I substance. *Id.* at 1135; see also A. Claire Frezza, *Counseling Clients on Medical Marijuana: Ethics Caught in Smoke*, 25 GEO. J. LEGAL ETHICS 537, 541 (2012) (noting that the federal government has consistently refused to move marijuana from the list of most regulated drugs or to otherwise ameliorate the severity of federal marijuana laws).

⁶ See Janel Greiman & Stephanie E. Slaughter, *Marijuana State Taxation, and the Risks to Practitioners Serving the Pot Culture*, J. MULTISTATE TAX’N & INCENTIVES, Aug. 2014, at 27.

⁷ *Id.*

have the power to undo federal criminal prohibitions,” and therefore may find itself in direct conflict with the federal law.⁸ Yet, the legal marijuana industry is expanding so rapidly that it is difficult to get firm figures on how big it has grown. It is said to be growing between two billion and three billion dollars annually, and if we expect the legalization trend to continue, this would mean significantly more growth in the future.⁹ The multibillion-dollar question is: What to do with all the millions collected each week or month? The focus of this Article will center on what happens to the money generated from this billion-dollar business of growing, manufacturing, and selling marijuana. Are marijuana businesses entitled to use financial institutions to deposit revenue from their business? Given that the sale and possession of marijuana is illegal under federal law, are banks that accept business from marijuana entrepreneurs subject to federal prosecution or to drug laundering violations? What is the correlation between banking regulations and federal marijuana policy? How does the Department of Justice and the Department of Treasury deal with these issues?

I. THE BANKING CONUNDRUM

As marijuana has been legalized for either medicinal or recreational use in twenty-three states including the District of Columbia, there is an increased dependence on banks to help lawful businesses maintain their money.¹⁰ In the current state of things, marijuana businesses keep their money in cash and store it away in safety vaults.¹¹ “The main problem the U.S. government has with regard to this practice is that the money accrued in such businesses is prone to security threats such as robberies.”¹²

“Nearly all of the nation’s banks either refuse or are reluctant to take money from marijuana sales or to offer basic checking or credit card services to the industry out of the fear that they will be shut down by federal authorities, for whom marijuana remains an illegal narcotic.”¹³ Consequently, banks are unwilling to do business with growers, processors, retail shops, medical dispensaries, employees, or contractors involved in the marijuana industry.¹⁴ Without a doubt, asking someone about her banking is like asking someone what she wears to bed at night, as it is an intensely personal question within the industry.¹⁵ “Without bank accounts, legal marijuana

⁸ Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 871 (2013).

⁹ See Stinson, *supra* note 1.

¹⁰ *Challenges Faced by Banks with the Legalization of Marijuana*, BANKER RESOURCE (Feb. 3, 2014), http://bankerresource.com/articles/view.php?article_id=14372. Further, “these businesses also do not have any access to a line of credit where they can take a business loan. Thus, the chance of paying their employees and utility bills on time is at risk.” *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Stinson, *supra* note 1.

¹⁴ *Id.*

¹⁵ Jacob Sullum, *Marijuana Money is Still a Pot of Trouble for Banks*, FORBES (Sept. 18, 2014, 5:42 PM), <http://www.forbes.com/sites/jacobsullum/2014/09/18/local-banks-terrified-by-friendly-neighborhood-marijuana-merchants>.

businesses have a hard time paying their employees and vendors.”¹⁶ Marijuana businesses that depend exclusively on cash leads to a lack of transparency in accounting and auditing, and it invariably complicates paying the taxes that states impose on marijuana.¹⁷ Most banks do not want to put themselves in jeopardy by opening accounts or receiving money from the sale of marijuana out of the fear of violating drug laundering laws and being shut down.¹⁸ According to federal law, any bank that provides marijuana-related businesses with a checking account, debit or credit card, a small business loan, or any other service could be found guilty of money laundering or conspiracy.¹⁹ Likewise, “[b]y providing [a] loan and placing the proceeds in [a] checking account, the banking institution would be conspiring to distribute marijuana.”²⁰ By facilitating customers’ credit card payments, the institution would be aiding and abetting the distribution of marijuana.²¹ Further, by “knowingly accepting deposits consisting of revenue from the sale of marijuana, the institution may be acting as an accessory after the fact.”²² A failure to meet the detailed monitoring and reporting requirements of the Bank Secrecy Act (“BSA”), which requires financial institutions to keep an eye out for suspicious activity, can also be treated as a felony.²³ In addition to the threat of criminal penalties, financial institutions that deal with marijuana businesses must contend with federal regulators who have the power to impose millions of dollars in fines or sentence a bank to death by revoking its deposit insurance.²⁴

It is therefore little wonder that financial institutions are wary of marijuana businesses, or that the growers, manufacturers, and retailers who are lucky enough to obtain banking services do not want to talk about how they managed to obtain such services.²⁵ It is an intensely personal question, even within the industry. So much of the money floating around outside a banking system is neither safe nor in anyone’s best interest.²⁶ Some marijuana businesses attempt to avoid suspicions from bankers

¹⁶ See Stinson, *supra* note 1.

¹⁷ *Id.*

¹⁸ *Id.* (citing Megan Michiels, senior counsel with the American Bankers Association).

¹⁹ See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 608 (2015); see also David Migoya, *Pot Businesses in Colorado Cannot Bank and No Solution is Ahead*, DENVER POST (Mar. 10, 2013), http://www.denverpost.com/business/ci_22751888/colorado-pot-businesses-cannot-bank-and-no-solution-is.

²⁰ Hill, *supra* note 19, at 608.

²¹ *Id.*

²² *Id.*; see also Sullum, *supra* note 15 (stating “[m]oney laundering can get one up to twenty years, and life is the maximum for participating in a marijuana conspiracy”).

²³ Sullum, *supra* note 15. BSA violations are punishable by up to ten years in prison when combined with other federal offenses. See 31 U.S.C. § 5322 (2012).

²⁴ Sullum, *supra* note 15.

²⁵ *Id.*

²⁶ This all-cash nature of the business creates security concerns for business owners as they seek to protect the business cash in hand. Some have installed panic buttons for workers in the event of a robbery, installing a vast number of security cameras, and in some cases

by opening accounts with names that “obscure the nature of the business” or just use personal bank accounts. Financial institutions tend to shut down such accounts because of the potential risks involved. It is not unusual for a legitimate marijuana business to have gone through several bank accounts in a few years.²⁷ All such bank-related issues are of concern to the Obama Administration, which issued guidelines intending to provide banks with the confidence that they will not be prosecuted if they provide services to legitimate marijuana businesses in compliance with state laws.²⁸

II. ATTEMPTS AT RESOLVING THE MARIJUANA BUSINESS BANKING PROBLEMS

A. *The Department of Justice Guidance and Memo*

After the U.S. Attorney General, Eric Holder Jr., expressed concern about the undeposited cannabis cash floating around and addressed the concerns that this posed to the public safety, the Obama Administration gave the banking industry the green light to finance and engage in business with legal marijuana traders.²⁹ The Justice Department released a memo (“The Cole Memo”) stating that the eight “federal law enforcement priorities” guiding prosecution of marijuana offenses in states with legal marijuana businesses would also guide the prosecution of financial crimes.³⁰ In a three-page memo to prosecutors, issued in conjunction with the new banking guidelines, Deputy Attorney General James M. Cole wrote that prosecutions may not be “appropriate” when banks do business with marijuana entities that are operating legally under state law, and when they do not violate any of the eight priorities set forth in the Cole Memo.³¹ The promise to refrain from prosecutorial

using military veterans with specialized operations experience. See Serge F. Kovalski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES (Jan. 11, 2014), <http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html>. “The crime potential for an all-cash businesses, whether that’s robbery, burglary or assault—a violent crime—or tax evasion, fraud and skimming—a white collar crime—is pretty substantial. . . . At the heart of the banking and tax issue is we want these businesses to be safe.” Matt Ferner, *House Votes to Allow Banking Access for Marijuana Business*, HUFFINGTON POST (July 16, 2014, 5:15 PM), http://www.huffingtonpost.com/2014/07/16/house-marijuana-banking_n_5592620.html (quoting Congressman Ed Perlmutter).

²⁷ See Kovalski, *supra* note 26.

²⁸ *Id.*

²⁹ Danielle Douglas, *Obama Administration Clears Banks to Accept Funds From Legal Marijuana Dealers*, WASH. POST (Feb. 14, 2014), https://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html.

³⁰ See Sullum, *supra* note 15.

³¹ See Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’ys, *Guidance Regarding Marijuana Enforcement 1* (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter *Cole, Guidance Regarding Marijuana Enforcement*].

actions is invariably tied to the ability of these banks to ensure that their customers are complying with state law, and are not violating any of the eight priorities.³²

The eight priorities include, among others, sales to minors, interstate smuggling, sales of other drugs, “use of firearms,” and “adverse public health consequences.”³³ The Cole Memo falls short of a real promise or commitment, stating: “[I]f a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.”³⁴ And Cole cautioned that, “nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”³⁵ The Cole Memo was essentially couched on the expectation that state laws legalizing marijuana-related conduct would implement “strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”³⁶ As a result, “financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal enforcement priorities.”³⁷ Financial institutions are to “apply appropriate risk-based anti-money laundry policies, procedures and controls . . . including by conducting customer due diligence.”³⁸ In sum, the banking industry

³² See Kovaleski, *supra* note 26.

³³ The “Cole Memo states that federal prosecutors should only bring marijuana prosecutions when the plant is being distributed to minors, when profits are flowing to criminal enterprises, when marijuana is being diverted to other states, when state-authorized marijuana activity is being used as a cover for the trafficking of other drugs, when violence is involved, when there are connections to drugged driving, when marijuana is being grown on public lands, and when preventing marijuana possession or use on federal property.” Ryan J. Reilly & Ryan Grim, *DOJ Marijuana Memo No Big Deal, Some Federal Prosecutors Insist*, HUFFINGTON POST (Sept. 9, 2013), http://www.huffingtonpost.com/2013/09/09/doj-marijuana-memo_n_3891228.html. “These are the same enforcement priorities that have traditionally driven the Department’s efforts in this area. Outside of these enforcement priorities, however, the federal government has traditionally relied on state and local [authorities] to address marijuana activity through enforcement of their own narcotics laws. This guidance continues that policy.” Press Release, Office of Public Affairs, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), <http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

³⁴ Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’y, Guidance Regarding Marijuana Related Financial Crimes 2 (Feb. 14, 2014), [http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%20\(2\).pdf](http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%20(2).pdf) [hereinafter Cole, Guidance Regarding Marijuana Related Financial Crimes].

³⁵ Cole, Guidance Regarding Marijuana Enforcement, *supra* note 31, at 4.

³⁶ *Id.* at 2.

³⁷ Cole, Guidance Regarding Marijuana Related Financial Crimes, *supra* note 34, at 3.

³⁸ *Id.*

did not find the memo reassuring, and the accompanying guidance from the Treasury Department's Financial Crimes Enforcement Network ("FinCEN")³⁹ has not done so either.⁴⁰

B. The FinCEN 2014 Guidance-Companion Memo

The Justice Department's memo was followed by guidance from the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), which was even less reassuring, although it apparently aimed to: "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses."⁴¹

The Treasury Department directed U.S. Attorneys not to go after banks that do business with legal marijuana dispensaries so long as they adhere to the guidelines issued in August 2013.⁴² Opponents have complained that the Administration is empowering an industry that is in violation of federal law.⁴³ There is a cautionary tale in that financial institutions should be wary of doing business with dealers, even when they are operating under the auspices of state laws.⁴⁴

Consistent with FinCEN regulations, a financial institution is required to notify federal regulators of suspicious activity by filing a suspicious activity report ("SAR") on any marijuana businesses it serves. This obligation to file a SAR is not affected by any state law that legalizes marijuana activity.⁴⁵ However, FinCEN announced a new distinction on SARs. If a financial institution that provides services to a marijuana-related business reasonably believes, after performing due diligence, that the marijuana-related business does not implicate one of the eight Cole Memo priorities or otherwise violate state law, then it should file a "marijuana limited SAR[s]."⁴⁶ In contrast, if the financial institution believes that one of the eight Cole

³⁹ FinCEN is a bureau of the U.S. Department of Treasury whose "mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities." U.S. Dep't of Treasury, *What We Do*, FINCEN.GOV, https://www.fincen.gov/about_fincen/wwd/ (last visited Dec. 9, 2015).

⁴⁰ See Kovaleski, *supra* note 26.

⁴¹ FIN. CRIMES ENFORCEMENT NETWORK, DEP'T OF THE TREASURY, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 1 (Feb. 14, 2014), https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf [hereinafter FINCEN, GUIDANCE].

⁴² See Cole, Guidance Regarding Marijuana Related Financial Crimes, *supra* note 34, at 3.

⁴³ See Douglas, *supra* note 29.

⁴⁴ See *id.*

⁴⁵ "Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law)." FINCEN, GUIDANCE, *supra* note 41, at 3.

⁴⁶ "The content of this SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in

Memo priorities is implicated or state is violated by the marijuana-related business, it should file a “marijuana priority SAR[s].”⁴⁷

If a bank decides to sever relations with a suspicious customer, such event would trigger a “marijuana termination SAR.”⁴⁸ FinCEN, like the Department of Justice, really did not provide any guarantees to the banking industry.⁴⁹ Instead, the bank is to be on alert for “red flags” that may differentiate “marijuana priority” cases from “marijuana limited” cases.⁵⁰ FinCEN’s list of warning signs, which it claims to be exhaustive, includes in part: (1) “international or interstate activity”; (2) an inability to “demonstrate the legitimate source of significant outside investments”; (3) signs that the customer is “using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity”; and (4) “negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.”⁵¹

The bank must report currency transactions related to marijuana businesses; for example, banks and money service businesses would have to file CTRs (Currency Transaction Reports) on the receipt or the withdrawal of more than \$10,000 in cash per day.⁵² Although the FinCEN 2014 memo is said to increase transparency, for the most part the guidance tends to impose a heavy burden on the banks to know and control their customers’ activities.⁵³

a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified.” *Id.* at 4. “More than 1,700 suspicious activity reports using the phrase ‘marijuana limited’ have been filed from 25 states since [the FinCEN guidance] advised financial institutions to use this term to report when they provided services to customers in the marijuana business.” Rachel L. Ensign, *Some Banks Serve Marijuana Businesses as Others Axe Them*, WALL ST. J.: RISK & COMPLIANCE J. (Apr. 13, 2015, 6:00 AM), <http://blogs.wsj.com/riskandcompliance/2015/04/13/some-banks-serve-marijuana-businesses-as-others-axe-them>.

⁴⁷ “The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) the addresses of the subjects and related parties; (iii) details regarding the enforcement priorities that the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.” FINCEN, GUIDANCE, *supra* note 41, at 4. “Only 313 reports were filed using the term ‘marijuana priority,’ which is meant to be used when activity may violate state law or fall under one of the Justice Department’s priorities for marijuana enforcement.” Ensign, *supra* note 46.

⁴⁸ “It should file a SAR and note in the narrative the basis for the termination.” FINCEN, GUIDANCE, *supra* note 41, at 4-5. “Nearly 1,300 suspicious activity reports from filers in 42 states and the District of Columbia used the phrase ‘marijuana termination.’” Ensign, *supra* note 46.

⁴⁹ See generally FINCEN, GUIDANCE, *supra* note 41.

⁵⁰ See *id.* at 2-3.

⁵¹ Sullum, *supra* note 15 (quoting FINCEN, GUIDANCE, *supra* note 41, at 6).

⁵² FINCEN, GUIDANCE, *supra* note 41, at 7.

⁵³ See Press Release, Colo. Bankers Ass’n, CBA Statement Regarding DOJ and Treasury Guidance on Marijuana and Banking (Feb. 14, 2014), http://c.ycmdn.com/sites/coloradobankers.site-ym.com/resource/resmgr/Communications/CBA_press_release_following_.pdf.

III. SHORTCOMINGS ON THE GUIDANCE MEMORANDA

The sharpest and most persistent criticism of the memoranda is that it has yet to resolve the problem of banks avoiding prosecution on account of marijuana-related businesses.⁵⁴ Nothing has changed under the federal law with regards to the use, possession, and sale of marijuana.⁵⁵ It is still a crime, and nothing stops a federal prosecutor from exercising this discretion if and when he or she deems it appropriate. As emphasized in the Cole Memo: “nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”⁵⁶ In light of these two memoranda, the Colorado Bankers Association, through its president, expressed its dissatisfaction in a February 2014 press release by stating that: “After a series of red lights, we expected this guidance to be a yellow one. This isn’t close to that. At best, this amounts to ‘serve these customers at your own risk’ and it emphasizes all of the risks. This light is red.”⁵⁷ The Colorado Bankers Association expected the guidance to relieve its members of the threat of prosecution should they open accounts for marijuana businesses.⁵⁸

In addition, in the eyes of the banks, filling out SARs on clients and still continuing those banking relationships elevates concerns and invites intense scrutiny by auditors and examiners, among others, because the banks have in that instance told the government repeatedly that their client may be doing something illegal.⁵⁹ These reputational, regulatory, and civil risks multiply their fears about entering into such business relationships under the current guidance.⁶⁰

Thus, despite the attempt to bring marijuana banking out of the shadows, in practice, such guidance has not made banks more willing to provide services to marijuana-related businesses.⁶¹ This is because the guidance does not guarantee banks’ protection from prosecution. In addition, it also requires banks to undertake time-consuming and costly due diligence on marijuana-related business. As a result,

⁵⁴ Douglas, *supra* note 29.

⁵⁵ The Cole Memo reiterates Congress’s determination “that marijuana is a dangerous drug, and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue for large-scale criminal enterprises, gangs, and cartels.” Cole, *Guidance Regarding Marijuana Enforcement*, *supra* note 31, at 1.

⁵⁶ *Id.* at 4.

⁵⁷ Press Release, Colo. Bankers Ass’n, *supra* note 53.

⁵⁸ “The Colorado Bankers Association . . . support[s] H.R. 2652 by U.S. Representative Perlmutter and others, which could accomplish a solution by prohibiting federal regulators from punishing any bank servicing marijuana businesses in states where it has been legalized and regulated.” *Id.*

⁵⁹ Sarah Trumble & Lanae Erickson Hatalsky, *Eight Things You May Not Know About Marijuana Legalization and Banks*, THIRD WAY (July 28, 2014), <http://www.thirdway.org/memo/8-things-you-may-not-know-about-marijuana-legalization-and-banks>.

⁶⁰ *See id.*

⁶¹ *See id.*

banks have been closing medical marijuana accounts in the twenty-three states where medical marijuana use is legal, and refusing to open accounts for new businesses that sell to the public because they are unwilling to take on either the risk, or the due diligence, that would be required to ensure that the federal priorities are not violated. After all, what has been offered is merely guidance, as it carries no force of law and can change overnight without warning.⁶²

Likewise, the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), and the Federal Reserve, have not given banks assurances that they will not run afoul of banking regulations that prohibit such bank deposits under federal law.⁶³ The paradox is that when it comes to marijuana banking, agencies, including the OCC and the FDIC, direct banks to the Treasury’s guidance. It is both ironic and problematic for banks that the OCC, the Federal Reserve, and the FDIC—not the Treasury, supervise them.⁶⁴

IV. POSSIBLE SOLUTIONS

Although it is said that Congress is the only solution to this problem, because it can simply reclassify marijuana from a Schedule I classification to either a Schedule II or III classification, this has to prove a viable solution. The issue of whether marijuana belongs on a list with heroin and LSD is an important one, since lowering its Schedule would still require a prescription for legal use under federal law, and as discussed above, this is so even in states where broad recreational use has been legalized.⁶⁵ So while reclassifying marijuana as lower than Schedule I would fix some issues,⁶⁶ a conflict would still exist between what is legal under federal law and what is legal under state law in states that have legalized recreational use. Hence, although it may be a proper and reasonable debate to hold, it does not resolve the banking problem.

One suggested solution by Congress would be the Marijuana Business Access to Banking Act (“H.R. 2652”) introduced by Congressmen Ed Perlmutter (D-CO) and Denny Heck (D-WA), which would grant banks and other financial institutions immunity from federal criminal prosecution if and when they serve marijuana-related businesses, assuming that they are following state law.⁶⁷ H.R. 2652 would also prohibit the Treasury from requiring banks to report a transaction as suspicious solely because it came from a marijuana-related business that is legal in the state. It would also prohibit regulators from terminating a bank’s depository insurance

⁶² Douglas, *supra* note 29.

⁶³ Keri Geiger et al., *Does Anybody Want \$3 Billion in Cash From Pot Sales? Big Banks Say No, Thanks*, BLOOMBERG BUS. (May 12, 2015), <http://www.bloomberg.com/news/articles/2015-05-12/banks-just-say-no-to-weed-as-treasury-pushes-the-business> (“The OCC, which supervises 1,620 banks in the U.S., hasn’t issued guidance on how to handle marijuana accounts . . .”).

⁶⁴ *Id.*

⁶⁵ Graham Boyd et al., *Marijuana Legalization: Does Congress Need to Act?*, THIRD WAY (June 10, 2015), <http://www.thirdway.org/report/marijuana-legalization-does-congress-need-to-act>.

⁶⁶ “Including paving the way for needed research around its medical uses.” *Id.*

⁶⁷ Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. § 3 (2013); *see also* Trumble & Hatalsky, *supra* note 59.

because it serves legal marijuana-related businesses, or from incentivizing them to not provide such services.⁶⁸

Given the way the banking industry is currently regulated, it is still difficult to expect Congress to address these problems through legislation. There have been suggestions that investors simply form a new bank with the sole purpose of banking with only marijuana-related businesses. However, in order to do so, banks would need to get a charter and deposit insurance from the federal government, which is a tough sell for a business plan that relies completely upon commerce that is a crime under federal law.⁶⁹ On the other hand, others have suggested that a state-chartered bank could step in and resolve the issue, but even with a state-chartered bank, it would still likely need federal deposit insurance. A completely in-state bank like the Bank of North Dakota (currently the only one), which can technically operate without federal deposit insurance, would still most likely issue federally insured loans or have some other federal or interstate relationship that would bring it under the auspices of federal regulators.⁷⁰ In fact, in the area of banking, the federal government is so entrenched that creating an effective work-around varies somewhere between unlikely and totally impossible.⁷¹

Another suggestion is implementing the regulations currently in effect in Washington in other states that have legalized marijuana. A number of credit unions in Washington have announced they will serve marijuana-related businesses, but they are limiting their services only to those at the front-end of the market: producers and processors whose sales are limited to licensed distributors and can easily be tracked by the state, apparently relieving the banks of the burden to do so directly.⁷²

⁶⁸ H.R. 2652, § 3.

⁶⁹ Regulators are likely going to slow-walk the process for any new bank to get a charter, which already can take years even when unencumbered by controversy, how much more of a complex case as marijuana-related businesses. Trumble & Hatalsky, *supra* note 59.

⁷⁰ *Id.*

⁷¹ *Id.* The state of Colorado recently passed a law authorizing the creation of “cannabis co-ops,” which would function without deposit insurance and be governed under state law by the Colorado financial services commissioner. This is unlikely to solve the problem, because in order to provide checking accounts or credit card services, the co-ops would still need permission from the Federal Reserve, which they will be hard pressed to receive since they are actively violating federal law. See Keith Coffman, *Colorado Governor Signs Law Creating State-Run Marijuana Banking Co-ops*, REUTERS (June 6, 2014), <http://www.reuters.com/article/2014/06/06/us-usa-colorado-marijuana-idUSKBN0EH2HH20140606>.

⁷² These credit unions do not serve dispensaries because they claim “the due diligence they would have to undertake to comply with the FinCEN guidance is simply too high a bar.” Trumble & Hatalsky, *supra* note 59 (citing *Numerica Credit Union’s Carla Altepeter: Opening Accounts for Marijuana Businesses is ‘In the Best Interests of Our Members and Their Communities,’* NORTHWEST CREDIT UNION ASS’N (May 20, 2014), <http://www.nwcua.org/member-resources/anthem/numerica-credit-union-s-carla-altepeter-opening-accounts-for-marijuana-businesses-is-in-the-best-interests-of-our-members-and-their-communities#sthash.06RnfYnL.dpuf>). After a “slow and careful” review of the risks and compliance requirements spelled out in the FinCEN guidance financial institutions would need to monitor retail stores so that large volumes of marijuana are not diverted from Washington to states where it is still illegal, something Numerica says it cannot control. See *Numerica Credit Union’s Carla Altepeter: Opening Accounts for Marijuana Businesses is ‘In*

Other restrictions on accounts, “from limits on total deposits and how deposits are made to the availability of related services,” are also designed to mitigate risk.⁷³ Further, the accounts that the credit unions do agree to open do not have access to debit or credit cards, the businesses are unable to pay their bills online, or allowed to make deposits at night. Consequently, this option still leaves storefronts without the needed ability to open bank accounts with needed facilities, and therefore still leaves criminals with easy-to-identify targets for robbery.⁷⁴ Thus, the banking problem is not resolved by the Washington regulations either.

A final option to solve the banking problem is a federal waiver program for states, whereby Congress would amend the Controlled Substances Act to establish a policy of federal non-intervention based on state waivers that carry the force of law.⁷⁵ That is, Congress would enact a “waive but restrict” policy, giving the Attorney General the authority to grant waivers allowing states to act outside of federal law for a set period of time.⁷⁶ This would permit states “with sufficiently strict regulatory regimes and safeguards to act outside of federal law without the fear of prosecution.”⁷⁷ Such waivers would also be fashioned with a sunset to allow policymakers to reevaluate such experiments after a set period of time, such as three to five years, and would likely give banks the peace of mind they need to provide legal marijuana-related businesses with the full panoply of banking services they need, while knowing that so long as its state has a waiver they would not be in violation of federal law.⁷⁸ According to Graham Boyd and others, in order for a state to qualify for such a waiver from federal law, it would have to: (1) “establish[] a strict regulatory system to ensure that its legal marijuana market will be well-run, transparent, and safe”; (2) “to earn a waiver, each state would have to agree to study the outcomes of their marijuana laws on a series of important metrics like youth marijuana use, rates of driving while intoxicated, diversion to other states, and prevalence of drug-related organized crime activity and share that data with the

the Best Interests of Our Members and Their Communities,’ NORTHWEST CREDIT UNION ASS’N (May 20, 2014), <http://www.nwcu.org/member-resources/anthem/numerica-credit-union-s-carla-altepeter-opening-accounts-for-marijuana-businesses-is-in-the-best-interests-of-our-members-and-their-communities#sthash.06RnfYnL.dpuf> [hereinafter *Numerica Credit Union*].

⁷³ *Numerica Credit Union*, *supra* note 72.

⁷⁴ *Id.*

⁷⁵ The idea of federal waivers for states that legalize marijuana was first suggested by Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL’Y ANALYSIS 41 (2013).

⁷⁶ Boyd et al., *supra* note 65.

⁷⁷ *Id.*

⁷⁸ This “waive but restrict” framework is said to provide consistency and protect public safety more effectively than either current law or the other policy proposals on the table. This exemption would only last for a specified period of time—but while in effect, it would have the force of law and offer protection from any future prosecution for actions taken during the time in which the waiver applied. “This structure would give federal officials the ability to ensure protection of legitimate federal interests, while also creating certainty for state officials and businesses and allowing them to operate outside the shadows.” *Id.*

federal government”]; and finally, (3) such “a state would have to agree to reapply for a waiver, if they were still available, once the initial waiver expires.”⁷⁹

If a waiver were not granted, the state would either need to shutter its legal recreational marijuana market or risk future enforcement action by the federal government.⁸⁰ State waivers would solve the banking problem because of the “increase in the safety and transparency of state marijuana markets, ensuring that they can be adequately regulated, tracked, and taxed.”⁸¹

CONCLUSION

The legalization of marijuana in the United States is a paradox in many ways. As per federal law the use, sale, and consumption of marijuana is illegal throughout the country, while more than half of the states have legalized marijuana for medical and recreational purposes. The Cole Memo declared that federal officials would utilize prosecutorial discretion, and that conduct falling within the regulatory framework of Colorado and Washington state would not be a priority for federal arrest, forfeiture, or criminal prosecution. At the same time, the Memo reiterated that possession, cultivation, and distribution of marijuana remain federal crimes.⁸² Therefore, the use of marijuana is both simultaneously prohibited and encouraged. This invariably impacts financial institutions that do or want to do business with marijuana-related businesses for the reasons already stated in this Article. The exercise of prosecutorial discretion today can become a policy of prosecutorial vigor tomorrow. The federal government could also decide to change course and sue legalizing states directly.⁸³ This atmosphere of uncertainty and peril dissuades law-abiding businesspeople from becoming operators, discourages transparent business practices, and impedes state lawmakers who wish to crack down on marijuana products, which could threaten both public safety and health.⁸⁴ Indeed, the days of Nancy Reagan’s drug policy appear to be over, and the federal government cannot simply stick its head in the sand and hope that the emerging trend works itself out.⁸⁵

If Congress does nothing, a new administration could reverse the Obama guidelines, file preemption lawsuits against any other state that has legalized marijuana, and prosecute anyone who has participated in their markets. On the other hand, a new administration could potentially go even further in the direction of federal non-intervention.⁸⁶ If Congress does not act decisively, the next President could unilaterally make major shifts in the federal government’s policy towards states that have legalized marijuana, and what exactly the next policy might look

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Cole, Guidance Regarding Marijuana Enforcement, *supra* note 31, at 4.

⁸³ This is often a risk that increases each time a state gets more involved in directly regulating certain aspects of the marijuana market. Boyd et al., *supra* note 65.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

like, can be anyone's best guess.⁸⁷ States need federal consistency and cooperation in order to establish strong and reliable licensing and regulatory regimes that will keep drugs out of the hands of children and criminals. The federal government's indecisive policy remains an incredible obstacle to achieving this goal. The suggested federal state waiver program should be looked into as an initial step. Regardless of what method is adopted, the die is cast on Congress to act.

⁸⁷ *Id.*