Pot Businesses Can't Bank on Much
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Despite recent changes in Colorado law regarding marijuana possession and use, proprietors of marijuana-related businesses, or MRBs, continue to face obstacles to their practical ability to run those businesses. These include owners of commercial real estate, who are concerned about the potential liabilities of leasing space for MRBs that clearly violate federal law, and local governments that refuse to permit MRBs to operate within their jurisdictions.

Because of concerns about the Colorado Rules of Professional Conduct for attorneys and federal banking laws for banks, MRBs face a relative lack of access to advice from attorneys and a lack of access to typical banking services. Recent announcements from the Colorado Supreme Court, the U.S. Department of Justice and the Financial Crimes Enforcement Network of the U.S. Department of the Treasury have discussed rule changes that are intended to facilitate access by MRBs to essential legal and financial services. However, considerable risks remain, and it is not clear that attorneys and banks will be comforted enough to accept MRB clients.

Regarding legal advice, Rule 1.2(d) of the Colorado Rules of Professional Conduct for attorneys says, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law."

Because MRBs clearly take actions that violate the federal Controlled Substances Act, attorneys in Colorado have hesitated to accept MRB clients and risk sanctions.

On March 24, the Colorado Supreme Court adopted a new comment to Rule 1.2, which says, "A lawyer may counsel a client regarding the validity, scope and meaning of Colorado constitution article XVIII, secs. 14 & 16 [regarding medical use of marijuana and personal use of marijuana, respectively], and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

While this new comment substantially reduces the risk that Colorado attorneys will face discipline by the Office of Attorney Regulation Counsel, this change does not alter the federal Controlled Substances Act. Colorado attorneys who counsel MRB businesses may face federal prosecution by aiding MRBs in the commission of clear violations of the act. As such, the availability of attorneys for MRBs may not improve substantially despite the state Supreme Court's recent clarification of Rule 1.2.

Regarding obstacles to banking, U.S. Department of Justice recently distributed a memorandum (the "Cole Memo") providing guidance to federal prosecutors on marijuana-related financial crimes. The Cole Memo indicated prosecution of financial institutions may not

be appropriate when they do business with MRBs, so long as the MRBs are operating lawfully under state law and are not violating any of eight enumerated Justice Department drug law priorities. However, the Cole Memo also makes it clear that prosecution of Controlled Substances Act violations remains a high priority, and that the prosecution of banks regarding their involvement with MRBs remains a matter of federal prosecutorial discretion. Clearly, this provides little comfort to banking institutions. The full text of the Cole Memo can be found at http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf

As a follow-up to the Cole Memo, the U.S. Treasury's Financial Crimes Enforcement Network issued guidance on Feb. 14 regarding the steps banks must take under the Bank Secrecy Act in order to "provide services to marijuana-related businesses consistent with their Secrecy Act obligations." The network's guidance provides that banks must follow an imposing series of guidelines to avoid Secrecy Act violations when working with MRBs. The guidelines require considerable due diligence by banks regarding the backgrounds and actions of their MRB clients, ongoing monitoring of MRB clients, and diligent filing of Suspicious Activity Reports if financial institutions know or suspect that a transaction "involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; is designed to evade regulations promulgated under the BSA; or lacks a business or apparent lawful purpose."

Because nearly all bank transactions with MRBs will involve funds derived from activities that violate the federal Controlled Substances Act, the burden on banks to file Suspicious Activity Reports may be administratively nightmarish enough to discourage banks from taking on MRB clients. The requirement that banks must perform ongoing monitoring of all MRB clients, combined with the risk that missteps may subject banks to federal prosecutions, also will discourage acceptance of MRB clients.

Conversely, MRBs may hesitate to go to banks knowing that banks must file frequent Suspicious Activity Reports related to many of their banking transactions. The Financial Crimes Enforcement Network Guidance states, "One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a Suspicious Activity Report that facilitates law enforcement's access to information pertinent to a priority."

The knowledge that banks will be required to file such reports is likely to discourage many MRBs from seeking bank services. The full text of the guidance can be found at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf

Until changes are made to the Controlled Substances Act, the challenges faced by MRBs will remain. Even with the new rules and guidelines announced by the Colorado Supreme Court, the Department of Justice and FinCEN, attorneys and banks are unlikely to embrace MRB clients, and MRB clients may hesitate to use banks given the degree of scrutiny their accounts will face. Exposure to liabilities for violations of federal law will continue to deter attorneys, banks and MRBs alike despite these efforts to facilitate MRB access to such services.

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