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Financial Institutions' Operations in Colorado after Amendment 64

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Notwithstanding the fact that passage of Amendment 64 made the possession, distribution and cultivation of limited quantities of marijuana by persons twenty-one years and older legal under Colorado law, the laws of the United States of America still deem such activities to be illegal. This fact restricts the ability of financial institutions in the State of Colorado to transact business with persons or business engaged in any of the foregoing activities. Indeed, due to the nature of existing federal law and the interrelatedness of the myriad federal agencies responsible for implementing and enforcing same, Colorado's financial institutions are unable, if not prohibited, from lending money to marijuana-related enterprises, accepting collateral that is associated with marijuana related enterprises and/or holding deposits of monies that flow through marijuana-related enterprises.

The purpose of this article not to provide the reader with an exhaustive laundry-list of all of the potential pitfalls that await a financial institution that transacts business with a marijuana related enterprise, but to advise the reader of some of the most concerning aspects of such a relationship. In researching this article, the author spoke with representatives of financial institution trade groups, banking regulators and internal bank compliance officers, all of whom uniformly voiced grave concerns regarding the prospect of financial institutions lending money to or accepting deposits from marijuana-related enterprises, particularly given the novelty of the intersection of statewide legalization of marijuana with federal laws prohibiting the same.

First and foremost, financial institutions should concern themselves with the 18 U.S.C. § 1956, titled "Laundering of Monetary Instruments." This statutory provision states, in pertinent part, "[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity … shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment of not more than twenty years, or both." Under this statute, a financial institution cannot lend money to, cannot extend credit to, and cannot accept money from persons or business that are actively involved in marijuana-related enterprises, since such enterprises are specifically prohibited by 21 U.S.C. § 801, *et seq.* (the "Controlled Substances Act"). To do so would violate 18 U.S.C. § 1956 because the financial institution would be intentionally promoting the carrying on of acts in violation of Controlled Substances Act.

Additionally, a financial institution that lends to or accepts deposits from a marijuana-related enterprise could also potentially be in violation of the Controlled Substances Act itself by serving as an accomplice to or conspiring with a principal to violate said act. Furthermore, it is possible that such an institution could be deemed in violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962) ("RICO") because acts involved in dealing with controlled substances are deemed racketeering activities and because a valid argument could be made that such an institution aided in the procurement of income derived from a pattern of racketeering activity.

In the event that a financial institution is suspected to be in violation of 18 U.S.C. § 1956, it and its customers would be subject to federal asset forfeiture laws. Specifically, 18 U.S.C. § 981, titled "Civil Forfeiture" states, in pertinent part, that real or personal property involved in a transaction or attempted transaction in violation of federal money laundering laws (or property traceable thereto) is subject to forfeiture to the United States Attorney General. Additionally, 18 U.S.C. § 982, titled "Criminal Forfeiture," provides for a similar penalty if a person is convicted of an offense under 18 U.S.C. § 1956. Further, 21 U.S.C. § 853 provides for criminal forfeiture of property constituting or derived from any proceeds obtained in violation of the Controlled Substances Act, whereas 18 U.S.C. § 1963 provides for criminal forfeiture of property constituting or derived from proceeds obtained in violation of RICO. Notwithstanding the fact that a federal trial court judge in Massachusetts recently rejected the Justice Department's effort to seize a family-owned motel due to what the judge said was a lack of a substantial connection between the motel and the forfeitable crimes, the statutes themselves and the weight of authority appear to indicate that federal seizure of assets is a strong possibility for those that are found to be in violation of federal money laundering, racketeering or controlled substances laws. In essence, if a financial institution were to loan money to a marijuana-related enterprise and accept inventory, proceeds or even commercial real estate as collateral, then such collateral would be subject to seizure, thereby causing such loan to be wholly unsecured. Similarly, cash deposits

arising from marijuana-related operations would also be a forfeiture risk. Even when a lender's collateral consists of commercial property, and said property is leased to a marijuana-related enterprise, said collateral is subject to federal seizure.

In addition to the imposition of criminal sanctions and the seizure of its property, financial institutions need also consider that 12 U.S.C. § 1818 provides for the very real possibility that their status as insured depository institutions could be terminated by the Federal Deposit Insurance Corporation (the "FDIC") if said agency were to determine that transacting business with marijuana-related enterprises constituted an unsafe and unsound banking practice. Given that as recently as June, 2011 the U.S. Department of Justice articulated, in an official memorandum, an inclination to enforce the Controlled Substances Act against "persons who are in the business of cultivating, selling or distributing marijuana *and those who knowingly facilitated those activities*," it is not unreasonable to assume the FDIC would consider engaging in such transactions unsafe and unsound practices. This is especially true when the U.S. Department of Justice's memorandum also expressly stated that "[t]hose who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."

Another consideration that financial institutions need to keep in mind is that by virtue of the federal Bank Secrecy Act (31 U.S.C. § 1501, *et seq.*), they are obligated to assist U.S. government agencies in detecting and preventing money laundering. Specifically, the Bank Secrecy Act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of daily aggregate cash transactions exceeding $10,000, and to report suspicious activity that might signify money laundering or other criminal activities. In essence, financial institutions engaged in lending and/or depository relationships with marijuana-related enterprises have an obligation to report such customers to the Financial Crimes Enforcement Network, which is a law enforcement agency of the U.S. Department of Treasury. Clearly, this is an unworkable Catch-22. One can even imagine a scenario where a financial institution that voluntarily engaged in business with such customers and then mandatorily reported such activities pursuant to the Bank Secrecy Act could be subject to common law claims asserted by its customers.

Simply put, due the nature of federal law, there is no workable way for financial institutions to transact business with marijuana-related enterprises, nor is there any workable way for such enterprises to procure valid financial services. While certain members of Colorado's legislature and an Amendment 64 task force appointed by Governor Hickenlooper have recently explored the idea of a state-owned bank or credit union devoted exclusively to the marijuana industry in Colorado, such a concept has been deemed unfeasible. Even a state-owned bank likely needs to be connected to the United States' payment system. Given federal regulation of the payment system, checks from a state-owned bank could not be deposited in other financial institutions, credit/debit cards could not be issued and funds could not be wired to/from other financial institutions. In short, such a state-owned bank would be an island unto itself and could only accept cash deposits at only its own branches. Other problems with such an arrangement include Colorado's constitutional prohibition against state-owned corporations, the amount of capital necessary to start a bank and operating without FDIC insurance.

In summary, because lending to, extending credit to and accepting deposits from marijuana-related enterprises remains a violation of federal law, financial institutions in Colorado are unlikely to engage in or continue relationships with persons or businesses that are involved, directly or indirectly, with such enterprises. This means that lenders and borrowers alike should closely inspect the nature of their relationships and the uses of their collateral, lest they be found to be in violation of federal law and/or have their collateral seized by federal authorities.

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