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Legal Sidebar

Effect of Rescheduling Marijuana on Access to Financial Services

August 26, 2024

Although federal law prohibits most marijuana-related activities, a majority of U.S. states and territories have adopted laws permitting certain types of marijuana sales and other marijuana-related activities. Many financial institutions, however, are unwilling to provide common banking products and services to state-authorized marijuana businesses because of the potential legal consequences they could face under federal law. Marijuana is currently classified as a Schedule I drug under the federal Controlled Substances Act (CSA). The CSA criminalizes the possession, distribution, and manufacturing of Schedule I substances, except for use in federally approved research studies. Additionally, federal anti-money laundering (AML) laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize the handling of proceeds derived from marijuana manufacturing and sales in violation of the CSA.

In August 2023, the Department of Health and Human Services (HHS) recommended that, based on its assessment of marijuana's medical uses and potential for abuse and chemical dependency, marijuana should be moved from Schedule I to Schedule III under the CSA. On May 21, 2024, the Department of Justice (DOJ) issued a notice of proposed rulemaking that would implement HHS's recommendation. This proposal has raised questions about how rescheduling would affect the provision of financial services to state-sanctioned marijuana businesses. As discussed below, rescheduling marijuana as DOJ has proposed is unlikely by itself to eliminate the legal risks of financial institutions serving marijuana businesses and, thus, might not significantly increase marijuana businesses' access to financial services.

This Legal Sidebar analyzes the liability that financial institutions risk under current federal law by serving state-sanctioned marijuana businesses, as well as how those risks might be affected if marijuana is moved to Schedule III. The Legal Sidebar finishes with a discussion of legislative options that Congress might consider for increasing access to financial services for marijuana businesses, notably including S. 2860, the Secure And Fair Enforcement Regulation Banking Act (SAFER Banking Act), and H.R. 2891, the Secure And Fair Enforcement Banking Act of 2023 (SAFE Banking Act).

Federal Financial Laws and Marijuana Businesses

A number of federal laws prohibit activities involving the possession and distribution of both marijuana and assets tied to marijuana sales and distribution.

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LSB11218

CSA. The federal CSA criminalizes the manufacture, sale, possession, and distribution of Schedule I substances, including marijuana. Schedule I drugs are statutorily considered to have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States" and may be lawfully used only for federally approved research studies. CSA violators may be subject to imprisonment or criminal fines.

Asset forfeiture. Federal authorities can also confiscate, through civil or criminal asset forfeiture proceedings, all proceeds derived from and any real or personal property involved in or traceable to marijuana sales that violate federal law, including the CSA. For example, if a bank provides a loan to a state-authorized recreational marijuana dispensary, federal authorities could require the bank to forfeit the dispensary's loan payments on the grounds that such payments can be traced to federally prohibited marijuana sales.

AML laws. Depository institutions (e.g., banks, thrifts, and credit unions) and certain other financial institutions that provide banking account, electronic payment, and other financial services to marijuana businesses do not typically possess, distribute, or manufacture marijuana in direct violation of the CSA. Financial institutions do, however, commonly acquire proceeds generated by their customers' product sales. Federal AML laws 18 U.S.C. §§ 1956 and 1957 criminalize the handling of proceeds derived from certain predicate unlawful activities, including marijuana manufacturing and sales that violate the CSA. Violators of AML laws may be subject to fines and imprisonment. An individual could be subject to a 20-year prison sentence and civil and criminal money penalties under § 1956 for knowingly engaging in financial transactions involving marijuana-related proceeds with the intent to promote a further offense. For example, a bank employee could violate § 1956 for knowingly withdrawing funds generated from marijuana sales from a checking account to pay the salaries of recreational marijuana dispensary employees on behalf of the dispensary. Similarly, a bank employee could face a 10-year prison term and civil and criminal money penalties under § 1957 for knowingly receiving deposits or allowing withdrawals of $10,000 or more in cash derived from the distribution or sale of recreational marijuana.

Bank Secrecy Act. The Bank Secrecy Act (BSA) requires certain financial institutions to have policies and procedures in place both to ensure that their clients are not engaging in unlawful behavior, such as selling marijuana, and to aid law enforcement by reporting potentially illegal or otherwise suspicious activities. Under the BSA, financial institutions must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding transactions suspected to be derived from illegal activities, including marijuana sales. The BSA also requires depository and certain other financial institutions to establish and maintain AML programs designed to prevent institutions from facilitating money laundering and financing terrorist activity. The programs also help ensure that the institutions' officers and employees have sufficient knowledge of their customers to identify when SARs should be filed. Bank personnel who willfully fail to file SARs can be subject to imprisonment of up to five years, and institutions that fail to implement sufficiently rigorous AML programs can suffer stiff civil and criminal money penalties, as well as asset forfeiture.

Administrative enforcement. Additionally, federal regulators can take administrative enforcement actions against financial institutions, their employees, and certain affiliated parties for violating the BSA or AML laws. For example, federal banking regulators (i.e., the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration) implement comprehensive supervisory regimes to ensure that depository institutions operate in a safe and sound manner and comply with applicable laws. To this end, banking regulators have strong, flexible administrative enforcement powers, which they may use against depository institutions and their directors, officers, controlling shareholders, employees, and certain agents and affiliates that act unlawfully. Such unlawful actions include engaging in marijuana-related activities that violate the BSA or AML laws. Banking regulators may, for instance, impose remedial measures by issuing cease-and-desist orders, assessing civil money penalties, and issuing prohibition

orders that temporarily or permanently ban individuals from working in the banking industry. In extreme cases, banking regulators may revoke an institution's federal deposit insurance and, under certain circumstances—including following a criminal conviction under the BSA or AML laws—take control of and liquidate a depository institution.

(The banking regulators' constitutional authority to exercise their long-standing administrative enforcement authorities has been called into question by the Supreme Court's June 2024 opinion in *Securities and Exchange Commission (SEC) v. Jarkesy*. The *Jarkesy* Court held that the SEC's use of administrative adjudication proceedings to impose punitive civil penalties for securities fraud violates the Seventh Amendment's right to a jury trial. Although *Jarkesy* directly applies only to the SEC, the Court's reasoning could apply to the banking regulators' administrative enforcement powers.)

Financial institutions expend tens of billions of dollars on BSA/AML compliance each year. Federal banking regulators have reportedly prioritized BSA and AML compliance to fight financial crime in recent years by increasing both the number of BSA/AML enforcement actions and the size of monetary penalties in these actions.

FinCEN Guidance to Financial Institutions

Although the banking regulators have yet to issue any formal guidance in response to state and local marijuana legalization efforts, FinCEN issued guidance in February 2014 on financial institutions' suspicious-activity reporting requirements when serving marijuana businesses. The guidance identified transactions that might trigger federal enforcement priorities, which include distributing to minors and supporting drug cartels or similar criminal enterprises. The guidance notes the following:

> 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. [A] financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law) in accordance with this guidance and [FinCEN regulations].

The guidance advises financial institutions serving marijuana businesses to file one of the three types of SARs:

1. A *marijuana limited SAR* should be filed when a financial institution determines, after exercising due diligence, that a marijuana business is not engaged in any activities that violate state law or implicate enforcement priorities outlined in the guidance.
2. A *marijuana priority SAR* must be filed when a financial institution believes a marijuana business is engaged in activities that implicate enforcement priorities.
3. A *marijuana termination SAR* should be filed when a financial institution finds that it must sever its relationship with a marijuana business to maintain an effective AML program.

The FinCEN guidance also lists examples of "red flags" that may indicate that a marijuana priority SAR is appropriate, such as if a business fails to sufficiently document state law compliance.

As of March 31, 2024, FinCEN reported that it has received more than 410,000 marijuana-related SARs and that about 680 depository institutions were filing marijuana-related SARs. However, the depth and breadth of financial services that these depository institutions are providing to marijuana businesses is unclear. It is also uncertain whether these depository institutions are serving businesses directly involved in cultivating and selling marijuana or are serving entities only indirectly involved in the marijuana business (e.g., landlords renting office space to marijuana businesses).

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As a result of all of these legal restrictions and potential liability, many financial institutions are unwilling to provide debit or credit card payment services, business loans, electronic payroll, and other common banking products and services to state-authorized marijuana businesses. This has reportedly stifled growth of state-authorized marijuana businesses and forced them to operate largely in cash, raising public safety and tax compliance concerns.

DOJ's proposed rescheduling of marijuana, in and of itself, is not likely to alter substantially the risk profile associated with providing financial services to state-sanctioned marijuana business. As is discussed more fully in this Legal Sidebar, "Moving marijuana from Schedule I to Schedule III, without other legal changes, would not bring the state-legal medical or recreational marijuana industry into compliance with federal controlled substances law."

Rescheduling would have no effect on state recreational marijuana laws because recreational marijuana activities would remain unlawful under federal law. For medical marijuana regimes, Schedule III drugs, unlike those on Schedule I, can be lawfully dispensed by prescription—but only if they are approved by the Food and Drug Administration (FDA). The FDA has not approved marijuana as a prescription drug. Even if certain marijuana products gain FDA approval at some point in the future, manufacturers, distributors, and sellers would need to comply with federal regulatory requirements applicable to Schedule III drugs, including registering with the Drug Enforcement Administration (DEA) and recordkeeping, reporting, and safeguarding requirements under the CSA. Additionally, users of Schedule III drugs would need to obtain prescriptions from medical providers that comply with federal standards. As currently structured, state medical marijuana laws do not meet these federal requirements.

While some of the CSA's requirements (e.g., quota limits) do not apply to Schedule III substances—and some criminal penalties are reduced for these substances—the manufacture and sale of marijuana could still result in severe penalties if it were moved from Schedule I. Additionally, bank responsibilities under the BSA and AML laws and banking regulator enforcement authorities would likely remain largely the same if marijuana became a Schedule III drug. Consequently, financial institutions would likely continue to face significant legal risks under federal law for serving marijuana-related businesses even if marijuana were moved to Schedule III.

It is possible that, if rescheduling were finalized, federal and state agencies might take additional actions that more significantly reduce the legal risks applicable to financial institutions that consider serving the marijuana industry. However, because substantial legal risks would remain, rescheduling alone might not have a substantial effect on state-sanctioned marijuana business' access to financial services.

Legislative Options for Congress

Both the House and the Senate have considered legislation specifically designed to reduce the legal risks associated with providing financial services to marijuana businesses operating in compliance with state laws. If enacted, these bills would be more likely than rescheduling marijuana to reduce the legal risks associated with providing financial services and, by extension, could bolster the marijuana industry's access to such services.

In September 2023, the Senate Banking Committee favorably reported one such bill: S. 2860, the SAFER Banking Act. A similar bill, H.R. 2891, the SAFE Banking Act of 2023, was introduced in the House. Although it has not done so thus far in the 118th Congress, the full House passed versions of the SAFE Banking Act seven times in the 116th and 117th Congresses: H.R. 7900 and H.R. 4521 in the 117th Congress, H.R. 3617 in the 117th Congress, H.R. 4350 and H.R. 1996 in the 117th Congress, and H.R. 6800 and H.R. 1595 in the 116th Congress. The first major action on a marijuana banking bill in the

Senate occurred in the 118th Congress when the Senate Banking Committee held a hearing followed by a markup and favorable report of S. 2860, the SAFER Banking Act.

The SAFER Banking Act and the very similar 118th Congress version of the SAFE Banking Act (S. 1323 and H.R. 2891) have two primary aims. First, they would constrain federal banking regulatory authority to penalize depository institutions for providing financial services to marijuana businesses complying with state laws. Second, they would protect depository institutions and their personnel from some legal liability under the BSA, AML, and asset forfeiture laws when providing financial services to marijuana businesses or investing proceeds derived from serving marijuana businesses that are complying with state laws.

The bills would provide that the proceeds from state-authorized marijuana activities shall not be treated as proceeds from an unlawful source for purposes of federal AML laws. They would further provide that income derived from state-authorized marijuana businesses must be treated like any other lawful source of income for participation in certain federally backed mortgage programs. They would relatedly protect the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and federal agencies administering federal mortgage loan, guarantee, and insurance programs from asset forfeiture when mortgage payments are derived in part from state-authorized marijuana activities. Additionally, the bills would require FinCEN to issue new guidance on filing marijuana-related SARs consistent with the bills' requirements. Finally, the bills would constrain the banking regulators' authority to force or encourage depository institutions to close customer accounts based on reputational risks, including those associated with customers' ties to state-authorized marijuana activities.

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