

Update on Financial Services and Medical Marijuana in Pennsylvania

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What We Will Cover

- Current Status of Marijuana Legalization Across the U.S. and in Pennsylvania
- Federal and State Issues Regarding Financial Services for Marijuana Producers/Providers
- Providing Financial Services for Marijuana Producers and Providers
- HR Issues Related to Medical Marijuana
- Hemp and What's Next

Marijuana Legalization in the United States

Marijuana Legalization in the U.S.

- Early 1900s- movements afoot to ban marijuana
- Marijuana Tax Act of 1937- possession or transportation of marijuana effectively illegal
- “Reefer Madness” (1938)

Marijuana Legalization in the U.S.

- Controlled Substances Act of 1970 (“CSA”)-
Marijuana a Schedule 1 drug- no accepted
medical use and high potential for abuse
- DEA created in 1973- agency periodically
determines which drugs are on which
schedules
- Some cannabis-derived drugs are Schedule II
(Syndros) and III (Marinol)

Marijuana Legalization in the U.S.

- Illicit Drug Anti-Proliferation Act of 2003- illegal to knowingly open, lease, rent, or maintain any place for the purpose of using, distributing or manufacturing any controlled substance
- Also illegal for a manager, employee or owner to profit from, or make available for use, any place for the purpose of storing, distributing, manufacturing, or using a controlled substance

Meanwhile . . .

Marijuana Legalization in the U.S.

- 1973-1978- States experiment with varying degrees of decriminalization
- 1980s-1990s- Movement for medical use galvanizes- cancer patients, HIV/AIDS epidemic
- 1996- California legalizes medical marijuana

And Now . . .

Marijuana Legalization in the U.S.

- 49 states, Guam, Northern Marianas, Puerto Rico and USVI have some form of legalized medical marijuana (including cannabidiol oil)
- 19 states and DC, Guam, Northern Marianas have legalized recreational use
- 27 states and USVI (and many cities) have decriminalized recreational use to some extent
- Idaho the last holdout

Medical Marijuana in Pennsylvania

Medical Marijuana in Pennsylvania

- First attempts at legislation in 2010
- Senate passes version in 2014, but goes no further in House and Governor Corbett threatened veto
- Governor Wolf signaled willingness to approve
- Act 16 of 2016, Pa's Medical Marijuana Act, signed into law April 17, 2016

Medical Marijuana in Pennsylvania

- Only “serious medical conditions”
 - Originally, Cancer, HIV/AIDS, ALS, Parkinson’s, etc.
 - Continual Expansion- Anxiety Disorder
- Only PA DOH-trained-and-certified doctors can prescribe
- Pills, oils, now vaporization of dry leaf- no smoking

Medical Marijuana in Pennsylvania

- Licenses for Grower/Processors- \$2 million in capital, at least \$500,000 on deposit at FDIC/NCUA insured depository institution
- Licenses for Dispensaries- \$150,000 in capital on deposit at FDIC/NCUA insured depository institution

Medical Marijuana in Pennsylvania

- Industry is up and running- 25 grower/processor and 50 dispensary permits issued (@80 dispensary sites)
- PA DOH Report May 15,2020
<https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/DOH%20MM%20Official%20Two%20Year%20Report%20-%20May%2015%202020.pdf>

Medical Marijuana in Pennsylvania

- Periodic News Reports 2019-2021- not enough marijuana being grown in PA to satisfy demand!
- COVID-19 pandemic has dramatically spiked use- anxiety now no. 1 reason, followed by chronic pain and PTSD
- Sales in PA- \$900 million in 2020, \$1 billion + annually likely

Medical Marijuana in Pennsylvania

- Auditor General Eugene DePasquale recommended full legalization in July 2018 Report- estimating \$581 million annually in tax revenue
- Post-Election 2018: Governor Wolf says time to consider full legalization, LG Fetterman went on tour of state to gather input
- Following Fetterman tour, on September 26, 2019, Governor Wolf announces support for full legalization and continues to do so
- Republican House and Senate- Not Happening!

National Marijuana Industry

National Marijuana Industry

- Nationally, sales of regulated marijuana were \$17.5 billion in 2020
- Expected to exceed \$30 billion by 2022
- Aspen, CO- outsold alcohol in 2017-18!
- It is a massively cash-centric industry, and, like any other industry, needs banking services
- O Canada . . .

How Do We Bank This Industry?

Many Problems to Overcome . . .

Federal and State Issues

- U.S. Supreme Court Cases:
 - *United States v. Oakland Cannabis Buyers' Cooperative* (2001)- CSA does not recognize a medical necessity exception
 - *Gonzales v. Raich* (2005)- even when individuals or businesses are complying with state medical cannabis programs, they are violating federal law

Federal and State Issues

- DEA- continually declines to reclassify marijuana from Category 1
- So still illegal under Federal law, but Epidiolex moved to Schedule V September 27, 2018
- Other cannabis-based products likely to seek same reclassification

Federal and State Issues

- Violations of the CSA can involve RICO actions
- RICO forfeiture- there goes your collateral!
- Private civil actions under RICO- 3x damages plus attorney fees- 2017 10th Circuit *Safe Streets Alliance v. Hickenlooper* case

Federal and State Issues

- Bankruptcy Courts- no access if violating law!
- *Garvin* and *Basrah* 9th Circuit cases
- According to US Trustee, this includes companies leasing to marijuana businesses because of Illicit Drug Anti-Proliferation Act
- Can be used as a defense . . .

Federal and State Issues

- Taxes and Structuring- Internal Revenue Code 280E (26 U.S.C. § 280E) BUT Tax Cuts and Jobs Act costs of goods sold provision? IRS- NO!
- *Polk v. Gontmakher* (W.D. Wash. August 2019)- contracts can't violate Federal law

Federal and State Issues

- “Second Cole Memorandum”- 2013, US DOJ encouraged to focus on illegal marijuana and people or organizations that are interfering with preventing:
 - (1) Distribution of marijuana to minors;
 - (2) Revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
 - (3) Diversion of marijuana from states where it is legal under state law in some form to other states;
 - (4) State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

Federal and State Issues

- (5) Violence and the use of firearms in the cultivation and distribution of marijuana;
- (6) Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- (7) Growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- (8) Marijuana possession or use on federal property.

Federal and State Issues

- FinCEN Guidance- 2014 (FIN-2014-G001)
- Can file “Marijuana Limited” SAR if reasonably believe customer does not implicate Cole Memo priorities
- Filed roughly every 120 days
- “Marijuana Priority” SAR
- “Marijuana Termination” SAR

Federal and State Issues

- December 2014- “Rohrabacher-Farr Amendment” to omnibus spending bill- DOJ prohibited from spending funds to interfere with the implementation of state medical marijuana laws
- Must be re-enacted every budget, and has been to date (need new sponsors now)

Federal and State Issues

- U.S. Attorney General Jeff Sessions stated that he did not like the trend of marijuana legalization
- In January 2018, he repealed all DOJ guidance on marijuana enforcement, including Cole memos
- Left prosecution decision up to local U.S. Attorneys
- Did not (and could not) address FinCEN Guidance
- And now he's gone . . . AG Barr had a new take and Biden Administration does as well

Federal and State Issues

- Federal Banking Regulators Defer to FinCEN Guidance as official position in 2014
- But official position is that there is no official position- institutions have to exercise utmost diligence and care in making business decision
- August 2018- state regulators urged Congress to act and create safe harbor for banking

Federal and State Issues

- 2019 SAFE Banking Act (“Secure and Fair Enforcement Banking Act of 2021”)
- Prohibits Federal Banking Regulators from:
 - Terminating or limiting deposit insurance because a bank provides services to industry
 - Prohibiting or penalizing banks from providing services to industry

Federal and State Issues

- SAFE Banking Act (con't)
 - Recommending encouraging or incentivizing banks not to offer services to industry
 - Taking any adverse or corrective supervisory action on a loan made by bank involving industry
 - Bank not liable under any Federal Law or regulation for providing services to or investing any income derived from industry

Federal and State Issues

- SAFE Banking Act (con't)
- Applies to “financial products or services” as defined in Dodd-Frank under CFPB provisions
- Passed House in April, so far nowhere in Senate
- Support is fractured

Federal and State Issues

- Schumer “Cannabis Administration and Opportunity Act” introduced in US Senate in July
- Among other things, would deschedule cannabis, expunge prior convictions, allow people to petition for resentencing and maintain the authority of states to set their own marijuana policies

Financial Services For The Marijuana Industry

Financial Services for the Industry

- OK, so we are thinking of banking medical marijuana, what do we have to deal with?
 - BSA/AML and SAR Filings
 - FedWire and Bankruptcy blocks
 - Examinations from Regulators
 - DOJ . . .

Financial Services for the Industry

- “Marijuana-Related Businesses” – Risk Tiers
 - Tier 1- Directly involved anywhere from growth to sale
 - Tier 2- provides products and services to Tier 1 MRBs
 - Tier 3- incidental products and services to Tier 1 MRBs

Financial Services for the Industry

- “Marijuana-Related Businesses”
 - Landowners/Developers
 - Contractors and Vendors
 - Insurance
 - What about stocks? OTC/Canada

HR Issues Related to Medical Marijuana

HR Issues



HR Issues

- PA's Medical Marijuana law prohibits employers from discharging, threatening, refusing to hire an employee based solely upon medical marijuana use
- BUT can discipline for being under the influence in the workplace!

HR Issues

- Drug Testing
- Federal DOT- CDL license requires test!
- Pre-employment testing coming under fire
 - Prohibited in Philly in 2022, with exceptions
 - Applicants eligible for medical marijuana are typically protected despite positive test
 - In 2020, Commonwealth Court upheld award of UC benefits to person terminated for medical marijuana

HR Issues

- Is the use of medical marijuana protected under the Americans with Disabilities Act?
 - NO – individuals “currently engaging in the illegal use of drugs” are not protected under the ADA
 - BUT – the underlying condition may be a disability
 - AND – “illegal use of drugs” does not include use of a Schedule I drug taken under supervision by a licensed health care professional
- Employers should adopt policies to ensure that employees are not engaged in the “illegal use of drugs”

HR Issues

- Is use of medical marijuana a serious health condition under the Family Medical Leave Act?
 - NO, BUT - FMLA leave may be required to accommodate medical use of marijuana due to a serious health condition
 - Conditions for inpatient care and/or continuing treatment must be met
- Employee may also be eligible for FMLA leave to seek treatment for substance abuse
 - Treatment for substance abuse does not prevent the employer from being able to take an adverse employment action against the employee

HR Issues

- Remote workers – may be using medical or recreational pot while working
- Employers may prohibit use at and during work – no requirement to accommodate workplace use
- How to enforce in homes?

Hemp

Hemp

- 2018 Farm Bill- Hemp defined as less than 0.3% THC
- Federal and State regulation
- You can bank hemp- it is not marijuana!
Unless it is over 0.3% THC . . .

Hemp

- PA Agriculture will perform random inspections and testing
- Hemp that's above 0.3% THC? Burn it
- Above 1.0%, PA Agriculture notifies law enforcement

What's Next

What's Next

- Things will shake out, one way or another
 - DEA- cannabis–derived to other schedules?
 - Budget Amendment?
 - DOJ position?
 - SAFE Banking Act/ CAO Act?
- Regardless, legalization efforts will continue to be pushed . . .

Questions?

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