Continued Uncertainty in Banking Marijuana Businesses in Ohio

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With Ohio entering the medicinal marijuana age, bankers unfortunately continue to have no clear direction when it comes to banking marijuana-related businesses (MRBs).

Given the state of the law in Ohio, the likelihood of state-prosecuted criminal or bank regulatory concerns is slim, assuming institutions follow Ohio law. To be clear however, federal law still considers marijuana a Schedule 1 drug and it remains illegal, along with other Schedule 1 drugs such as LSD and heroin. Department of Justice (DOJ) Director Sessions reinforced a strong federal position against legalization of marijuana when he rescinded a memo from the Obama administration which had suggested that federal prosecutors not pursue cases against MRBs that comply with state law.

As a result, federal law considerations arising from the continued illegality of dealing in marijuana continue to cloud what, if any, activities banks and thrifts can safely engage in with MRBs without violating federal law and/or without posing undue risk for the institution and its directors and officers. There has been no indication from the DOJ that it intends to offer any comfort in the foreseeable future, and as a result, on the federal level there unfortunately continues to be no "safe harbor" for financial institutions electing to deal with MRBs any more so than if they were banking businesses for heroin or LSD.

Banking agencies and FinCEN have provided some direction for addressing bank deposit issues that arise under BSA/AML regulations, which reduce the likelihood that institutions following that guidance will in fact encounter bank regulatory penalties. However, the BSA/AML banking compliance issues are only a part of the overall MRB puzzle, and only a portion of the risk considerations for institutions electing to participate in the marijuana industry.

Potential ancillary issues may well pose the greatest risk considerations for institutions considering engaging with MRBs. The DOJ continues to consider marijuana a controlled substance with all of the concerns that brings to the business, including uncertainty as to whether the DOJ will choose to target institutions banking MRBs for any number of potential federal criminal actions. And even if institutions themselves are not the subject of federal criminal or civil actions by the DOJ or other federal agencies, federal forfeiture powers can impact MRB customers and the value of potential collateral held for MRB loans, including mortgage and lien interests in physical collateral, as well as deposit accounts.

There are also questions concerning how or whether mortgage insurance coverage may be adversely impacted as a result of the current uncertainty with MRBs, as well as director and officer insurance coverage for boards and management of institutions that elect to engage with MRBs. While Ohio provides significant personal liability protections for directors and officers through a broad statutory scheme that reinforces the strength of the business judgment rule in Ohio and broad indemnification authority, there are no cases to indicate whether those protections would be authorized for Ohio corporations in the event that the board and management of an institution knowingly chooses to engage in business with MRBs while federal law remains adverse. There are also questions as to how the FDIC may react, or be forced to react, to MRB issues relating to ongoing FDIC coverage in light of the unresolved federal criminal aspects of the business.

In the current state of affairs, it boils down to risk/reward and a careful analysis of whether the rewards of banking MRBs outweigh the actual and potential risks. It also points to the importance of adequacy of customer information and controls in dealing with MRBs. Under current federal law, there are unfortunately no "percentage of business" tests or other clear safe harbors for institutions in developing internal MRB policies and procedures. The impact of reputation risk on institutions choosing to bank MRBs remains unknown, whether resulting from the impact of potential federal action against the institution or its officers, director or employees, or simply from being known in the community as the "marijuana bank."

There have been news reports of credit unions providing certain basic banking depository services to MRBs however none to date appear to be providing lending or other banking services. There was also a recent news report of at least one instance where an institution was required to divest its medical marijuana-related business as a condition to being acquired, which raises obvious questions regarding the potential adverse impact of engaging in MRB activities on institution valuations at the present time.

There are a multitude of shareholder, business, public policy and public safety reasons why banking institutions need clarity and guidance in this area from Congress, the DOJ, FinCEN and others. However, as long as federal law and state law on MRBs remain at odds, the impact of banking MRBs will remain unclear and the risks will continue. Certainly, no institution or its directors and officers want to provide the opportunity for the "test case." Guidance and action at the federal level to provide comfort and a "safe harbor" for banks would help with clarity, risk assessment and safety, and would enable institutions to serve MRBs as any other business and help avoid driving the MRB business to "underground" providers.