

Full Steam Ahead Toward Banking Cannabis Money Under Prop 64?

You Must Be High

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In anticipation of changing attitudes regarding cannabis and the possibility of the passage of Proposition 64, this firm was preparing to advise banking clients about how cannabis-related deposits could be best handled. We were strategizing with people in the cannabis industry and in the banking industry to develop a set of best banking practices. We were planning to meet with regulators to obtain feedback, if not tacit approval of these practices.

California passed Prop 64 as predicted, but Trump was unexpectedly elected. That changes everything. By the way, anyone that wanted both of those things to happen did not understand the inherent inconsistency.

The federal framework for banking “marijuana-related” businesses is based largely on two documents: the “Cole Memo,” written by a Deputy A.G. at the DOJ, and FIN-2014-G001, written by FinCEN. Of course, the head of the DOJ is the Attorney General, and the Director of FinCEN is overseen by the Secretary of the Treasury. The A.G. and Secretary of the Treasury are executive officers appointed by the President with the advice and consent of the Senate. The current likeliest scenario is that President Elect Trump will nominate and the Senate will confirm Sen. Jeff Sessions (R-AL) to Justice and banker/hedge fund manager Steve Mnuchin to Treasury. So far, Treasury has lagged behind Justice, but mostly followed its lead in giving guidance.

The A.G. has the most power (in many ways more so than even the President) over enforcement of the nation’s federal controlled substance laws and law enforcement attitudes generally. Current U.S. attorneys will be replaced almost entirely in the first months of the new administration. In the absence of Congressional action to legalize cannabis or the banking of cannabis (something a Republican Congress will likely never do), A.G. Sessions will determine day-to-day policy on the issue. FinCEN may elect not to rescind its guidance (containing the marijuana SAR tiers and policies), even if Justice were to reverse itself. But the FinCEN guidance relies so heavily on the Cole Memo that FinCEN’s guidance would be difficult to rely upon following reversal of the Cole Memo by Justice.

Sen. Sessions is one of the most hostile voices to cannabis in national politics. The New York Times reports that Sen. Sessions at an April hearing in Senate said “[w]e need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized.” The Times quotes a Brookings institution scholar on cannabis law saying that “[a]s attorney general, Sessions would have the ability to rescind two Justice Department directives — known as the Cole and Ogden memos — that called for stepping back from marijuana prosecutions. He could also use federal law enforcement power against operators and sue state regulators to block state systems. The only person who can stop the attorney general is the president, and it is unclear whether Trump will direct or delegate drug policy — the latter option being what should worry [states with legalized cannabis] the most.” [Emphasis added.] The Los Angeles Times reports that anti-cannabis lobbyists will urge Sessions to treat even government permitting of cannabis businesses as violations themselves of the Controlled Substances Act.

Given the President-elect’s unpredictable positions, there is no solid reason to believe that the current laissez-faire system will continue. As president, Trump may decide that the politics of a crackdown are too much to bear and keep the current system, or he may defer to a major loyalist and early backer who he chose to run Justice. FinCEN has been expected for many months to issue clarification on the issue of indirect marijuana-related business (those that do not handle or sell the product), but there is no longer a basis for thinking its leadership will continue to pursue that goal.

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In 2013, banks were targeted by the Justice Department with Operation Choke Point in an effort to shut down internet payday lending. Banks were accused of aiding and abetting in the commission of fraud by virtue of processing ACH transactions for processors which were processing for lenders which were making loans via the internet to borrowers across the country. Banks were accused of causing harm (“affecting” under FIRREA) to themselves because of the adverse consequences (reputational and legal defense costs) which resulted from the government’s threats to prosecute them civilly under FIRREA. Yes, that reasoning is profoundly circular. The point is that the government can be a powerful enemy and it may not play fair. It would be wise to postpone for several months any headlong entry into a cannabis related business activity. We may know more by the end of the first quarter of 2017 than we know now, but these are uncertain times and the risks of running afoul of the Justice Department are substantial.

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