

WHY MMJ BUSINESSES CANNOT OBTAIN BANK ACCOUNTS AND WHAT TO DO ABOUT IT

Most Hawaii MMJ licensees and auxiliary MMJ businesses are aware, either through personal experience or news reports that it is very difficult, if not impossible, to obtain a personal or business bank account when “touching” Marijuana. This article will examine the legal and practical reasons for banks’ reluctance, and offer a plan or protocol with which to approach your bank.

All financial institutions (banks, credit unions, brokerages,) are governed and licensed by the Department of the Treasury and regulated by both FinCEN (Financial Crimes Enforcement) and the DOJ (Department of Justice). Since Marijuana remains on the CSA Shd I list as a narcotic, therefore illegal under federal law, banks are forbidden to participate in the “trafficking of illegal substances”. The primary reason banks avoid MJ cash businesses is to avoid criminal charges of Money Laundering. Since 2013 the DOJ has recognized that some 23 states have legalized medical marijuana, which puts state legal businesses in conflict with the Federal law. In August 2013, the DOJ issued the “Cole Memo” that set forth eight criteria for well-regulated state marijuana programs and providing that legal MJ business would avoid federal interference in complying states. Then in February 2014 FinCEN issued further guidance allowing financial institutions, banks, to deal with a MJ business at their own risk if they utilized thorough customer due diligence in making the risk assessment.

In April 2015 the Commissioner of Financial Institutions at the DCCA in Hawaii issued State of Hawaii specific guidance to banks on how they should “...conduct customer due diligence in assessing the risk of providing services to a marijuana-related business.” It is important to list these CDD (Customer Due Diligence) requirements as they form the model, which will be discussed later, for MJ businesses to utilize when approaching financial institutions in Hawaii. The seven criteria that financial institutions should follow when performing their due diligence regarding MJ businesses in Hawaii are paraphrased here:

1. Verify whether the business is duly licensed and registered in Hawaii.
2. Review the license application, and documentation, submitted to DOH.
3. Request from state licensing and enforcement authorities (NED, background checks done on owners and employees) information about the business and individuals.
4. Understand the business activity and customers.

5. Monitor public sources for adverse information about the business and related parties.
6. Monitor suspicious activity and red flags. File Suspicious Activity Reports (SAR) with the IRS along with Currency Transaction Reports (CTR) for cash deposits exceeding \$10,000.
7. Periodically review business activity and communicate with the business.

These criteria do not replace or eliminate any financial institution's standing requirement of legal compliance with the BSA (Bank Secrecy Act) to avoid money laundering (18 USC 1956/1957) by monitoring accounts and filing CTRs and SARs with the IRS. To understand the serious consequences of money laundering, it is a criminal offense with penalties up to 20 years in prison, a \$500,000 fine for individuals, fines in the millions of dollars for the financial institution, and the potential loss of financial institution's banking license from the Department of the Treasury. The bottom line then is that it is very risky for banks to deal with MJ businesses and the compliance time and staffing costs are expensive.

So what is an MJ business to do? In chief, the MJ business should work to remove these hurdles to the involvement of financial institutions. Do not approach the banks as if you are a regular business or try to hide the nature of your business. Instead, be proactive - approach the bank with a well-documented compliance plan that takes into account the above seven criteria, as well as an in-house AML (anti-money laundering) plan for your MJ business operations. Establish policies and procedures to KYC (Know Your Customers). The financial institutions want your MMJ business, but only if they can avoid or minimize the risk and cost. Understanding the banks' legal restraints and compliance issues will go a long way to making the local MMJ business a welcome customer.

This whole area of the industry regulated by the BSA, DOJ, FinCEN, and other federal laws regarding financial institutions and money laundering is very complex. To help you with navigating this landscape, the Hawaii Dispensary Alliance is investigating the potential for hosting a seminar on the banking and anti-money laundering issues discussed here – please let Garrett Halydier at the Alliance know of your interest so that we can plan the event.

Stephen P. Pingree, J.D. is an attorney who specializes in Federal Financial Crimes (Money Laundering, tax evasion) defense and teaches AML courses. Steve is also the Asia Region Marketing Director for AMLAware LLC, providing AML online courses throughout Asia. He is always available to advise and counsel MMJ businesses regarding State Regulatory and Federal legal issues. Steve can be reached at pingimac@mac.com.

