



Cannabis and Hemp Banking 2018-2021

Cannabis Banking

2014-2017 – The Cole Memo

2014-2017 - The Cole Memo

- Contrary to belief the Federal Reserve has not, since the Cole Memo was issued in 2014, had a policy that prohibits banks and savings institutions from maintaining client accounts and accepting deposits from cannabis businesses through the Federal Reserve System. Nor does the FDIC refuse memberships to banks that have cannabis accounts.
- The Cole Memo, issued on February 14, 2014, clarified guidance given by Janes Cole, Deputy Attorney General, to Federal prosecutors on August 29, 2013, regarding areas of enforcement under the Controlled Substances Act (CSA). It addressed the impact of that guidance on financial crimes.
- The Cole Memo noted that the money laundering statutes (AML), unlicensed money remitter statute, and Bank Secrecy Act (BSA) all still applied to cannabis businesses.
- It also noted that financial institutions that conduct transactions with money generated by marijuana-based conduct could face criminal liability under the BSA for, among other things, failing to identify and report suspect transactions.
- The Cole Memo simply suggested that where activity falls outside the 8 priority enforcement guidelines, Federal prosecution may not be appropriate.

2014-2017 - The Cole Memo

- The Cole Memo assumed that States that had enacted legalizing marijuana statutes and that had robust regulatory schemes could adequately police local conduct in that State and that, accordingly, Federal enforcement was not a priority use of Federal resources.
- Since the original 2009 Justice Department guidance (the “Odgen” Memo) spoke in terms of medical marijuana, the Cole Memos (both the August 29, 2013 and February 14, 2014 Memos) have been interpreted to be confined to activities relating to medical cannabis and not recreational cannabis.
- The Financial Crimes Enforcement Network (FinCen) issued guidance also on February 14, 2014 (FIN-2014-G001), implementing the Cole Memo priorities. The FinCen Guidance noted that:
 - The decision to open, close or refuse accounts should be made by each financial institution based upon facts applicable to that institution.
 - Customer due diligence is a critical aspect of making a decision related to a cannabis-business financial relationship, providing eight factors to consider in the due diligence process.

2014-2017 - The Cole Memo

- The eight Cole Memo priorities should be considered in the due diligence process.
- A financial institution is required to file a Suspicious Activity Report (SAR) if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.
- Since all marijuana activities are illegal under Federal law, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, 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's suspicious activity reporting requirements and related thresholds.
- If the depositor business does not involve one of the eight Cole Memo priorities, the financial institution would file a "Marijuana Limited SAR."
 - Content limited to limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified.

2014-2017 - The Cole Memo

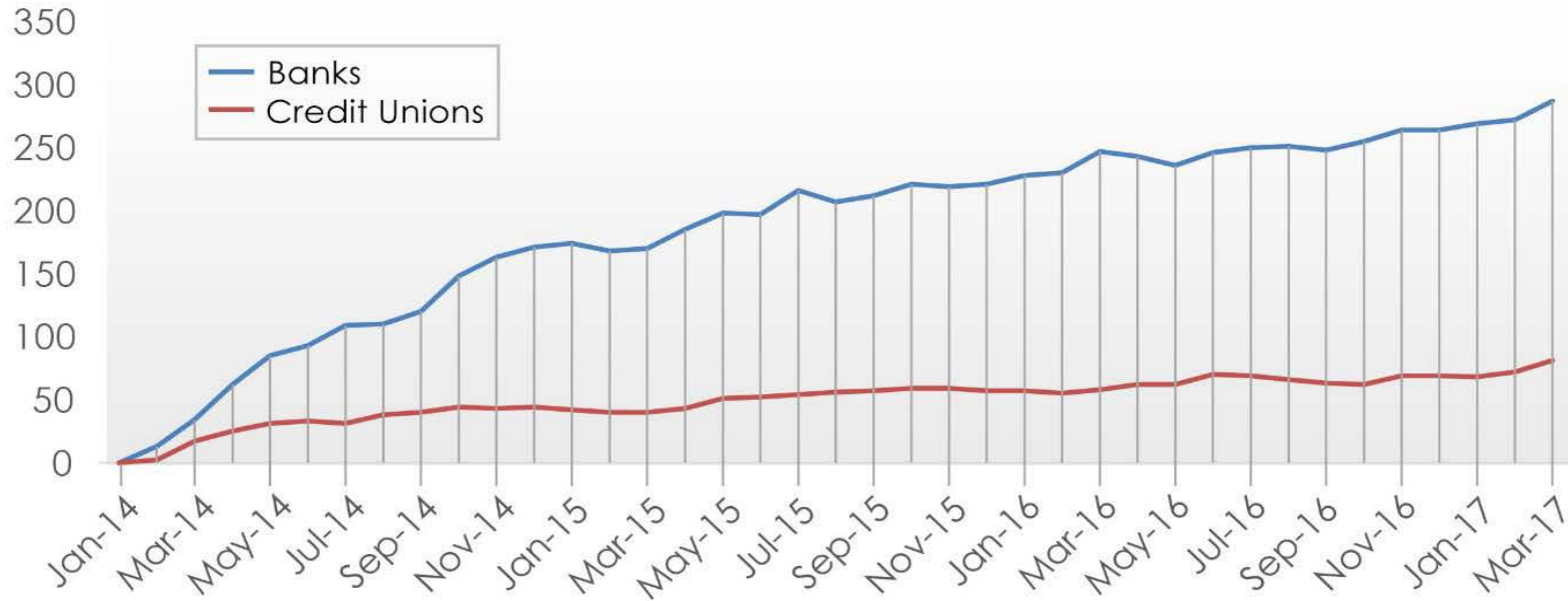
- Continuing activity SARs should be filed under existing FinCen guidelines.
- If the depositor business does involve one of the eight Cole Memo priorities, the financial institution would file a “Marijuana Priority” SAR.
 - Specific content consists of details particularly relevant to law enforcement in this context, including: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.
- If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it should file a “Marijuana Termination” SAR.
 - To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity.
- The FinCen guidance provided a number of “red flags” to consider.

2014-2017 - The Cole Memo

- As of 31 March 2017, FinCEN received a total of 28,651 SARs using the key phrases associated with MRBs. Several of the SARs contain more than one key phrase, which accounts for the numbers for each key phrase being greater than the total.
- FinCEN received 20,288 SARs from filers in 45 states, the District of Columbia, and the Commonwealth of Puerto Rico using the key phrase “Marijuana Limited.”
- FinCEN received 2,007 SARs from filers in 40 states, the District of Columbia, and the Commonwealth of Puerto Rico using the key phrase “Marijuana Priority.”
- FinCEN received 7,326 SARs from filers in 50 states, the District of Columbia, and the Commonwealth of Puerto Rico using the key phrase “Marijuana Termination.”
- FinCen reported that the number of depository institutions with cannabis activity rose from 340 to 400 by September 2017

2014-2017 - Aftermath of The Cole Memo

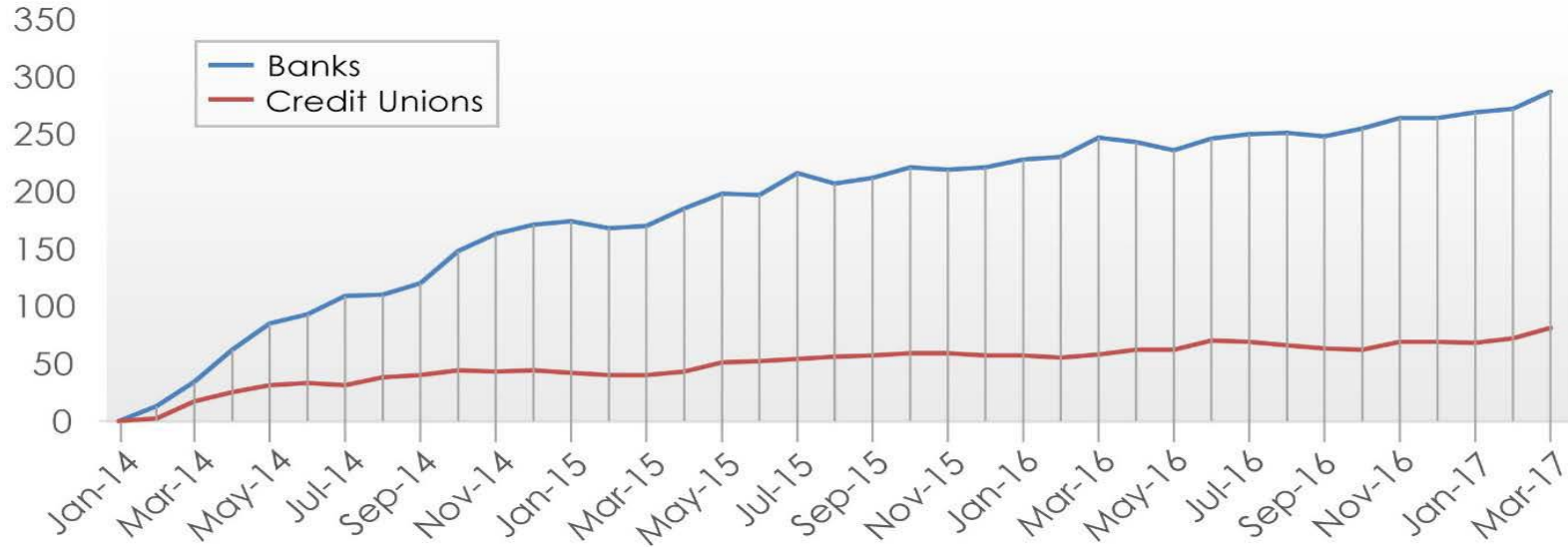
Depository Institutions Accepting Cannabis Customers – 2014-2017



Source: FinCen

2014-2017 - Aftermath of The Cole Memo

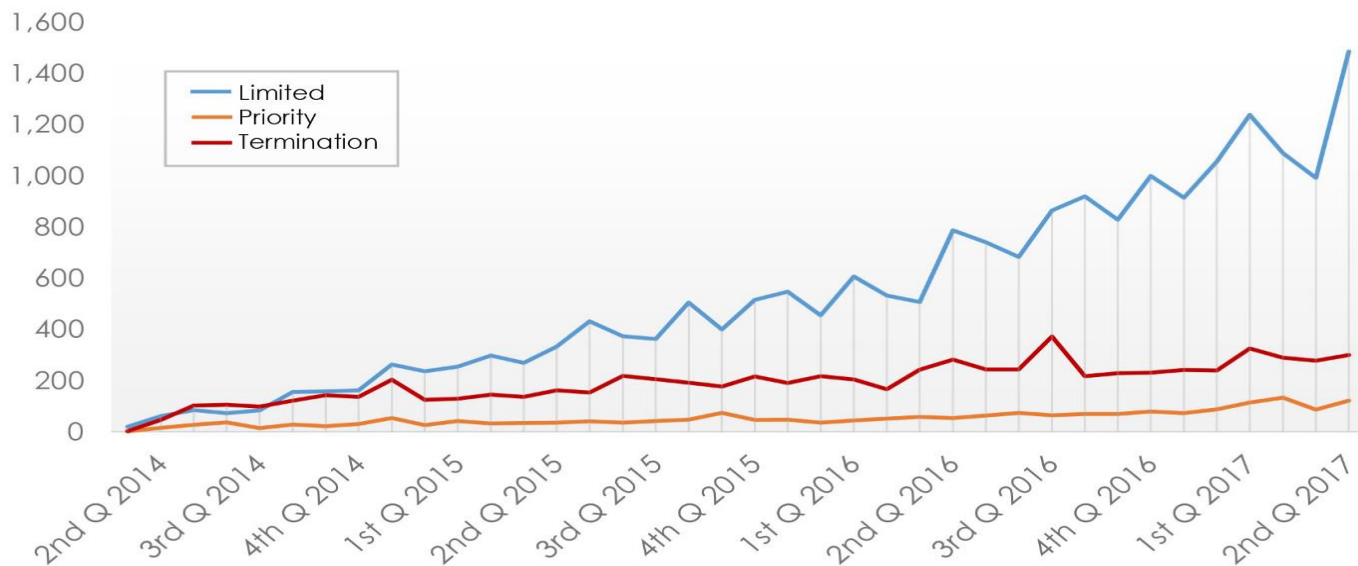
Number of Depository Institutions Actively Banking Cannabis Accounts in the US
(as reported in SARs)



Source: FinCen

2014-2017 - Aftermath of The Cole Memo

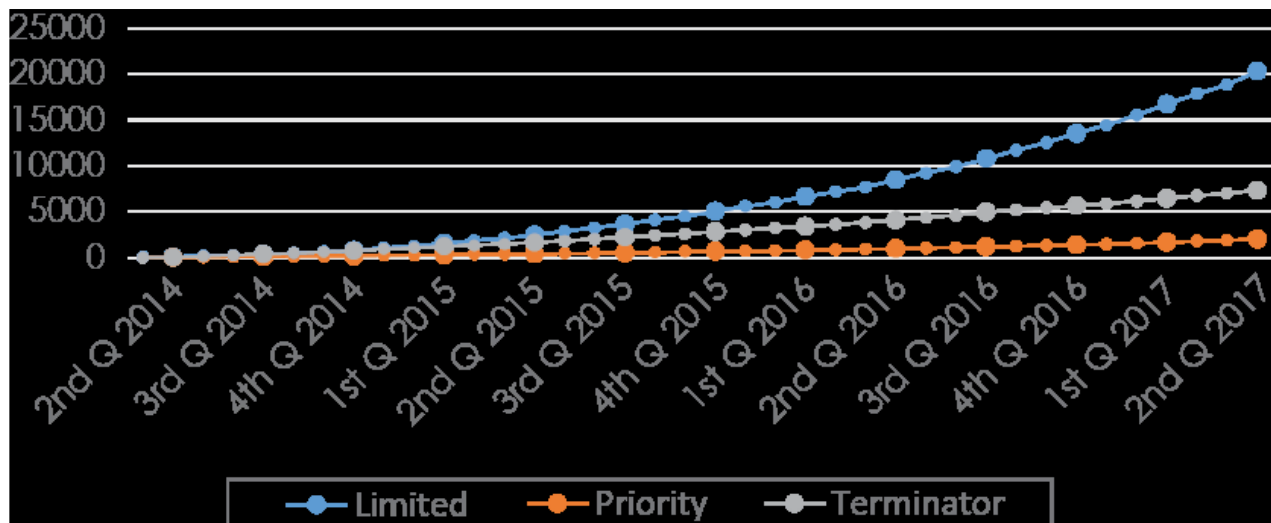
Monthly SAR totals by Key Phrase



Source: FinCen

2014-2017 - Aftermath of The Cole Memo

Cumulative SAR totals by Key Phrase



Source: FinCen

2019 FinCen Bank Stats

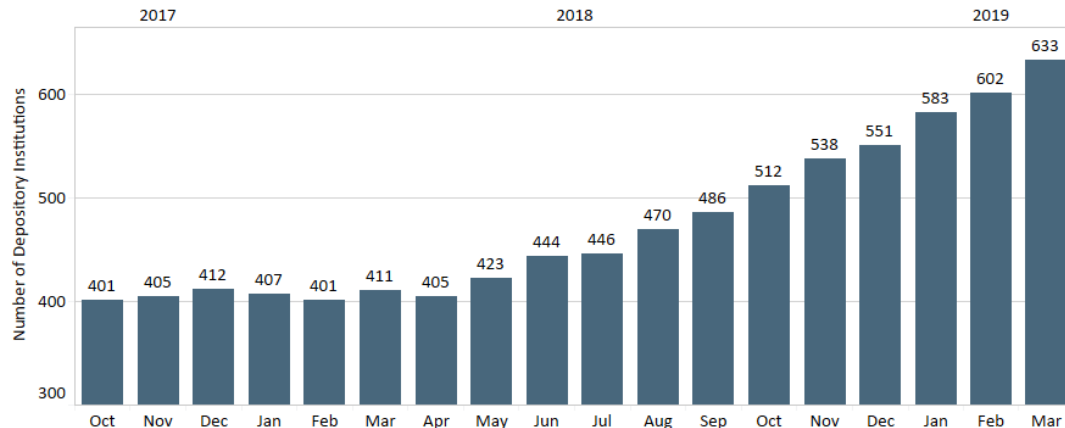
2019 – Banks Serving the Cannabis Industry



Chart of the Week

Marijuana
Business **Daily**

Depository Institutions Actively Banking Marijuana-Related Businesses in the United States: October 2017 - March 2019



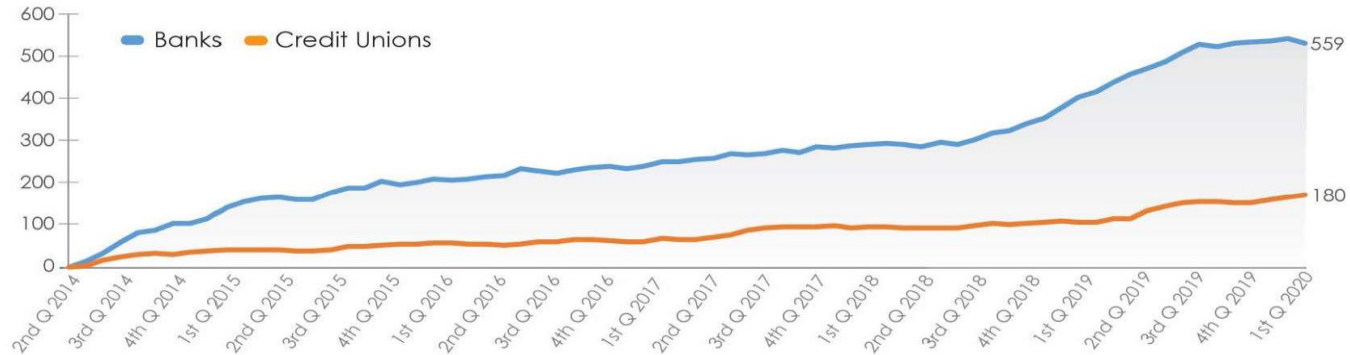
Source: U.S. Treasury Financial Crimes Enforcement Network

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Source: Marijuana Business Daily

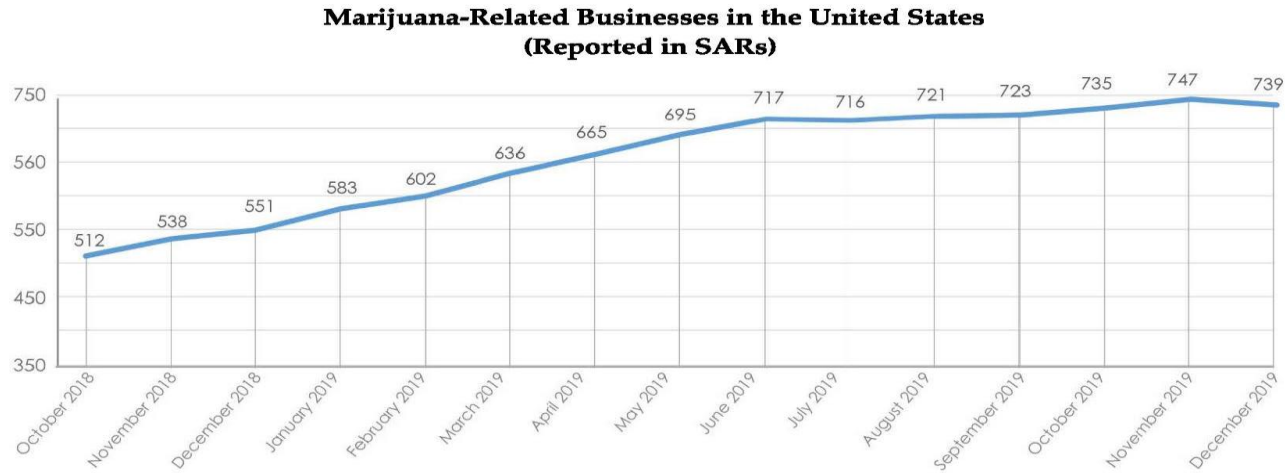
2019 – FinCen Bank Stats

(SARs filed through 31 December 2019)



Source: FinC

2019 – FinCen Bank Stats



Source: FinCen

Cannabis Banking

New Developments

The Trump Years

- On February 23, 2017, the White House Press Secretary stated that enforcement of marijuana drug laws was being considered by the White House.
- President Trump appointed Jeff Sessions, former U.S. Senator from the State of Alabama, as the US Attorney General. Sessions repeatedly stated that he was apposed to the legalization of marijuana by the Federal government and that marijuana is a dangerous substance.
- The only thing that prevented a change in Federal policy on marijuana enforcement was the “Rohrabacher-Farr Amendment,” which prohibits the use of any portion of the Federal budget to enforce marijuana laws. The Rohrabacher-Farr Amendment is annually renewable and has been attached to every budget bill since 2014. It has been extended to January 19, 2020. (The history of the Rohrabacher-Farr Amendment can be found at https://en.wikipedia.org/wiki/Rohrabacher%E2%80%93Farr_amendment)
- The Rohrabacher-Farr Amendment has been applied by the courts to dismiss Federal prosecutions of marijuana defendants. Most recently, the Federal Court of Appeals for the Ninth Circuit, in a 10-case consolidation, confirmed this principle. U.S. v. McIntosh (9th Cir, August 16, 2016) (See https://en.wikipedia.org/wiki/Rohrabacher%E2%80%93Farr_amendment for the other cases dealing with the application of Rohrabacher Farr to federal enforcement)
- The Rohrabacher-Farr Amendment did not survive the 2021 Budget bill

The Trump Years

SESSIONS REVOKES COLE MEMO

- On January 4, 2018, Attorney General Jeffrey Sessions issued a memorandum revoking the Cole Memo and directed U.S. Attorneys to follow “well established principles when pursuing prosecutions related to marijuana activities.”
- The Sessions memo stated that: "It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission. Therefore, today's memo on federal marijuana enforcement simply directs all U.S. Attorneys to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."

AFTERMATH OF COLE MEMO REVOCATION

- On January 4, 2018 (same day as the Cole Memo revocation), the Banking Law Monitor stated that: For the banks and credit unions that have already chosen to offer financial services to marijuana and marijuana- related businesses, they will likely need to reassess their risk appetite. At the very least, each financial institution currently offering financial services in the marijuana industry should examine its internal policies and procedures in light of this new risk environment. These policies and procedures (which are probably based on the Cole Memo and FinCEN guidance), will now likely need to be revised, recalibrated, and reapproved. Also, the management and governing bodies of banks and credit unions will now presumably need to revisit their decisions to offer financial services in light of this new environment, and if so, to whom and to what extent those financial services will be offered.” (Banking Law Monitor, 1-4-18)
- On January 5, 2018, the Los Angeles Times reported that: “Most banks and credit unions won’t accept deposits from marijuana businesses, but the few that do have been relying on federal guidelines that state how they can accept deposits from those companies. Although those guidelines remain in effect for now, many expect they will have to change because they were underpinned by one of the policies just rescinded — a 2013 document known as the Cole memo.” (See LA Times article 1-5-18, by James Rufus Koren)

AFTERMATH OF COLE MEMO REVOCATION

- On January 12, 2018, FinCEN spokesman Stephen Hudak told Reuters the agency's policy "remains in place."
- On January 17, 2018, House members Denny Heck (D-WA) and Ed Perlmutter (D-CO) sent a letter with 29 additional bipartisan co-signers to FinCen urging that the 2014 FinCen guidelines remain in place.
- On January 18, 2018, it was reported that a top official with the U.S. Treasury Department said that the Trump administration was currently reviewing whether to keep the 2014 FinCen Guidelines in light of the revocation of the Cole Memo. In the meanwhile, the FinCen Guidelines remain in place.

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State Bank Initiatives

CREATION OF STATEWIDE BANKS

California

- On December 19, 2017, the Los Angeles Times reported that talks are underway between the State of California, banks and federal regulators on a plan to allow banks to serve a marijuana market that is expected to grow to \$7 billion annually by 2020 in California following the California law effective January 1, 2018 allowing both medical and recreational marijuana growing and sales in California.
- It was reported that officials in Gov. Jerry Brown's administration have quietly met with representatives of 65 banks and credit unions about creating a network of financial institutions that would accept funds from cannabis businesses in a way that would guarantee federal banking regulators that the cannabis industry money is subjected to special tracking, oversight and transparency.
- The proposal would have one bank act as a central correspondent bank that would hold accounts from other banks that are doing business with marijuana firms. When a cannabis retailer wants to pay a distributor for a crop, the transaction would go from the retailer's bank through the central correspondent bank, which would instantly clear payment through the distributor's bank.
- Setting up a special clearinghouse for marijuana money would allow the state to provide a second level of compliance oversight by assigning examiners to make sure special restrictions set by the federal government are followed, suspicious activity reports are filed and the number and scope of transactions through the central bank are tracked.

State Bank Initiatives

CREATION OF STATEWIDE BANKS

New Jersey

- On January 2, 2018, it was reported that Governor-elect Phil Murphy was advocating for a New Jersey State-owned bank, if it can exempt itself from Federal oversight, and accordingly, FinCen. He believed he could build a customer base with over \$2 billion in deposits.

Hemp Banking

Hemp Industry Banking

2018 Farm Bill

2018 Farm Bill

- The Farm Bill, signed by President Trump in late December, 2018, removed industrial hemp containing less than .3% THC from the list of controlled substances under the Controlled Substances Act.
- Such hemp and its byproducts are now legal nationally to be cultivated, processed and sold in interstate commerce, subject to State laws permitting (or not prohibiting) such activity.
- The FDA is responsible for developing regulations affecting industrial hemp.
- Each State can file a hemp regulatory plan with the FDA for approval
- For now, the FDA has banned placing hemp byproducts in food.
- There are no impediments against banks taking on hemp accounts.

2018 Farm Bill

- FinCen put out Fin 2020-G001 to provide guidance to the banking industry on its position regarding providing financial services to hemp businesses.
- DI's are NOT required to file SARs for legitimate hemp businesses which are operating under State law.

Safe Banking Act of 2021

H.R. 1996; S.910

Safe Banking Act of 2021

DEFINITIONS:

- **“Cannabis-Related Legitimate Business”** - engages in a business activity involving the handling of cannabis or cannabis products, including cultivation, producing, manufacturing, selling, transporting, displaying, dispensing, distributing, or purchasing cannabis products, pursuant to a law established by a State or a political subdivision of a State (**“CRLB”**)
- **“Service Provider”** - a business or organization which sells goods or services to a cannabis-related legitimate business, or provides any business services, including the sale or lease of real property, legal or other licenced services, or other ancillary services, relating to cannabis (**“SP”**)
- **“Depository Institution”** – includes any depository institution defined in the Federal Deposit Insurance Act, a Federal credit union or a State credit union (**“DI”**)
- **“State”** – includes States, Territories, Puerto Rico, District of Columbia
- **“Hemp-Related Legitimate Business”** - participates in a business or organization that involves handling hemp, hemp-derived CBD products, etc, including cultivation, producing, manufacturing, selling, transporting, displaying, dispensing, distributing, or purchasing hemp-related products pursuant to the 2018 Farm Bill and State law (**“HRLB”**)
- **“Financial Service”** includes financial products or services, insurance, funds payment operations (credit cards, debit cards, payment cards, access devices, electronic funds transfers)

Safe Banking Act of 2021

Safe Harbors --- Federal Banking regulator (includes Federal Reserve, FDIC, OCC, Treasury Dept, FinCen) may not:

- Terminate FDIC insurance of a Depository Institution (“DI”) that provides financial services to “cannabis-related legitimate business” or “service provider”
- Penalize a DI or discourage a DI from providing financial services to a CRLB or n SP
- Encourage or incentivize a DI not to provide financial services or to cancel financial services to a CRLB or an SP
- Take any adverse action on a loan made to a CRLB or an SP, or an employee, owner or operator of each, or an owner or operator of real estate leased to, or occupied by, a CRLB or an SP
- Penalize or prohibit a DI (or an entity servicing a DI) from engaging in financial services for a CRLB or an SP
- Treats proceeds from a transaction involving activities of a CRLB or an SP as not being unlawful solely because the proceeds came from a CRLB or an SP

Safe Banking Act of 2021

Protections:

- If a State, political subdivision, or Indian Tribe allows cannabis activities, a DI, any entity providing financial services, insurer, and its officers, directors, employees, may not be held liable pursuant to any Federal law or regulation, solely for providing the financial services, or from further investing any income derived from those financial services.
- Protects the Federal Reserve banks, Federal Home Loan Banks and their officers, directors and employees, from being held liable pursuant to any Federal law or regulation, solely for providing the financial services, or from further investing any income derived from those financial services.
- Protects insurers acting within a State or Indian Tribe that has jurisdiction and a cannabis law from being held liable pursuant to any Federal law or regulation, solely for providing the financial services, or from further investing any income derived from those financial services.
- **No DI or insurer or Federal bank is required to provide financial services to the cannabis industry**

Safe Banking Act of 2021

Suspicious Activity Reports:

- Does not eliminate the requirement that SARs be filed.
- Within 6 months of enactment, the Secretary of the Treasury should publish guidance on the future of SAR reporting for the cannabis industry

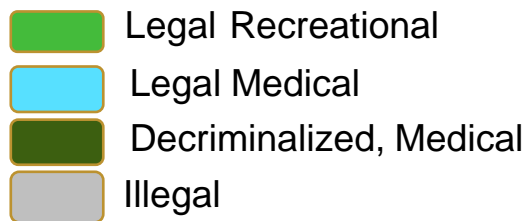
Safe Banking Act of 2021

The Hemp Industry:

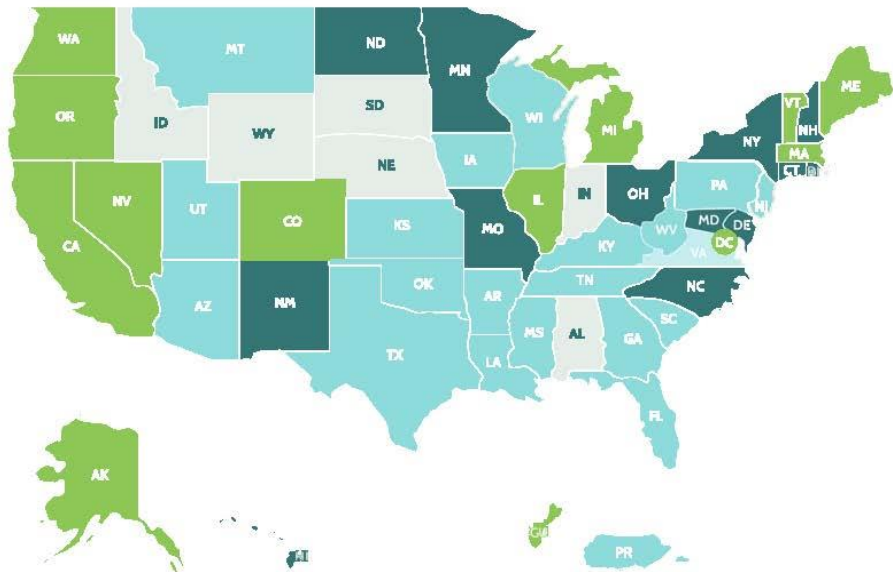
- **Within 3 months of enactment, the Federal banking regulators should publish guidance on the provision of financial services to the hemp industry, including best practices.**
- **Note that the “protections” afforded the cannabis industry are not repeated for the hemp industry – probably requires yet more legislation**

Marijuana and the States - 2021

2014-2017 - The Cole Memo



Source: Weedmaps



The Stradling Cannabis Group

OUR PRACTICE

Stradling attorneys work with our national and regional clients in:

- Navigating the federal and state regulatory framework for cannabis and CBD;
- Assisting our clients in preparing and submitting applications for licenses to operate;
- Negotiating and documenting acquisitions and all manner of contracts;
- Creating joint ventures and other business combinations;
- Conducting due diligence on the targets of such transactions;
- Advising and planning for federal, state and local taxes, such as 280E;
- Providing day-to-day regulatory advice and general business counsel;
- Compliance with labor and employment laws, including workplace training and litigating workplace claims;
- Advising on banking and alternatives to banking;
- Protecting intellectual property.

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FIRM OVERVIEW

200+

M&A transactions since 2015

\$35B

Public finance transactions in 2019

700+

Litigation matters since 2015

Stradling is a leading business law firm with more than 110 lawyers providing experienced counsel in critical transactions and disputes from 10 offices across California, Colorado, Nevada and Washington. By focusing on its clients' core needs, Stradling's size, structure and culture provide big-firm counsel with small-firm flexibility and responsiveness. That deliberate focus on client success has helped the firm attract and retain many of the most accomplished lawyers in their fields. The Stradling teams work together to provide clients with innovative solutions to their corporate and securities, finance, private equity, litigation, M&A, employment, tax, venture capital, intellectual property, healthcare regulatory, bankruptcy and restructuring, environmental, real estate, and public finance needs.