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Banks, Marijuana, and Federalism

Julie Andersen Hill

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BANKS, MARIJUANA, AND FEDERALISM

Julie Andersen Hill[†]

ABSTRACT

Although marijuana is illegal under federal law, twenty-three states have legalized some marijuana use. The state-legal marijuana industry is flourishing, but marijuana-related businesses report difficulty accessing banking services. Because financial institutions will not allow marijuana-related businesses to open accounts, the marijuana industry largely operates on a cash-only basis—a situation that attracts thieves and tax cheats.

This Article explores the root of the marijuana banking problem as well as possible solutions. It explains that although the United States' dual banking system comprises both federal- and state-chartered institutions, when it comes to marijuana banking, federal regulation is pervasive and controlling. Marijuana banking access cannot be solved by the states acting alone for two reasons. First, marijuana is illegal under federal law. Second, federal law enforcement and federal financial regulators have significant power to punish institutions that do not comply with federal law. Unless Congress acts to remove one or both of these barriers, most financial institutions will not provide services to the marijuana industry. But marijuana banking requires more than just congressional action. It requires that federal financial regulators set clear and achievable due diligence requirements for institutions with marijuana-business customers. As long as financial institutions risk federal punishment for any marijuana business customer's misstep, institutions will not provide marijuana banking.

† Associate Professor of Law, University of Alabama School of Law. This Article was presented at the Marijuana, Federal Power, and the States Symposium hosted by Case Western Reserve School of Law. The comments I received from symposium participants were invaluable. I am also grateful to Michael Hill for his helpful comments on this Article. To ward off marijuana jokes from my family and friends, I note that I have never used marijuana and do not intend to start.

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INTRODUCTION

Marijuana is illegal under federal criminal law.¹ Notwithstanding the federal ban, twenty-three states and the District of Columbia have legalized medical marijuana use.² Some states have moved

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1. 21 U.S.C. § 841(a)(1) (2012) (making it unlawful “to manufacture, distribute, or dispense . . . a controlled substance”); *id.* § 802(6) (defining controlled substance to include drugs in “schedule I”); *id.* § 812 (classifying marijuana as a schedule I drug).
 2. ALASKA STAT. § 17.37.030 (2012); ARIZ. REV. STAT. ANN. § 36-2811 (2014); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007); COLO. CONST. art. XVIII, § 14; CONN. GEN. STAT. § 21a-408a (West Supp. 2014); DEL. CODE ANN. tit. 16, § 4903A (Supp. 2014); D.C. CODE § 7-1671.02 (2012); HAW. REV. STAT. § 329-125 (2014); 410 ILL. COMP. STAT. 130/25 (West Supp. 2014); ME. REV. STAT. ANN. tit. 22, § 2423-A (Supp. 2014); MD. CODE ANN., HEALTH-GEN. § 13-3313 (West Supp. 2014); MASS. GEN. LAWS ANN. ch. 94C App., § 1-3 (West Supp. 2014); MICH. COMP. LAWS ANN. § 333.26424 (West Supp. 2014); MINN. STAT. ANN. § 152.32 (West 2014); MONT. CODE ANN. § 50-46-319 (2013); NEV. REV. STAT. § 453A.200 (Lexis-Nexis Supp. 2013); N.H. REV. STAT. ANN. § 126-X:2 (Supp. 2014); N.J. STAT. ANN. § 24:6I-6 (West Supp. 2014); N.M. STAT. ANN. § 26-2B-4 (2014); N.Y. PUB. HEALTH LAW § 3362 (McKinney 2014); OR. REV. STAT. ANN. § 475.319 (West Supp. 2014); R.I. GEN. LAWS § 21-28.6-4 (2014); VT. STAT. ANN. tit. 18, § 4474b (2014); WASH. REV. CODE § 69.51A.040 (2015). Additional states allow oil derived from marijuana to treat seizures. ALA. CODE ANN. § 13A-12-214.2 (2014); FLA. STAT. ANN. § 381.986 (West 2014); IOWA CODE § 124D (2015); KY. REV. STAT. ANN. § 218A.010(21)(b) (West 2014); MISS. CODE ANN. § 41-29-

beyond medical marijuana to recreational marijuana. Colorado and Washington first allowed recreational marijuana use.³ Alaska, Oregon, and the District of Columbia now also allow recreational marijuana.⁴ Whether for medicinal or recreational use, state legalization of marijuana conflicts with the federal ban. This tension has been called “one of the most important federalism disputes in a generation.”⁵

Yet many are willing to declare that, at least for practical purposes, the marijuana federalism battle has been won by the states. They conclude that “[t]he reality on the ground today is that the federal ban on marijuana is largely toothless.”⁶ Because the federal government lacks (or refuses to deploy) law enforcement resources, people are largely free to grow, sell, and use marijuana so long as they act consistently with state law.⁷ But this narrative largely overlooks

136(4)(2014); MO. REV. STAT. § 195.207 (2014); TENN. CODE ANN. § 39-17-402(16)(A)-(B) (2014); UTAH CODE ANN. § 58-37-4.3 (Lexis-Nexis Supp. 2014); WIS. STAT. § 961.14(4)(t) (2014).

3. COLO. CONST. art. XVIII, § 16; WASH. REV. CODE § 69.50.401(3) (West Supp. 2014).
4. Alaska Ballot Measure 2: An Act to Tax and Regulate the Production, Sale and Use of Marijuana (2014) (to be codified at ALASKA STAT. §§ 17.38.010 to .900) (taking effect in February 2015); Oregon Ballot Measure 91: Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (2014) (allowing home possession and cultivation beginning in July 2015 and allowing marijuana business applications beginning in January 2016); Washington, D.C. Initiative 71: Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014 (taking effect after a thirty-day review period). *But see* Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235 div. E, tit. VIII, § 809 (denying funding to Washington, D.C. for implementing a marijuana regulation system).
5. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1425 (2009); *see also* David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 569 (2013) (“Marijuana legalization by the states presents the most pressing and complex federalism issue of our time.”).
6. Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997, 998 (2012); *see also* Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 15 (2013) (concluding that federal enforcement of a marijuana ban “is not likely to make a sizable dent in the reduction of medical marijuana usage”); Darrell G. Ford & Marty Ludlum, *Medical Marijuana and Employment Discrimination*, 23 SO. L.J. 289, 309 (2013) (“Federal enforcement may be irrelevant in any event since only 1% of marijuana arrests occur at the federal level.”).
7. Grabarsky, *supra* note 6, at 15 (“[T]he federal government hardly has the resources or know-how to pursue local drug crimes”); Mikos,

the federal government's substantial power to conscript private parties into its law enforcement efforts. Perhaps nowhere is the federal government's indirect law enforcement power greater than in the area of banking.⁸

It is well documented that marijuana-related entities in states where marijuana is legal have difficulty obtaining banking services.⁹ The banking drought extends beyond businesses that directly handle marijuana. For example, Wells Fargo Bank closed the account of Marijuana Ventures, a magazine aimed at cannabis growers and retailers.¹⁰ When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law.¹¹

Lack of banking services stands as a formidable barrier to growth of the state-legal marijuana industry. Without access to banking services, marijuana businesses must conduct transactions in cash and

supra note 6, at 1009 (“Today . . . the federal government lacks the fiscal and political capital needed to enforce [the marijuana] ban aggressively and to quash the burgeoning medical marijuana movement.”).

8. Other indirect ways to limit the growth of the state-legal marijuana industry include taxing marijuana businesses and restricting marijuana growers' access to water from federal irrigation projects. See Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 525 (2014); Nicholas K. Geranios, *Feds Don't Want Irrigation Water Used to Grow Pot*, SEATTLE TIMES, May 21, 2014, at B8, available at 2014 WLNR 13714405.
9. See, e.g., Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 47 (2014) (“One of the most universally acknowledged problems with the current state of affairs, however, is the difficulty that marijuana businesses have in obtaining basic banking services.”).
10. Marc Stiles, *Bank Terrified by Even the Mention of the Word Marijuana*, PUGET SOUND BUS. J., June 25, 2014, available at 2014 WLNR 16832820. After press reports of Marijuana Ventures's banking travails, Wells Fargo agreed to accept the business's deposits. Marc Stiles, *Bank Isn't Afraid of the Word "Marijuana" After All*, PUGET SOUND BUS. J., Jun. 23, 2014, available at 2014 WLNR 17057524.
11. See, e.g., David Migoya, *Financing for Shop Lessors Could Lessen*, DENVER POST, Feb. 19, 2014, at A1 (“Our policy of not banking marijuana-related businesses . . . is based on applicable federal laws,” [Wells Fargo Bank] spokeswoman Christie Drumm said in an e-mail.”); Steven A. Rosenberg, *Marijuana Businesses May Be Cash Only; Banks Cite US Law in Shunning State's Industry*, BOSTON GLOBE, Aug. 10, 2014, at Z1 (“As a federally regulated financial institution, we abide by federal law and do not bank marijuana-related businesses,” said Mark Pipitone, a spokesman for Bank of America.”); David Pierson, *Cash Crop Shunned by Banks, Legitimate Pot Sellers Must Deal in Currency, Posing Safety and Logistical Problems*, L.A. TIMES, Nov. 28, 2014, at 1 (“Representatives for Wells Fargo, Bank of America, and JP Morgan Chase said they adhere to federal laws when choosing customers.”).

spend an inordinate amount of time and resources on cash management. From vaults, to cameras, to security personnel, to finding suppliers that accept cash payment, managing cash can quickly become a logistical and security nightmare.¹² In Colorado, the controller of one recreational marijuana retailer described cash management as “a full-time job.”¹³ Stories abound concerning marijuana retailers attempting to surreptitiously drive large quantities of concealed cash across town just to pay tax bills.¹⁴

At the same time, lack of banking services equates to a lack of capital for the marijuana industry. Banks are the traditional backbone of small business financing,¹⁵ but banks will not lend to marijuana-related businesses.¹⁶ The state-legal marijuana industry must instead “rely on short-term loans from individuals, usually with higher interest rates.”¹⁷ Even if a marijuana-related business finds financing, there is still the problem of not having a bank account. As a marijuana retailer hoping to finance the one-million-dollar purchase of a new building explains, “What do you say? . . . I want it in cash, guys?”¹⁸

The banking problem also raises hurdles for states seeking to allow but regulate marijuana use. Notwithstanding the security efforts of marijuana businesses themselves, the combination of marijuana and cash raises local law enforcement concerns.¹⁹ Even federal officials re-

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12. Alex Altman, *Pot's Money Problem*, TIME, Jan. 27, 2014, at 32 (describing how “marijuana moguls” “lease secret off-site warehouses to store their money and pay employees with cash-stuffed envelopes”).
 13. Eric Gorski, *Herb Empire: A Series About the Recreational Marijuana Industry—Holding the Bags*, DENVER POST, June 15, 2014, at 1A.
 14. See *id.* (delivering \$122,000 to tax authorities); Serge F. Kovalski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 11, 2014, at A1 (delivering \$51,000 to tax authorities).
 15. See NAT'L SMALL BUS. ASS'N, SMALL BUSINESS ACCESS TO CAPITAL SURVEY 4 (2012), available at <http://www.nsba.biz/wp-content/uploads/2012/07/Access-to-Capital-Survey.pdf> (reporting that within the last twelve months, 43% of small business survey respondents used a revolving line of credit from a bank, 37% used credit cards, and 29% used a bank loan).
 16. Kovalski, *supra* note 14 (“[L]egal marijuana operations, for the most part, cannot get bank loans . . .”).
 17. *Id.*
 18. Gorski, *supra* note 13.
 19. See, e.g., Steven A. Rosenberg, *Security Will Be Key at Medical Marijuana Sites: One Chief Voices Fear Police Can't Handle All Criminal Threats*, BOSTON GLOBE, Feb. 13, 2014, at Reg. 1 (“Several [police] chiefs, including Plymouth’s Michael Botieri and Lowell Police Superintendent William Taylor, are concerned about the amount of cash dispensaries will generate.”); Gorski, *supra* note 13 (reporting that “the Denver Police Department warned marijuana business couriers of a plot to rob them”).

cognize the “public safety” concern caused by “[s]ubstantial amounts of cash, just kind of lying around with no place for it to be appropriately deposited.”²⁰ So far media reports of successful robberies and related violence are limited but chilling.²¹

Perhaps more importantly from a public policy standpoint,²² when marijuana-related businesses are outside the banking system, those businesses are harder to tax and regulate.²³ Colorado and Washington allow recreational marijuana use but regulate marijuana similarly to alcohol. They prohibit the sale of marijuana to minors,²⁴ require that businesses be registered,²⁵ and take other regulatory measures designed to keep the marijuana industry separate from other illegal drugs.²⁶ Both states plan to fund the monitoring and registration of

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20. *American Forum: A Conversation with Attorney General Eric Holder* (Miller Center, University of Virginia PBS television broadcast April 23, 2014), available at <http://millercenter.org/events/2014/a-conversation-with-eric-holder>.
 21. Altman, *supra* note 12, at 34 (“In July, a medical-marijuana-dispensary owner and a security guard were shot and killed during an apparent robbery in Bakersfield, Calif. In October 2012 the industry was shaken by the grisly tale of three people who allegedly kidnapped the owner of a lucrative dispensary in Orange County. According to court documents, the assailants zip-tied the victim, tortured him and drove him to a patch of desert where they believed he had buried large sums of money. When the kidnappers could not find it, they allegedly burned him with a blowtorch, cut off his penis and doused him with bleach before dumping him along the side of a road. (He survived.)”).
 22. Other cash-intensive businesses find ways to successfully manage their robbery risk, typically through a combination of security measures and insurance. Unless somehow constrained, a cash-intensive marijuana industry would eventually do the same. While this would probably be less efficient for the marijuana industry than just contracting with banks, it may suggest that in the long-term, public safety concerns are not paramount.
 23. See Kamin, *supra* note 9, at 47 (“If marijuana exists as a cash only business, the risk of illegal diversion and non-payment of taxes is necessarily magnified.”); Steve Lynn, *Cash-Only Pot Sales Irk State, Owners*, BIZWEST (Apr. 4, 2014), <http://bizwest.com/cash-only-pot-sales-irk-state-owners/>.
 24. COLO. CONST. art. 18, § 16(1)(b)(II); WASH. REV. CODE ANN. § 69.50.357 (West Supp. 2015) (“Licensed marijuana retailers shall not employ persons under twenty-one years of age or allow persons under twenty-one years of age to enter or remain on the premises of a retail outlet.”); *id.* § 69.50.360 (providing no criminal or civil safe harbor for retailers that sell marijuana to those under twenty-one).
 25. COLO. REV. STAT. § 12-43.4-401 (2014); WASH. REV. CODE ANN. § 69.50.325 (West Supp. 2015).
 26. See, e.g., COLO. REV. STAT. § 12-43.4-306 (2014) (prohibiting individuals “whose criminal history indicates that he or she is not of good moral character” from owning or financing marijuana businesses);

growers, distributors, retailers, and medical users by taxing the marijuana industry itself.²⁷ But cash businesses have opportunities and incentives to underreport taxes.²⁸ Without anticipated tax revenues, states could potentially have trouble funding their regulatory structures. Cash businesses may also be more likely to funnel earnings to illicit activities.²⁹ Finally, tax authorities (including federal tax authorities) prefer to be paid by check, credit card, or electronic deposit, rather than with bags of cash smelling of weed.³⁰

In short, it is unsurprising that banking has been described as “the most urgent issue facing the legal cannabis industry today.”³¹

WASH. REV. CODE § 69.50.331(9) (2014) (allowing the state to consider “chronic illegal activity associated with the applicant’s operations” in issuing or renewing a marijuana business permit).

27. See COLO. REV. STAT. §§ 12-43.3-501(1), 39-28.8-501 (2014); WASH. REV. CODE § 69.50.540(4) (2014).
28. Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1504–05 (2003) (“Cash businesses present not only great opportunities for tax evasion but also a strong financial incentive to do so.”); Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL’Y REV. 37 (2009) (concluding that small cash businesses tend to evade taxes because the likelihood of being caught is low and because others in the same position also evade taxes). The tax collection problem could extend well beyond marijuana businesses themselves. For example, if a marijuana dispensary pays employees and suppliers in cash, tax authorities might have trouble tracking and taxing those payments.
29. See Alope Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Antiterrorism Financing Strategy*, 32 W. NEW ENG. L. REV. 295, 307 n.35 (2010) (noting that “cash businesses” are one source of funding for “terrorist organizations”).
30. Lynn, *supra* note 23. The IRS has assessed a 10% penalty to legal marijuana businesses that pay quarterly employee withholding taxes by cash rather than by wire through the Electronic Federal Tax Payment System. David Migoya, *IRS Fining Firms for Paying in Cash*, DENVER POST, July 3, 2014, at 1A. After one marijuana business challenged the penalty in tax court, the IRS agreed to refund its penalties. David Migoya, *IRS Deal Will Refund Fines to Denver Pot Shop*, DENVER POST, Mar. 20, 2015, at 10A. However, “[i]t remains unclear whether the IRS settlement will extend to other marijuana businesses.” *Id.*
31. Kovaleski, *supra* note 14 (quoting Aaron Smith, executive director of the National Cannabis Industry Association in Washington, D.C.); see also Trish Regan, *Dazed, Confused About Pot at Bank: Federal Moves Unlikely to Open Many Doors for Marijuana Dispensaries*, USA TODAY, Feb. 19, 2014, at 1B (calling “lack of access to banks” “the biggest challenge facing the almost-legal marijuana industry”); Walter Hickey, *Legalized Pot: Our Exclusive Look Inside America’s Emerging Marijuana Industry*, BUS. INSIDER, Aug 14, 2013, <http://www.businessinsider.com/legal-marijuana-in-colorado-2013-8> (identifying “banking re-

At its root, the issue of marijuana banking—like the issue of state legalization of marijuana more broadly—is a federalism issue. Since 1863, the United States has had a dual banking system with both federal- and state-chartered financial institutions.³² Yet, states often have little power in this dual banking system. This Article catalogs pervasive federal control over virtually all financial institutions. Federal control has important implications for how the marijuana industry can secure banking services.

As Part I explains, current criminal law gives federal authorities broad power to punish financial institutions that do business with the marijuana industry. In addition, federal banking regulators have expansive powers to discipline financial institutions, even state-chartered institutions, for providing services to the marijuana industry. States, on the other hand, have comparatively little power. States cannot stop the federal government from choosing to enforce federal criminal law, and they have little say in what activities federal regulators determine are too risky for financial institutions.

Notwithstanding this broad federal control, some proposals for banking the marijuana industry stop short of major revisions to federal law. First, federal agencies have issued guidance for financial institutions and the marijuana industry. The guidance explains that the agencies do not prioritize punishment of banks servicing state-legal marijuana businesses.³³ But the guidance is not binding and reiterates the need for expansive compliance measures. Second, Colo-

strictions” as one of “the biggest challenges facing entrepreneurs in the Colorado marijuana industry”).

32. See National Currency Act of 1863, ch. 58, 12 Stat. 665 (1863); National Bank Act of 1864, ch. 106, 13 Stat. 99 (1864) (allowing the federal government to charter and regulate national banks). Before 1863 financial institutions were only chartered under state law. See generally I JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS (1492–1900), at 170, 217 (2002).
33. See Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Marijuana Enforcement Memorandum 2013]; FIN. CRIMES ENFORCEMENT NETWORK, DEP’T OF THE TREASURY, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014), http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf [hereinafter FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE]; Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’ys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), available at [http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20\(2\).pdf](http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf) [hereinafter Cole Marijuana Related Financial Crimes Memorandum].

rado passed legislation authorizing financial cooperatives to bank marijuana businesses.³⁴ The cooperatives, however, are not beyond the federal government's reach. In fact, the state statute requires approval from the Board of Governors of the Federal Reserve before any cooperative begins operations.³⁵ Part II of the Article discusses these proposed avenues for banking the marijuana industry and explains why they fall short.

Given the pervasive nature of federal criminal and banking laws, Part III argues that widespread banking access for the marijuana industry is unlikely unless Congress acts. However, even if Congress acts, federal financial regulators will retain significant power to discourage banks from servicing the marijuana industry. If federal financial regulators insist that proper risk management requires institutions to confirm that marijuana business customers are fully compliant with every aspect of state and federal law, then few banks will offer marijuana banking. For marijuana banking to flourish, federal financial regulators must ensure that their efforts do not practically prevent banks from servicing the marijuana industry.

I. DUAL BANKING AND MARIJUANA

The United States has a dual banking system: banks can choose a federal charter issued by the Office of the Comptroller of the Currency or a state charter from a state banking regulator.³⁶ Likewise, credit unions can generally choose a federal charter from the National Credit Union Administration (NCUA) or a state charter from a state credit union regulator.³⁷ Indeed, the federalism represented by the

34. COLO. REV. STAT. §§ 11-33-101 to -128 (2014).

35. *Id.* § 11-33-104(4)(a).

36. *See* 12 C.F.R. § 5.20 (2014) (describing the Office of the Comptroller of the Currency's process for chartering a national bank); 12 U.S.C. § 1813(a)(2) (2012) (defining the term "[s]tate bank" as "any bank . . . incorporated under the laws of any State"); ALA. CODE §§ 5-5A-1 to 5-5A-16 (2014) (describing the process for chartering a state bank in Alabama).

37. *See* 12 U.S.C. §§ 1753, 1752(6) (2012) (describing the NCUA's requirements for a federally chartered credit union and defining "state credit union" as "a credit union organized and operated according to the laws of any State . . . which laws provide for the organization of credit unions similar in principle and objectives to Federal credit unions"); ALA. CODE § 5-17-2 (2014) (describing the procedure for chartering a state credit union in Alabama). Delaware, South Dakota, and Wyoming do not have state credit union acts and do not charter state credit unions. Michael Edwards, *The Changing Landscape of Financial Services Law in 2009: Federal Preemption, Credit Rating Agency Liability, and Regulatory Reform Legislation*, 6 BUS. L. BRIEF., 34 n.40 (Fall/Winter 2009–2010).

dual banking system has been described as “competitive” because regulators compete to charter institutions.³⁸ In general, national financial institutions must follow a set of federal laws while state institutions must follow state law. If the dual banking system were truly dichotomous (federal law only regulated national institutions and state law only regulated state institutions), the answer for marijuana banking would be clear: state-chartered institutions in states where marijuana is legal would be free to provide banking services to marijuana-related entities.

But state and federal financial institution regulators do not “operate in distinct spheres.”³⁹ The federal government has some regulatory control over state institutions, and state government has some control over federal institutions.⁴⁰ It is not uncommon for federal and state regulators to coordinate their enforcement efforts.⁴¹ Thus, some describe banking federalism as “cooperative.”⁴²

Others still have proclaimed the “dual banking system” dead, arguing that the current banking regulatory scheme is so pervaded by

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38. See, e.g., Helen A. Garten, *Devolution and Deregulation: The Paradox of Financial Reform*, 14 YALE L. & POL'Y REV. 65, 65–66 (1996) (“[B]ank regulation is characterized by an uneasy sharing of power among competing regulatory authorities.”); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 8 (1977) (arguing that “regulatory diversity in effect allows . . . banks to choose the set of laws and administrators under which they will operate”).
39. Cassandra Jones Havard, “Goin’ Round in Circles” . . . and Letting the Bad Loans Win: When Subprime Lending Fails Borrowers: The Need for Uniform Broker Regulation, 86 NEB. L. REV. 737, 766 (2008).
40. Robert F. Roach, *Bank Mergers and the Antitrust Laws: The Case for Dual State and Federal Enforcement*, 36 WM. & MARY L. REV. 95, 119 (1994) (stating that dual banking “is a symbiotic system with state regulatory control over federal banks as well as federal regulatory control over state banks”).
41. Havard, *supra* note 39, at 766 (noting that “federal and state banking regulation co-exist with cooperation between the regulators”).
42. See, e.g., Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 679 (1988) (“The regulatory outcomes generated by the dual banking system appear to be cooperative rather than competitive, because Congress has divided up the regulatory turf of the relevant state and federal agencies in the way most beneficial to the groups that the system regulates.”); *Bush Task Group Report on Regulation of Financial Services: Blueprint for Reform (Part 1): Hearings Before a Subcomm. of the H. Comm. on Gov’t Operations*, 99th Cong., 339 (1985) (“Because it has served the financial needs of the nation so well over time, state participation in the chartering and regulation of financial institutions can genuinely be regarded as one of the finest examples of cooperative federalism in the nation’s history.”).

federal regulation that the availability of a state bank charter has little impact on the banking system.⁴³

This section explores the dual banking system through the lens of state legalization of marijuana. It shows that when considering the marijuana question, federal control is pervasive. As an initial matter, federal and state financial institutions, like other businesses and individuals, must comply with lawfully enacted federal criminal laws.⁴⁴ In addition, through federal deposit insurance, federal holding company regulation, and federally administered payment systems, federal financial regulators have significant oversight of state-chartered banks and credit unions. This federal oversight currently leaves little room for marijuana banking.

A. *Federal Controlled Substances Act*

The federal Controlled Substances Act⁴⁵ prohibits manufacturing, distributing, or dispensing marijuana.⁴⁶ Federal law also criminalizes conduct beyond directly handling marijuana. It is illegal to aid and abet the manufacture, distribution, or dispensing of marijuana.⁴⁷ It is illegal to conspire to manufacture, distribute, or dispense marijuana.⁴⁸ And federal law punishes accessories after the fact.⁴⁹ If the quantity of

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43. See, e.g., Carl Felsenfeld & Genci Bilali, *Is There a Dual Banking System?*, 2 J. BUS. ENTREPRENEURSHIP & L. 30 (2008); see also Khalil Nicholas Maalouf, Note, *Impediments to Financial Development in the Banking Sector: A Comparison of the Impact of Federalism in the United States and Germany*, 28 MICH. J. INT'L L. 431, 440–41 (2007) (“Given the powerful trump that U.S. federalism allocates to the federal government, federal regulators have significant power over their state counterparts, undermining any notion of regulatory parity that the dual banking system’s history may intimate.”).
44. U.S. CONST. art. VI, cl. 2 (providing that “[t]his Constitution, and the Law of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).
45. 21 U.S.C. §§ 801–904 (2012).
46. *Id.* §§ 841(a)(1), 802(6), 812. There are only two minor exceptions: one for federally sanctioned drug trials and one for a federal program that provides medical marijuana to a total of eight patients. See Mikos, *supra* note 5, at 1433–34.
47. 18 U.S.C. § 2 (2012) (“Whoever . . . aids, abets, counsels, commands, induces or procures” a federal crime, or “causes” a federal criminal act to be done, “is punishable as a principal.”).
48. *Id.* § 371.
49. *Id.* § 3 (“Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”).

marijuana involved is large, prison time and fines for violations of the Controlled Substances Act are substantial.⁵⁰ The Supreme Court has upheld the federal government's authority to criminalize marijuana, even in the face of contrary state law.⁵¹

It is not hard to imagine how a financial institution and its employees could run afoul of these laws by providing banking services to a marijuana dispensary. Suppose a marijuana entrepreneur in Colorado comes to a financial institution and forthrightly explains her proposed business. Her business needs a small inventory loan, a checking account, and credit card payment processing services. By providing the loan and placing the proceeds in the checking account, the institution would be conspiring to distribute marijuana.⁵² By facilitating customers' credit card payments, the institution would be aiding and abetting the distribution of marijuana.⁵³ And by knowingly accepting deposits consisting of revenue from the sale of marijuana, the institution may be acting as an accessory after the fact.⁵⁴

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50. *See* 21 U.S.C. § 841(b)(1)(A) (2012) (providing that cases involving more than 1,000 kilograms of marijuana or 1,000 marijuana plants carry a mandatory minimum sentence of ten years in prison). Simple possession of marijuana is a less serious federal crime. *See id.* § 844.
51. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 489–95 (2001) (holding that medical necessity was not a defense to the Controlled Substances Act); Gonzales v. Raich, 545 U.S. 1, 23–33 (2005) (holding that the federal government's Commerce Clause power was broad enough to criminalize the cultivation of a small amount of medicinal marijuana for personal use).
52. *Cf.* United States v. Jobe, 101 F.3d 1046 (5th Cir. 1996) (upholding bank employees' convictions for conspiracy to commit bank fraud when employees processed fraudulent transactions after receiving enough information to conclude that the payments were fraudulent); Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002) (explaining that a doctor would conspire to violate the Controlled Substances Act if the “doctor [had] knowledge that a patient intends to acquire marijuana, agree[d] to help the patient acquire marijuana, and intend[ed] to help the patient acquire marijuana”).
53. *Cf.* United States v. Speer, 40 M.J. 230 (C.M.A. 1994) (holding that the defendant aided and abetted the offense of drug distribution by accepting cash payment from the buyer, even though the delivery of the drugs had been completed, because the defendant facilitated the “financial climax of the deal”); United States v. Burroughs, 12 M.J. 380, 381 (C.M.A. 1982) (upholding a criminal conviction for aiding and abetting the sale of marijuana when the defendant was “merely present at the scene of the crime and made change for the twenty dollar bill” used to purchase the marijuana); *Conant*, 309 F.3d at 636 (noting that “[a] doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana”).
54. *Cf.* Neal v. United States, 102 F.2d 643, 646 (8th Cir. 1939) (explaining that a defendant would be guilty of aiding and abetting a crime if (1) a crime was committed by the principal, (2) the defendant knew that the

The Department of Justice has warned that “[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.”⁵⁵ Moreover, “[s]tate laws or local ordinances are not a defense to . . . criminal enforcement of federal law . . . including enforcement of the [Controlled Substances Act].”⁵⁶

At the same time, the Department of Justice has acknowledged its “limited investigative and prosecutorial resources” and suggested that the federal government may ignore some Controlled Substances Act violations in states that legalize and regulate marijuana use.⁵⁷ In a 2013 memorandum, Deputy Attorney General James M. Cole laid out the following federal law enforcement priorities:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

principal committed the crime, and (3) “having such knowledge, the defendant aided and assisted the principal to escape punishment by suppressing important evidence . . . [by] conceal[ing] . . . the fruits and proceeds of the offense”).

55. Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’y’s, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011), *available at* <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf> [hereinafter Cole Memorandum 2011].
56. *Id.* See also Cole Marijuana Enforcement Memorandum 2013, *supra* note 33, at 4 (stating that no “state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the [Controlled Substances Act]”).
57. Cole Marijuana Enforcement Memorandum 2013, *supra* note 33, at 1.

- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.⁵⁸

The memorandum further explains that “[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems . . . conduct in compliance with those laws and regulations is less likely to threaten the federal priorities.”⁵⁹

The federal government, however, did not promise immunity from federal law. Regardless of state law, individuals, businesses, and financial institutions that violate the Controlled Substances Act can be prosecuted under federal law.⁶⁰ Even if the federal government does not prosecute financial institutions directly, institutions risk losing money as a result of criminal and civil forfeiture laws allowing federal officials to seize marijuana-related property, including bank accounts.⁶¹

B. Federal Anti-Money Laundering Statutes

Federal law, however, expects financial institutions to do more than merely avoid assisting those who manufacture, distribute, or dispense marijuana. Financial institutions must discover illegal activity, report it to federal officials, and prevent wrongdoers from accessing the banking system.

The Money Laundering Control Act⁶² makes individuals and entities subject to criminal liability for money laundering. There are several ways to commit the offense of money laundering, but two are especially relevant to financial institutions considering marijuana banking. First, a financial institution commits money laundering by conducting a financial transaction involving the proceeds of a known

58. *Id.* at 1–2 (quoting bullet points exactly as found in the Cole Marijuana Enforcement Memorandum 2013).

59. *Id.* at 3.

60. *Id.* at 4 (explaining that nothing in the memorandum “precludes investigation or prosecution, even in the absence of any one of the [priority] factors listed [in the memorandum], in particular circumstances where investigation and prosecution otherwise serves an important federal interest”).

61. See 21 U.S.C. §§ 853, 881(a)(6) (2012) (providing for criminal and civil forfeitures); see also Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 815–18 (2004) (discussing the use of federal criminal and civil forfeiture statutes in the enforcement of federal drug laws).

62. 18 U.S.C. §§ 1956–57 (2012).

“specified unlawful activity” while “knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement under State or Federal law.”⁶³ Second, a financial institution commits money laundering if it “knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000.”⁶⁴ Lest there be any doubt, the “manufacture, importation, sale, or distribution of a controlled substance,” including marijuana, is a “specified unlawful activity” under the money laundering statute.⁶⁵ Both types of money laundering can result in substantial fines and imprisonment.⁶⁶

Press reports suggest that because financial institutions are well aware of the anti-money laundering laws, some marijuana businesses attempt to gain access to banking services by disguising the nature of their business. As one owner of medical marijuana dispensaries in Washington explains, “Your savvy business owners know how to open a holding company, get a banking account through that holding company, and put their assets underneath that holding company. . . . The only way to really get banking is to not give the bank the entire story.”⁶⁷

Of course, these surreptitious businesses may be subject to money laundering charges themselves.⁶⁸ Moreover, it is far from clear that such measures result in long-term access to the banking system; banking law does not allow financial institutions to simply take customer assertions at face value.

63. *Id.* § 1956(a)(1)(B).

64. *Id.* § 1957(a).

65. *Id.* §§ 1956(c)(7), 1957(f)(3); *see also* Cole Memorandum 2011, *supra* note 55, at 2 (“Those who engage in transactions involving the proceeds of [the cultivation, sale, or distribution of marijuana] may also be in violation of federal money laundering statutes . . .”).

66. *Id.* § 1956(a) (allowing “a fine of not more than \$500,000 or twice the value of the property involved in the transactions, whichever is greater, or imprisonment for not more than twenty years, or both”); *id.* § 1957(b) (allowing for a fine and “imprisonment for not more than ten years or both”).

67. Jacob Sullum, *Marijuana Money in the Mattress*, REASON, July 2014, at 32–33.

68. Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1115 (2014) (noting that when marijuana businesses “attempt to bank surreptitiously, through the use of their personal accounts or holding companies designed to purge the taint of marijuana transactions[,]” those businesses become open to the “threat of money-laundering charges”).

Under the Bank Secrecy Act⁶⁹ and the USA PATRIOT Act,⁷⁰ financial institutions⁷¹ must maintain robust programs designed to prevent money laundering.⁷² Every financial institution must implement a customer identification program to make reasonable efforts to “verify the identity of any person seeking to open an account.”⁷³ Even when the “person” opening an account is a business, a financial institution must verify the identity of the prospective account holder.⁷⁴

Verifying the identity of the customer is only the beginning. Federal regulators expect institutions to undertake sufficient due diligence on each customer to adequately assess the risk associated with that customer.⁷⁵ For “higher-risk” accounts (like accounts belonging

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69. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of the U.S.C.).
 70. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S.C.).
 71. The Bank Secrecy Act applies broadly to all banks, credit unions, and a number of other entities that may facilitate money laundering. *See* 31 U.S.C. § 5312 (2012) (defining the term “financial institution” broadly).
 72. *Id.* § 5318(h) (requiring that financial institutions have (1) “internal [anti-money laundering] policies, procedures, and controls,” (2) a “compliance officer,” (3) “ongoing employee training,” and (4) “an independent audit function to test programs”).
 73. *Id.* § 5318(l); 31 C.F.R. § 1020.220 (2014). These are commonly referred to as “know your customer” requirements.
 74. *See, e.g.*, 31 C.F.R. § 1020.220(a)(2)(ii)(C) (providing that an institution’s customer identification program “must address situations where, based on the bank’s risk assessment of a new account opened by a customer that is not an individual, the bank will obtain information about individuals with authority or control over such account, including signatories, in order to verify the customer’s identity”).
 75. This due diligence is not specifically required by either the Bank Secrecy Act or the USA PATRIOT Act. *See* Mark E. Plotkin & B.J. Sanford, *The Customer’s View of “Know Your Customer”—Section 326 of the USA PATRIOT Act*, 1 BLOOMBERG CORP. L.J. 670, 677 (2006) (“[Customer Due Diligence] is not strictly required by Section 326 of the Patriot Act. Indeed, it is not mentioned in any law or regulation, but rather is imposed on banks by their regulators as part of the supervisory process.”). Regulators, however, believe that due diligence is required in order for financial institutions to satisfy the mandate to report suspicious transactions. *See infra* note 79 and accompanying text (describing the suspicious activity reporting requirements); FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 63–65 (2010), http://www.ffiec.gov/bsa_aml_infobase/documents/bsa_aml_man_2010.pdf [hereinafter BSA/AML EXAMINATION MANUAL] (tasking bank examiners with “[a]ssess[ing] the appropriateness and comprehensiveness of the bank’s customer due diligence policies, procedures, and processes for obtaining customer

to “cash-intensive businesses”), financial institutions must know the purpose of each account, the source of funds in the account, and the customer’s primary trade area.⁷⁶

Armed with information about the normal business of each customer, financial institutions are then tasked with identifying suspicious transactions. The Bank Secrecy Act requires that financial institutions report illegal and suspicious activities to the federal Financial Crimes Enforcement Network (FinCEN).⁷⁷ Institutions must file currency transaction reports for any transaction that involves more than \$10,000 in cash.⁷⁸ Financial institutions must also provide suspicious activity reports for transactions involving “at least \$5,000 in funds or other assets” if the bank knows, suspects, or has reason to suspect the following:

- (i) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;
- (ii) The transaction is designed to evade any requirements of this chapter or of any other regulations promulgated under the Bank Secrecy Act; or
- (iii) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.⁷⁹

Recent FinCEN guidance makes it clear that virtually every transaction conducted by a state-legal marijuana business “involve[s] funds derived from illegal activities” as described in the Bank Secrecy

information and assess[ing] the value of this information in detecting, monitoring, and reporting suspicious activity”).

76. BSA/AML EXAMINATION MANUAL, *supra* note 75, at 25, 65.

77. “FinCEN, a bureau of the U.S. Treasury, is the delegated administrator of the [Bank Secrecy Act].” *Id.* at 9. FinCEN issues rules and regulations interpreting the Act and “provid[es] investigative case support to law enforcement.” *Id.*

78. 31 U.S.C. § 5313(a) (2012); 31 C.F.R. § 1010.311 (2014).

79. 31 C.F.R. § 1020.320(a)(2).

Act regulations.⁸⁰ Thus, banks must prepare suspicious activity reports for most marijuana-related business transactions.⁸¹

Run-of-the-mill marijuana-related transactions warrant only “Marijuana Limited” suspicious activity reports. These reports identify the parties involved, state that “the filing institution is filing the [report] solely because the subject is engaged in a marijuana-related business,” and represent that “no additional suspicious activity has been identified.”⁸²

However, FinCEN expects financial institutions to conduct due diligence to determine whether the marijuana-related transactions implicate any of the Department of Justice’s Controlled Substances Act enforcement priorities or state law.⁸³ If an institution discovers transactions that might violate those priorities or state law, the institution must file a “Marijuana Priority” suspicious activity report.⁸⁴ Recognizing that “a financial institution filing a [report] on a marijuana-related business may not always be well positioned to determine whether the business implicates one of the [Department of Justice] priorities or violates state law,” FinCEN provides a long, but not exhaustive, list of “red flags” that could indicate improper conduct.⁸⁵

Among those red flags are the following:

- The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.

80. FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE, *supra* note 33, at 3 (“Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity.”).

81. Suspicious activity reports that identify only continuing activity of a previously filed report must be reported every ninety days. BSA/AML EXAMINATION MANUAL, *supra* note 75, at 76.

82. FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE, *supra* note 33, at 4. Financial institutions should file continuing activity reports for as long as these routine transactions occur. *Id.*

83. *Id.*; see *supra* note 58 and accompanying text (listing the Department of Justice enforcement priorities).

84. FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE, *supra* note 33, at 4 (emphasizing that the report “should include comprehensive detail” including identifying information and addresses of involved parties, the dates and amounts of transactions, and the reason the institution believes a “Marijuana Priority” report is warranted).

85. *Id.* at 4–5.

- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a “consulting,” “holding,” or “management” company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.⁸⁶

Finally, a financial institution must provide a “marijuana termination” suspicious activity report when the institution determines “it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program.”⁸⁷ When an institution learns that a terminated “marijuana-related business seeks to move to a second financial institution,” FinCEN encourages the first institution to voluntarily alert the second institution of its concerns.⁸⁸

FinCEN has authority to seek substantial civil money penalties from financial institutions and individuals who violate the Bank Secrecy Act.⁸⁹ Such fines often reach well into the millions of dollars.⁹⁰ Federal officials also have an even bigger hammer: criminal prosecution.⁹¹

For example, a person, including a bank employee, willfully violating the BSA or its implementing regulations is subject to a criminal fine of up to \$250,000 or five years in prison, or both. A person who commits such a violation while violating another

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86. *Id.* at 5–6 (quoting bullet points exactly as found in FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE).
87. *Id.* at 4–5 (stating that the institution’s report should “note in the narrative the basis for the termination”).
88. *Id.* at 5. USA PATRIOT Act regulations provide a safe harbor from liability for institutions that share information about possible terrorist activity or money laundering. 31 C.F.R. § 1010.540 (2014).
89. 31 U.S.C. § 5321(a)(2) (2012) (granting authority to the Secretary of the Treasury); 31 C.F.R. § 1010.810(d) (2014) (delegating authority from the Secretary of the Treasury to FinCEN).
90. *See, e.g.*, JPMorgan Chase Bank, N.A., No. 2014-1 (Dep’t of the Treasury, FinCEN Jan. 7, 2014), *available at* http://www.fincen.gov/news_room/ea/files/JPMorgan_ASSESSMENT_01072014.pdf (consenting to the assessment of a \$461 million civil penalty imposed by FinCEN for failing to report suspicious transactions associated with Bernard Madoff’s Ponzi investment scheme).
91. 31 U.S.C. § 5322 (2012) (providing criminal penalties for persons and financial institutions that willfully violate the Bank Secrecy Act or its regulations); *id.* § 5324(d) (providing criminal penalties for those who help structure transactions to evade Bank Secrecy Act reporting requirements).

U.S. law, or engaging in a pattern of criminal activity, is subject to a fine of up to \$500,000 or ten years in prison, or both.⁹²

Institutions face criminal money penalties of “not less than 2 times the amount of the transaction, but not more than \$1,000,000.”⁹³

In connection with the FinCEN guidance, the Department of Justice issued guidance regarding marijuana-related financial crimes.⁹⁴ The Department reiterated its previous enforcement priorities, including preventing the sale of marijuana to minors and preventing the sale of marijuana in states where it is illegal under state law.⁹⁵ The new guidance stated that enforcement of marijuana-related financial crimes “should be subject to the same consideration and prioritization.”⁹⁶ Thus, “if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for [money-laundering] offenses may not be appropriate.”⁹⁷ The guidance also warns that financial institutions could face prosecution if their due diligence efforts fall short.

For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers’ activities, such prosecution might be appropriate.⁹⁸

Like previous guidance, the memorandum further warns that the Department of Justice is not bound by the enforcement priorities and

92. BSA/AML EXAMINATION MANUAL, *supra* note 75, at 14 (citing 31 U.S.C. § 5322).

93. 31 U.S.C. § 5322(d).

94. Cole Marijuana Related Financial Crimes Memorandum, *supra* note 33.

95. *Id.* at 1; *see also supra* note 58 and accompanying text (listing all eight Department of Justice enforcement priorities).

96. Cole Marijuana Related Financial Crimes Memorandum, *supra* note 33, at 2.

97. *Id.* at 2–3.

98. *Id.* at 2.

can choose to investigate and prosecute anyone violating the money laundering laws.⁹⁹

In sum, a financial institution that knowingly processes transactions for marijuana-related businesses commits the crime of money laundering. Even if financial institutions believe that prosecutorial discretion will spare them criminal penalties, the Bank Secrecy Act requires costly due diligence and reporting for all marijuana-related transactions. Ignoring Bank Secrecy Act obligations is a recipe for incurring civil and criminal penalties.

C. Federal Deposit and Share Insurance

The next tool of federal control in the banking system is the ubiquitous nature of federal deposit and share insurance. The vast majority of financial institutions, whether federal- or state-chartered, are federally insured. The Banking Act of 1933¹⁰⁰ created the Federal Deposit Insurance Corporation and required that all national banks obtain FDIC insurance. All states subsequently required that their state banks obtain FDIC insurance.¹⁰¹ The story is much the same for credit unions. In 1970, Congress created the National Credit Union Share Insurance Fund to insure the shares (essentially the deposits) of federal- and state-chartered credit unions.¹⁰² Federal credit unions must be insured by the NCUA.¹⁰³ Most states also require federal in-

99. *Id.* at 3 (“[N]othing [in the guidance] precludes investigation or prosecution, even in the absence of any one of the [enforcement priority] factors . . . in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”).

100. Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.).

101. Christine E. Blair & Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, 18 FDIC BANKING REV., no. 1, 2006 at 1, 3 n.3 (“While most states [quickly] required their banks to become federally insured, some states continued to charter banks without this requirement. Banks without federal deposit insurance continued to be supervised exclusively at the state level. After the savings and loan crises in Maryland and Ohio in the mid-1980s, when state-sponsored deposit insurance systems collapsed, federal deposit insurance became a requirement for all state-chartered banks.”).

102. Act of Oct. 19, 1970, Pub. L. No. 91-468, § 203(a), 84 Stat. 994, 999–1000 (codified as amended at 12 U.S.C. § 1783 (2012)).

103. See 12 U.S.C. § 1781(a) (2012) (providing that the federal share insurance “shall insure the member accounts of all Federal credit unions and it may insure the members accounts of (1) credit unions organized and operated according to the laws of any State, the District of Columbia, [and] the several territories . . . and (2) credit unions organized and operating under the jurisdiction of the Department of Defense”).

surance for state-chartered credit unions, but a few states still allow their credit unions to purchase alternative private share insurance.¹⁰⁴

With the benefit of federal insurance comes the burden of federal regulation.¹⁰⁵ In order to retain the federal insurance, financial institutions must comply with FDIC or NCUA restrictions. To ensure state-chartered banks and credit unions comply with federal regulations, the FDIC and NCUA conduct regular examinations.¹⁰⁶

Under the laws governing federal deposit and share insurance, financial institutions and related individuals face significant civil penalties for Bank Secrecy Act violations. FDIC and NCUA examinations scrutinize financial institution compliance with the Act.¹⁰⁷ The federal insurers can bring civil money penalty actions for Bank Secrecy Act violations.¹⁰⁸ Federal insurers can also impose the “death-

104. See *infra* note 129 and accompanying text.

105. See *Weir v. United States*, 92 F.2d 634 (7th Cir. 1937) (stating that the federal government can impose conditions applicable to institutions that receive federal deposit insurance); George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 676–77 (1994) (“By agreeing to participate in the federal deposit insurance scheme, the institution gains access to a vast supply of low-cost capital for itself in the form of government guaranteed deposits. In exchange for this enormous benefit, the institution and its directors and officers become bound by the laws, regulations, and policies imposed by law . . .”).

106. 12 U.S.C. §§ 1820(b), 1784 (2012); 12 C.F.R. § 741.1 (2014). The FDIC serves as the primary federal regulator (and examiner) for state-chartered banks that are not members of the Federal Reserve System. *Who Is the FDIC?*, FDIC, <http://www.fdic.gov/about/learn/symbol/WhoistheFDIC.pdf> (last visited Jan. 23, 2015). The Board of Governors of the Federal Reserve is the primary federal regulator for state-chartered banks that have elected to be members of the Federal Reserve System. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS* 59–60 (9th ed. 2005). The National Credit Union Administration is the primary federal regulator for federally insured credit unions. *Frequently Asked Questions*, NCUA, <http://www.ncua.gov/Resources/Cnsmrs/Pages/FAQ.aspx> (last visited Jan. 23, 2015) (“All federal credit unions and state credit unions that are federally insured must report to us. Some non-federally insured credit unions also report to NCUA at the request of their state regulator.”).

107. 12 U.S.C. §§ 1818(s)(2), 1786(q) (2012); 31 C.F.R. § 1010.810(b) (2014); see also BSA/AML EXAMINATION MANUAL, *supra* note 75, at 9 (“FinCEN relies on the federal banking agencies to examine banks within their respective jurisdictions for compliance with the [Bank Secrecy Act].”). The Federal Reserve examines state-chartered banks that are members of the Federal Reserve System for Bank Secrecy Act compliance. See *infra* note 144 and accompanying text.

108. 12 U.S.C. § 1818(i) (granting authority to the “appropriate Federal banking agency”); *id.* § 1786(k) (granting authority to the NCUA for credit unions); see, e.g., TCF Nat’l Bank, AA-EC-2012-155 (Dep’t of

penalty”—revocation of deposit insurance—effectively forcing the closure of any institution that is required to have federal insurance.¹⁰⁹ Finally, insured financial institution employees who violate money laundering laws or the Bank Secrecy Act face regulatory suspension or prohibition from the banking industry.¹¹⁰

Federal deposit insurance does more than provide federal regulators an additional avenue for enforcing already applicable federal laws (like the Bank Secrecy Act). Deposit insurance gives the federal insurers authority and motivation to manage risks that could result in losses for the federal insurance funds.

Increasingly the FDIC has become concerned about the risk, including the reputational risk¹¹¹ associated with payment processing.¹¹² For a time, the FDIC provided a non-exhaustive list of “high-risk”

the Treasury, Comptroller of the Currency, Jan. 25, 2013), *available at* <http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-18a.pdf> (order consenting to the assessment of a \$10 million civil penalty for filing late suspicious activity reports and failing to maintain an adequate anti-money laundering policy).

109. 12 U.S.C. § 1818(a)(2) (providing that the FDIC Board may terminate deposit insurance for a bank if the “depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the [FDIC] in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the [FDIC]”); *id.* § 1786 (providing that the NCUA Board may terminate share insurance for a credit union that “is violating or has violated an applicable law, rule, regulation, order, or any condition imposed in writing by the Board”); *see also* Ernest L. Simons IV, Comment, *Anti-Money Laundering Compliance: Only Mega Banks Need Apply*, 17 N.C. BANKING INST. 249, 259 (2013) (“In November of 2012, First Bank of Delaware lost its charter (the so-called ‘Death Penalty’) for its [anti-money laundering] failures.”).
110. 12 U.S.C. § 1818(e)(2); *see also* BSA/AML EXAMINATION MANUAL, *supra* note 75, at 14 (“[I]ndividuals may be removed from banking [for Bank Secrecy Act violations], as long as the violation was not inadvertent or unintentional.”).
111. “Reputation risk is the risk arising from negative public opinion.” FDIC, FINANCIAL INSTITUTION LETTER NO. 44-2008, GUIDANCE FOR MANAGING THIRD-PARTY RISK 3 (2008), <http://www.fdic.gov/news/news/financial/2008/fil08044a.pdf>.
112. *Id.*; FDIC, FINANCIAL INSTITUTION LETTER NO. 3-2012, PAYMENT PROCESSOR RELATIONSHIPS 1 (2012), <http://www.fdic.gov/news/news/financial/2012/fil12003.pdf>; FDIC, FINANCIAL INSTITUTION LETTER NO. 43-2013, FDIC SUPERVISORY APPROACH TO PAYMENT PROCESSING RELATIONSHIPS WITH MERCHANT CUSTOMERS THAT ENGAGE IN HIGHER-RISK ACTIVITIES (2013), <http://www.fdic.gov/news/news/financial/2013/fil13043.pdf>.

businesses requiring additional due diligence.¹¹³ While the FDIC's high-risk list did not specifically mention the marijuana industry, it did identify unlawful Internet gambling and tobacco sales as risky.¹¹⁴ If those industries present reputational risk, it seems likely the state-legal marijuana industry does as well. After the FDIC's high-risk list attracted complaints that it unfairly targeted lawful businesses, the FDIC eliminated the list.¹¹⁵ The FDIC, however, reiterated that banks need to "properly manage customer relationships."¹¹⁶

According to the FDIC, insured banks should focus their due diligence not only on bank customers but also on third-party payment processors who provide services to businesses. "Financial institutions that fail to adequately manage these relationships may be viewed as facilitating a payment processor's or merchant client's . . . unlawful activity and, thus, may be liable for such acts or practices."¹¹⁷ In other words, an insured bank must not only know its customers; it must also know the customers of its customers.

What exactly should the due diligence entail? The FDIC provides few specifics but warns that "[f]inancial institutions need to assure themselves that they are not facilitating fraudulent or other illegal activity."¹¹⁸ Reports suggest that rather than attempt to meet the FDIC's stringent but opaque standard, some financial institutions are closing accounts for high-risk businesses, including third-party payment processors, payday lenders, gun and ammunition retailers,

113. FDIC, *Managing Risks in Third-Party Payment Processor Relationships*, SUPERVISORY INSIGHTS, Summer 2011, at 6.

114. *Id.*

115. See Rob Blackwell, *Takeaways from the "Hit List" Withdrawal*, AM. BANKER, July 29, 2014, at 1.

116. FDIC, FINANCIAL INSTITUTION LETTER NO. 41-2014, CLARIFYING SUPERVISORY APPROACH TO INSTITUTIONS ESTABLISHING ACCOUNT RELATIONSHIPS WITH THIRD-PARTY PAYMENT PROCESSORS (2014), <https://www.fdic.gov/news/news/financial/2014/fil14041.html> ("In fact, it is the FDIC's policy that insured institutions that properly manage customer relationships are neither prohibited nor discouraged from providing services to customers operating in compliance with applicable federal and state law."). Even though the FDIC no longer provides an official list of high-risk businesses, it seems likely that it and other regulators will subject some customer relationships, including those with state-legal marijuana businesses, to additional scrutiny.

117. FDIC, FINANCIAL INSTITUTION LETTER NO. 3-2012, PAYMENT PROCESSOR RELATIONSHIPS 2 (2012), <http://www.fdic.gov/news/news/financial/2012/fil12003.pdf> (emphasis omitted).

118. FDIC, FINANCIAL INSTITUTION LETTER NO. 43-2013, FDIC SUPERVISORY APPROACH TO PAYMENT PROCESSING RELATIONSHIPS WITH MERCHANT CUSTOMERS THAT ENGAGE IN HIGHER-RISK ACTIVITIES 1 (2013), <http://www.fdic.gov/news/news/financial/2013/fil13043.pdf>.

and the adult entertainment industry.¹¹⁹ If insured banks cannot meet the FDIC's regulatory due diligence requirements for these industries (which may or may not involve fraudulent or illegal conduct), it seems unlikely that they will meet the FDIC's regulatory hurdles for the marijuana industry (which clearly violates federal criminal law).¹²⁰

119. See, e.g., STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., THE DEPARTMENT OF JUSTICE'S "OPERATION CHOKE POINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? 2, 6–7 (Comm. Print 2014), <http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf> [hereinafter HOUSE OPERATION CHOKE POINT REPORT] (noting that accounts had been closed due to "heightened scrutiny required by our regulators" and "current regulatory trends affecting your industry").

In conjunction with the FDIC's increased interest in third-party payment processing, the Department of Justice implemented "Operation Choke Point"—a series of investigations into insured banks under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). See Memorandum from Michael S. Blume, Dir. Consumer Protection Branch, Dep't of Justice, to Stuart F. Delery, Ass't Att'y Gen., Civ. Div., Dep't of Justice (Sept. 9, 2013), available at <http://oversight.house.gov/wp-content/uploads/2014/05/Appendix-1-of-2.pdf> (HOCR-3PPP000329). FIRREA allows the U.S. Attorney General to seek civil penalties from entities and individuals that have committed fraud "affecting a federally insured financial institution." *Id.* (citing 12 U.S.C. § 1833a(c)(2) (2012)). These investigations may also have led banks to close accounts for some high-risk businesses. HOUSE OPERATION CHOKE POINT REPORT, *supra*.

120. The Department of Justice's position on bank processing of state-legal marijuana transactions under Operation Choke Point is less clear. FIRREA, the basis for Operation Choke Point, does not apply to transactions violating the Controlled Substances Act or money laundering laws. FIRREA applies to "fraudulent" transactions "affecting" insured financial institutions. See 12 U.S.C. § 1833a (2012). Marijuana transactions violate federal law but are not typically fraudulent. Critics have suggested that the Obama Administration might, therefore, be more lenient to banks that process marijuana transactions than it is to banks that process transactions for completely legal businesses. See William M. Isaac, DOJ's "Operation Choke Point": An Attack on Market Economy, AM. BANKER (Mar. 21, 2014, 10:00 AM), <http://www.americanbanker.com/bankthink/dojs-operation-choke-point-an-attack-on-market-economy-1066421-1.html> ("Ironically, at the same time, government is making life miserable for businesses seeking to meet consumer needs for emergency funds it is encouraging banks to offer services to marijuana dealers. While marijuana sales are authorized in a few states, it remains a felony in most states and under federal law."); HOUSE OPERATION CHOKE POINT REPORT, *supra* note 119, at 2–3 ("[A]t the same time the Administration is pressuring banks to terminate relationships with legal industries, it is providing formal guidance to banks on how to provide financial services to the marijuana industry."). Others believe the marijuana industry also risks being swept up in Operation Choke Point enforcement. See Andrew Langer, Obama's Operation Choke Point and the New American Legal System, DAILY CALLER (May 13, 2014, 5:06

Like the FDIC, the NCUA focuses its examination of insured credit unions on risk, including reputational risk.¹²¹ However, the NCUA has not identified “high-risk” industries. Moreover, the NCUA does not pursue enforcement actions based solely on reputational risk.¹²² Indeed, some reports suggest that the NCUA may welcome credit union participation in the payday lending market—a market that the FDIC believes warrants extra scrutiny.¹²³ Thus, it is possible that the NCUA would take a more favorable view of state-legal marijuana business than the FDIC.

Even if the NCUA views the marijuana industry favorably, credit unions may not be able to service the entire state-legal marijuana industry. Insured credit unions may generally only provide services to “members.”¹²⁴ Members of nationally chartered credit unions must have a “common bond.”¹²⁵ Many states also place limitations on credit union membership.¹²⁶ In addition, federally insured credit unions face

PM), <http://dailycaller.com/2014/05/13/obamas-operation-choke-point-and-the-new-american-legal-system/> (“If Operation Choke Point stands, there is nothing to prevent the targeting of legal dispensaries and growing operations having their bank accounts canceled or payment processing shut down.”).

121. See NCUA, EXAMINER’S GUIDE 1-5 to 1-8 (2004); Letter from Debbie Matz, Chairman, NCUA, to Jeb Hensarling, Chairman, House Comm. on Fin. Sercs. (June 12, 2014), *available at* http://www.nafcu.org/News/2014_News/June/Matz-Hensarlingreputationalriskreply/ [hereinafter Matz Reputational Risk Letter] (stating that the “NCUA does consider reputation risk along with six additional key risks in its supervision of federally insured credit unions”).
122. Matz Reputational Risk Letter, *supra* note 121 (“NCUA neither pursues enforcement nor otherwise takes action against supervised federally insured credit unions based on reputation risk alone. However, NCUA duly considers the impact reputation risk may have on the CAMEL ratings in concert with the six other risk factors.”).
123. Rachel Witkowski, *Bank, Credit Union Regulators Split Over Payday Loan Products*, AM. BANKER, May 2, 2014, at 1; *see also* Matz Reputational Risk Letter, *supra* note 121 (stating that the “NCUA does not force an institution to change its business practices simply on a reputation risk matter”).
124. 12 C.F.R. § 741.3(e) (2014).
125. 12 U.S.C. § 1759(b) (2012).
126. *See, e.g.*, ALA. CODE § 5-17-5 (2014) (“Credit union organization shall be limited to groups, of both large and small membership, having a common bond of occupation or association or to groups within a well-defined neighborhood, community or rural district.”). State-chartered credit unions without any common bond of membership risk their federal exemption from income tax under 26 U.S.C. § 501(c)(14) (2012). *La Caisse Populaire Ste. Marie v. United States*, 563 F.2d 505 (1st Cir. 1977).

restrictions on business lending.¹²⁷ These limitations may prevent some marijuana-related businesses from accessing credit union services.

Of course, state-chartered credit unions with private insurance escape NCUA regulation. The NCUA does not examine these institutions, and NCUA regulations are not binding on them.¹²⁸ However, only nine states currently have privately insured credit unions,¹²⁹ and there are only about 150 non-federally insured state-chartered credit unions total.¹³⁰ Of the states allowing some marijuana use, only California, Illinois, Maryland, and Nevada have privately insured state-chartered credit unions. Even in these states, it is not clear that a private insurer would be willing to insure an institution with marijuana business. Providing insurance might subject the

127. See 12 U.S.C. § 1757a (2012); 12 C.F.R. § 723.16(a) (2014) (restricting the total amount of business loans a credit union can make to “the lesser of 1.75 times the credit union’s net worth or 12.25% of the credit union’s total assets”).

128. *Efforts to Ensure Compliance and Enforcement of the Bank Secrecy Act: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 108th Cong. 77 (2004) (prepared statement of JoAnn M. Johnson, Chairman, NCUA) (stating that the “NCUA does not review examinations of privately insured credit unions and does not have enforcement authority for BSA compliance in those credit unions”).

129. Alabama, California, Idaho, Illinois, Indiana, Maryland, Nevada, Ohio, and Texas. ALA. CODE § 5-17-19(b) (2014); CAL. FIN. CODE § 16004 (Supp. 2014); IDAHO CODE ANN. § 26-2153(1) (2014); 205 ILL. COMP. STAT. 305/58 (2007); IND. CODE § 28-7-1-31.5(a) (West 2010); MD. CODE ANN. FIN. INST. § 6-701(a) (West 2002); NEV. REV. STAT. ANN. § 678.750(3) (Lexis-Nexis 2014); OHIO REV. CODE ANN. § 1733.041 (West 2009); TEX. FIN. CODE ANN. § 15.410 (West 2013); 7 TEX. ADMIN. CODE § 95.101 (2014); Disclosures for Non-Federally Insured Depository Institutions Under FDICIA, 70 Fed. Reg. 12,823, 12,823 (proposed Mar. 16, 2005). The remaining states either require federal insurance or simply do not have any privately insured credit unions. See U.S. GENERAL ACCOUNTING OFFICE, GAO-03-971, FEDERAL DEPOSIT INSURANCE ACT: FTC BEST AMONG CANDIDATES TO ENFORCE CONSUMER PROTECTION PROVISIONS 7 (2003). Currently, the only private insurer is American Share Insurance. Stephanie O. Crofton et al., *American Share Insurance: The Sole Surviving Private Deposit Insurer in the United States*, 28 ESSAYS IN ECON. & BUS. HIST. 27 (2010).

130. See Ed Roberts, *ASI-Insured to Pay 7.5 BP Premium*, CREDIT UNION J., Sept. 15, 2013, at 3 (reporting that American Share Insurance “provide[d] primary insurance (up to \$250,000 per account) for 120 state-chartered credit unions”); Ray Birch, *Recent Converts to ASI Say Choice Remains a Wise One*, CREDIT UNION J., Jan. 18, 2010, at 1 (reporting that 155 credit unions had private primary share insurance); see also NCUA, *Frequently Asked Questions*, <http://www.ncua.gov/Resources/Cnsmrs/Pages/FAQ.aspx> (last visited Jan. 21, 2015) (“There are currently fewer than 500 non-federally insured state chartered credit unions.”).

insurer to punishment under the Controlled Substances Act or anti-money laundering laws.

Nevertheless, one group of financial institution organizers is betting that a credit union charter is the path to marijuana financial services. In November 2014, organizers convinced Colorado regulators to grant Fourth Corner Credit Union a state charter.¹³¹ Marijuana businesses are specifically included as part of Fourth Corner's field of membership.¹³² Fourth Corner Credit Union has also applied to the NCUA for share insurance. If the NCUA refuses to issue share insurance, Fourth Corner's organizers plan to request that Colorado consider chartering a credit union with private share insurance.¹³³ Assuming Fourth Corner can clear other regulatory hurdles,¹³⁴ Colorado might even allow the credit union to open before it gets insurance.¹³⁵

131. David Migoya, *Overlooked Colorado Law Opened Door*, DENVER POST, Nov. 24, 2014, at 1A.

132. *Id.* (“Any cannabis-related business can be a member, as well as anyone who is a member of a nonprofit group that supports legalized marijuana.”).

133. David Migoya, *Colorado Pot Credit Union Might Get State Approval If Feds Deny Insurance, Fourth Corner May Operate in the Private Sector*, DENVER POST, Dec. 1, 2014, at 1A. Colorado allows credit unions with federal share insurance “or comparable insurance approved by the commissioner.” *Id.* (quoting Colo. Rev. Stat. § 11-30-117.5 (2014)). In 2003, Colorado's Financial Services Commissioner issued an opinion stating that no private share insurance was comparable because the NCUA had “much greater borrowing authority to cover the liquidity needs of its insured credit unions.” *Id.* Fourth Corner would likely have to convince the current commissioner to rethink this policy—at least with respect to those credit unions unable to secure federal insurance. *Id.* Fourth Corner has mentioned Lloyd's of London as a possible insurer. Matt Richtel, *The First Bank of Bud*, N.Y. TIMES, Feb. 8, 2015, at BU1.

134. Before Fourth Corner Credit Union can open, the Federal Reserve must grant it access to its payment system. See David Migoya, *Marijuana Business Owners Have No Dock to Bank Cash*, DENVER POST, Dec. 28, 2014, at 20W (“No financial institution can transact business unless they have [sic] access to the Federal Reserve System,” said Chris Mykelbust, . . . [Colorado's] commissioner of financial services”). Part I.F of this Article discusses the Federal Reserve's control over payment systems and Fourth Corner's application for access.

135. Aaron Passman, *New “Pot CU” Could Open Doors Without Insurance*, CREDIT UNION J., Dec. 15, 2014, at 1 (“A loophole in Colorado's law allows credit unions to open as long as they have applied for insurance, even if it hasn't been approved”); COLO. REV. STAT. § 11-30-117.5(3) (2014) (“No credit union shall be granted a charter by the commissioner unless such credit union has *applied* for insurance on its shares and deposits as provided in this section.”(emphasis added)).

At any rate, Fourth Corner's NCUA share insurance application may be a bellwether: if it succeeds in getting federal share insurance, that may be a reliable sign that share and deposit insurance regulators will not punish financial institutions who serve the marijuana industry. For now though, the vast majority of financial institutions are governed by federal deposit or share insurance regulations that discourage service to the marijuana industry.

D. Federal Reserve Regulation of Member Banks

Just as state-chartered financial institutions subject themselves to federal regulation by using federal deposit or share insurance, state banks subject themselves to federal regulation if they choose to become members of the Federal Reserve System. All state-chartered banks (but not credit unions) are eligible to apply for Federal Reserve membership.¹³⁶ In order to become a member of the Federal Reserve System, a state-chartered bank must make an application¹³⁷ and must purchase stock in its regional Federal Reserve Bank.¹³⁸ There are currently 850 state member banks.¹³⁹

Once a state bank becomes a member of the Federal Reserve, it must comply with federal laws governing member banks and regulations established by the Federal Reserve.¹⁴⁰ A Federal Reserve member bank must "at all times conduct its business and exercise its powers with due regard to safety and soundness."¹⁴¹ In order to meet this safety and soundness requirement, a member bank must monitor "[c]ompliance with applicable laws and regulations."¹⁴²

136. 12 U.S.C. § 321 (2012) ("Any bank incorporated by special law of any State, . . . or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System . . ."); *see also* 12 C.F.R. §§ 208.2(f), 208.3(a) (2014). National banks are required to become members of the Federal Reserve. 12 U.S.C. § 222 (2012).

137. In deciding on applications, the Federal Reserve must "consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of [law creating the Federal Reserve System]." 12 U.S.C. § 322 (2012); *see also* 12 C.F.R. § 208.3 (2014).

138. 12 U.S.C. §§ 321, 323 (2012).

139. BD. OF GOVERNORS OF THE FED. RESERVE SYS., 100TH ANNUAL REPORT 46 (2013) ("At the end of 2013, 2,003 banks (excluding nondepository trust companies and private banks) were members of the Federal Reserve System, of which 850 were state chartered.").

140. 12 U.S.C. §§ 324, 330 (2012).

141. 12 C.F.R. § 208.3(d).

142. 12 C.F.R. pt. 208, app. D-1 § II.A.5 (2014).

The Federal Reserve regularly examines state member banks.¹⁴³ Among other things, the examination evaluates a bank's risk management practices and compliance with the Bank Secrecy Act.¹⁴⁴ The Federal Reserve's Commercial Bank Examination Manual instructs examiners to evaluate each state member bank's operations to ensure that the bank does not provide deposit or loan services to illegal enterprises. The Manual explains that a bank "should perform its due diligence by adequately and reasonably ascertaining and documenting that the funds of its . . . customers were derived from legitimate means."¹⁴⁵ It further explains that "if accounts at U.S. banking entities are used for illegal purposes, the entities could be exposed to reputational risk and risk of financial loss as a result of asset seizures and forfeitures."¹⁴⁶ In addition, banks are warned that loans should only be provided "for legitimate purposes" and that loan collateral "derived from illegal activities . . . is subject to forfeiture through the seizure of assets by a government agency."¹⁴⁷

Unsurprisingly, the Federal Reserve's Commercial Bank Manual does not specifically address customer activities that are illegal under federal law but allowed under state law. Yet it is clear that the Federal Reserve, under its duty to enforce the Bank Secrecy Act and regulate member bank risk, has ample authority to impose civil penalties on state member banks that do business with the marijuana industry.

E. Federal Bank Holding Company Regulation

Next, the federal government regulates all bank holding companies. A bank holding company is simply a corporation that controls at least one bank.¹⁴⁸ Banks of all sizes choose a holding company structure for a variety of business and tax reasons.¹⁴⁹ Today about 80

143. 12 U.S.C. § 325 (2012).

144. 31 C.F.R. § 1010.810(b)(2) (2014).

145. DIV. OF BANKING SUPERVISION & REGULATION, BD. OF GOVERNORS OF THE FED. RESERVE SYS., COMMERCIAL BANK EXAMINATION MANUAL § 4128.1, at 10 (2014).

146. *Id.* at 12.

147. *Id.* at 10.

148. 12 U.S.C. § 1841 (2012).

149. See Joseph M. Ford, *One-Bank Holding Companies for Community Banks*, 14 TEX. TECH L. REV. 739, 743 (1983); Donald M. Brown, *The Effect of State Banking Laws on Holding Company Banks*, FED. RESERVE BANK OF ST. LOUIS REV., Aug./Sept. 1983, at 26. Because credit unions are owned cooperatively, they do not utilize holding company structures.

percent of banks are controlled by holding companies.¹⁵⁰ At the end of 2013, banks controlled by holding companies “held approximately 99 percent of all insured commercial bank assets in the United States.”¹⁵¹

The federal government began regulating bank holding companies in earnest with the Bank Holding Company Act of 1956.¹⁵² Under the Act as amended, the Federal Reserve has broad regulatory authority over bank holding companies and their non-bank subsidiaries.¹⁵³ As it does with member banks, the Federal Reserve scrutinizes bank holding company risk management.¹⁵⁴ “Organizations supervised by the Federal Reserve, regardless of size and complexity, should have effective compliance risk-management programs that are appropriately tailored to the organizations’ risk profiles.”¹⁵⁵ The Federal Reserve warns that “larger, more complex banking organizations” require “firmwide compliance risk management” that includes comprehensive anti-money laundering policies.¹⁵⁶ The Federal Reserve also has authority to take enforcement actions and assess civil penalties against bank holding companies and related parties.¹⁵⁷ Thus, the Federal Reserve has the power to shut off the marijuana industry’s access to not only member banks but also to other non-bank financial companies owned by a bank holding company.

F. Federal Payment Systems Administration

The federal government also wields significant control over payment systems. The Federal Reserve provides four important payment services: (1) a centralized check collection system, (2) the Automated Clearinghouse (ACH) network for processing batched electronic small-

150. BD. OF GOVERNORS OF THE FED. RESERVE SYS., 100TH ANNUAL REPORT 281 (2013).

151. *Id.* at 47.

152. Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841–50 (2012)); *see also* Ford, *supra* note 149, at 741 (“Federal regulation of bank holding companies was limited and ineffective until Congress adopted the Bank Holding Company Act of 1956.”).

153. 12 U.S.C. § 1844 (2012).

154. *See, e.g., id.* § 1844(c)(2) (authorizing the Federal Reserve to “make examinations of a bank holding company and each subsidiary of a bank holding company in order to . . . inform the Board of . . . the financial, operational, and other risks within the bank holding company system”).

155. DIV. OF BANKING SUPERVISION & REGULATION, BD. OF GOVERNORS OF THE FED. RESERVE SYS., BANK HOLDING COMPANY SUPERVISION MANUAL § 2124.07.1.1 (2015).

156. *Id.*

157. *See* 12 U.S.C. §§ 1818, 1847 (2012).

dollar payments, (3) the Fedwire system for larger electronic payments, and (4) coin and currency services.¹⁵⁸

Financial institutions use each of these systems to provide customers payment services. The Monetary Control Act of 1980 requires that the Federal Reserve offer payment system services to all “depository institutions,” regardless of whether the institution is a member of the Federal Reserve System.¹⁵⁹ Thus, the Federal Reserve currently provides services to banks and credit unions alike.¹⁶⁰ By establishing regulations and policies governing access to its payment systems, the Federal Reserve has the ability to impact practices at all financial institutions using these systems.

Accessing the Federal Reserve’s payment systems is not administratively difficult. It requires only a resolution from the financial institution’s board of directors and the completion of forms designating individuals authorized to initiate transactions and identifying the types of services wanted.¹⁶¹ Under normal circumstances, once a financial institution receives a charter, the Federal Reserve

158. *What Is the Advantage of Putting Your Money in a Fed Member Bank Versus a Bank That Is a Nonmember? How Do You Know Which Banks Are Fed Members?*, FED. RESERVE BANK OF S.F. (Oct. 2003), <http://www.frbsf.org/education/publications/doctor-econ/2003/october/member-nonmember-banks>; see also BD. OF GOVERNORS OF THE FED. RESERVE, *POLICIES: THE FEDERAL RESERVE IN THE PAYMENTS SYSTEM* (1990) [hereinafter *THE FEDERAL RESERVE IN THE PAYMENTS SYSTEM*].

159. 12 U.S.C. § 248a (2012) (requiring that the Federal Reserve provide a single fee schedule for providing payment systems services to member and non-member depository institutions); *id.* § 461(b)(1)(A) (defining depository institution to include “any insured bank . . . or any bank which is eligible to make application to become an insured bank” and “any insured credit union . . . or any credit union which is eligible to make application to become an insured credit union”).

160. See FED. RESERVE BANK SERVS., *FEDERAL RESERVE OPERATING CIRCULAR 1: ACCOUNT RELATIONSHIPS* § 2.2 (Feb. 1, 2013), http://www.frbservices.org/files/regulations/pdf/operating_circular_1_02012013.pdf [hereinafter *FED. CIRCULAR 1*] (describing the types of financial institutions that can maintain an account with a Federal Reserve Bank and access Federal Reserve payment services); *THE FEDERAL RESERVE IN THE PAYMENTS SYSTEM*, *supra* note 158 (“Since implementation of [The Monetary Control Act of 1980], the Reserve Banks have provided access to Federal Reserve services to nonmember banks, mutual savings banks, savings and loan associations, and credit unions.”).

161. See FED. RESERVE BANK SERVS., *FEDERAL RESERVE ACCOUNT MANAGEMENT GUIDE I-3* (Apr. 2014), http://www.frbservices.org/file/regulations/pdf/amg_0414.pdf; *New Financial Services Customer—Setup Service or Access*, FED. RES. BANK SERVS. http://www.frbservices.org/servicesetup/new_customer_setup.html (last visited Jan. 21, 2015).

grants the institution a “master account” and access to payment services.¹⁶² This process makes sense because the prospective financial institution has already been vetted by the chartering authority, and usually by the deposit or share insurer as well.

Of course, nothing prevents the Federal Reserve from adjusting the terms and conditions for use of the Federal Reserve’s payment systems. It is possible that future terms and conditions could cut off access to financial institutions that provide services to the marijuana industry.¹⁶³

One group of credit union organizers is learning firsthand that the Federal Reserve can prevent marijuana banking by limiting access to payment systems. As explained in Part I.C, Colorado has granted Fourth Corner Credit Union a charter to open a credit union focused on the marijuana industry.¹⁶⁴ Fourth Corner, however, is not currently operating because it has been unable to get access to the Federal Reserve’s payment systems.¹⁶⁵ Fourth Corner requested a master account in 2014.¹⁶⁶ Rather than access, “the credit union organizers got a letter from Esther George, president of the Federal Reserve Bank of Kansas City. The letter stated that issuance of a master account was ‘within the Reserve Bank’s discretion’ and required the Fed to identify the risks ‘posed by such a financial institution.’”¹⁶⁷ Months later Fourth Corner is still waiting for a decision.¹⁶⁸ It is possible that the decision will ultimately come not from the Federal Reserve Bank of Kansas City, but from the Board of Governors of the

162. See Richtel, *supra* note 133 (noting that “granting of a master account by the Federal Reserve had usually been routine” and that Federal Reserve approval “comes in days”); David Migoya, *Denver Pot Credit Union Awaits Approval*, DENVER POST, Dec. 12, 2014, at 17A (“Any credit union or bank needs a Federal Reserve master account to operate. Approval is typically procedural once a business has a valid charter and routing numbers.”).

163. For example, the National Automated Clearing House Association (NACHA) Rules—private rules governing financial institutions that use the ACH network—require that each originating depository financial institution have a contract with each customer originating payment. In that contract, the customer must “agree not to originate Entries that violate the laws of the United States.” NAT’L AUTOMATED CLEARING HOUSE ASS’N, NACHA OPERATING RULES & GUIDELINES § 2.2.2.1(c) (2014). It is possible that the Federal Reserve could choose to add a similar requirement for accessing the ACH system.

164. See *supra* notes 131–135 and accompanying text.

165. David Migoya, *Sen. Bennet Urges Fed to Move on Pot Bank Case*, DENVER POST, Mar. 10, 2015, at 9A.

166. Migoya, *supra* note 131; Migoya, *supra* note 162.

167. Richtel, *supra* note 133.

168. Migoya, *supra* note 165.

Federal Reserve in Washington, D.C.¹⁶⁹ The Board may be coordinating with the NCUA as the NCUA considers Fourth Corner's application for share insurance.¹⁷⁰ Currently, the outcome is far from certain.¹⁷¹ At a minimum, Fourth Corner's experience shows the Federal Reserve's control over its payment systems access gives it significant regulatory power.

G. Limited State Control

As the preceding parts explain, federal drug and anti-money laundering laws criminalize knowing efforts to bank state-legal marijuana businesses. In addition, federal laws aimed to prevent money laundering, protect the federal insurance funds, and manage risk give federal regulators power to punish (and close) both federal- and state-chartered financial institutions. States have no legislative or administrative authority to prevent federal authorities from enforcing federal law.

States regulators can reassure financial institutions that state regulators will allow banks to service the marijuana industry,¹⁷² but the state regulators cannot speak for federal regulators. State regulators recognize the federal government's power. When asked about banks and marijuana, Scott Jarvis, director of Washington's Department of Financial Institutions, noted that "[s]o much is in the hands of our federal counterparts."¹⁷³ He explained that Washington state financial regulators do not provide advice to banks regarding marijuana businesses. "We're not telling them 'no.' We're not telling

169. David Migoya, *Pot Bank Decision Appears Headed to Fed Board*, DENVER POST, Feb. 22, 2015, at 1K.

170. See Migoya, *supra* note 165 ("Although Fourth Corner has a Colorado charter to operate, it cannot formally open its doors until it has the master account, which in part hinges on deposit insurance by the National Credit Union Administration, which is also pending.").

171. In another context, commentators have expressed skepticism that the Federal Reserve will grant payment system services to financial institutions aimed primarily at servicing the marijuana industry. See *infra* note 220. After all, processing payments for marijuana business violates criminal conspiracy and anti-money laundering laws. See *supra* notes 52–56, 63–66, and accompanying text.

172. Steve Daniels, *Banks Reluctant to Bankroll Pot Biz*, CRAIN'S CHI. BUS., Mar. 23, 2015, at 26 ("We are telling banks that it is a business decision on their part but that our examiners will not criticize a bank if they choose to provide financial services to medical cannabis providers," a spokesman for the Illinois Department of Financial and Professional Regulation [said] in an email.").

173. Jerry Cornfield, *Banks Willing to Serve Pot Industry, But Not Able*, DAILY HERALD (Everett, Wash.) (Oct. 28, 2013), <http://www.heraldnet.com/article/20131028/BIZ/710289959/Financial-centers-willing-but-not-able-to-serve-pot-industry>.

them ‘yes.’”¹⁷⁴ Instead, the Washington Department of Financial Institutions issued a statement to banks considering marijuana business customers. The statement recommended hiring “independent legal counsel” and having counsel explain “the difference between a law and a policy of prosecutorial discretion (or priority-setting) related to enforcement of a law.”¹⁷⁵

II. ATTEMPTS TO BANK THE MARIJUANA INDUSTRY

Notwithstanding the clarity of federal criminal law and the pervasiveness of federal banking regulation, both the federal and state governments are experimenting with measures to facilitate marijuana banking. So far efforts have been incremental; they have not made major changes to federal criminal or banking laws. At the federal level, the Department of Justice and FinCEN have issued guidance explaining current enforcement priorities. At the state level, Colorado has passed legislation authorizing the creation of a financial cooperative to provide banking services to the state-legal marijuana industry. Neither of these measures addresses the core concern for banks: at any time federal law enforcement and regulators may change their guidance and punish financial institutions for past practices.

A. Federal Guidance

As explained in Part I, federal law is clear: it is illegal to manufacture, distribute, or dispense marijuana, or to knowingly provide banking services to those who do.¹⁷⁶ However, as states began to legalize marijuana and the state-legal marijuana industry began to flourish, the industry began to experience banking problems. States that had legalized marijuana clamored for federal authorities to address the issue.¹⁷⁷

174. *Id.*; see also Robert Barba, *Former Colorado Bank Regulator Discusses Dodd-Frank, Pot, Bitcoin*, AM. BANKER, Jan. 3, 2014, at 4 (reporting that Fred Joseph, who served as Colorado’s Banking and Securities Commissioner from 2011 until 2014, believes that “as long as the specter is there at the federal level,” he would “be shocked if banks want to take” marijuana industry accounts).

175. WASH. DEP’T OF FIN. INSTS., PROVIDING BANKING SERVICES TO MARIJUANA RELATED BUSINESSES UNDER I-502 1 (2d ed. 2014), <http://www.dfi.wa.gov/documents/banks/marijuana-faqs.pdf> (emphasis omitted).

176. See *supra* Parts I.A and I.B.

177. See Ed Roberts, *Governors Ask NCUA, Bank Regulators for Guidance on Pot*, CREDIT UNION J., Oct. 3, 2013, at 1; Kevin Wack, *Regulators Pressed to Act on Marijuana Business*, CREDIT UNION J., Dec. 23, 2013, at 1.

Recognizing their limited enforcement resources, the Department of Justice and FinCEN issued guidance addressing marijuana banking.¹⁷⁸ As previously explained, the FinCEN guidance describes when financial institutions should file “Marijuana Limited,” “Marijuana Priority,” and “Marijuana Termination” suspicious activity reports.¹⁷⁹ According to FinCEN, the guidance was intended to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”¹⁸⁰ The Department of Justice guidance explains its marijuana enforcement priorities and suggests that banks may not face criminal prosecution if they only service state-legal marijuana businesses.¹⁸¹

Financial institutions’ response to the guidance was tepid. According to Don Childears, president and CEO of the Colorado Bankers Association, the guidance did little to facilitate marijuana industry banking. “At best, [it] amounts to ‘Serve these customers at your own risk’ and it emphasizes all those risks.”¹⁸² The American Bankers Association agreed: “[The] guidance . . . doesn’t alter the underlying challenge for banks. . . . As it stands, possession or distribution of marijuana violates federal law, and banks that provide support for those activities face the risk of prosecution and assorted sanctions.”¹⁸³

Still, FinCEN was quick to declare the guidance a success in opening the doors for marijuana banking. In August 2014, FinCEN Director Jennifer Shasky Calvery revealed that FinCEN had received 502 “Marijuana Limited” reports.¹⁸⁴ She also announced that based on the reports, “there are currently 105 individual financial institutions from states in more than one third of the country engaged in banking relationships with marijuana-related businesses.”¹⁸⁵ Thus she concluded that “from our perspective the guidance is having the intended

178. See Cole Marijuana Enforcement Memorandum 2013, *supra* note 33; FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE, *supra* note 33; Cole Marijuana Related Financial Crimes Memorandum, *supra* note 33.

179. See *supra* notes 80–88 and accompanying text.

180. FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE, *supra* note 33, at 1.

181. See *supra* notes 57–59, 94–99, and accompanying text.

182. Pete Yost, *U.S. Offers Banks Rules On Marijuana*, BOSTON GLOBE, Feb. 15, 2014, at B3.

183. Andrew Grossman, *Banks Can Do Business with Legal Pot Sellers*, WALL ST. J., Feb. 15, 2014, at B2.

184. Jennifer Shasky Calvery, Dir., FinCEN, Remarks at the 2014 Mid-Atlantic AML Conference 5 (Aug. 12, 2014), http://www.fincen.gov/news_room/speech/pdf/20140812.pdf.

185. *Id.* at 4.

effect. It is facilitating access to financial services, while ensuring that this activity is transparent and the funds are going into regulated financial institutions responsible for implementing appropriate [anti-money laundering] safeguards.”¹⁸⁶

But those who believe that the FinCEN and Department of Justice guidance entirely solves the marijuana-banking problem are wrong. First, the marijuana industry continues to report difficulty in securing access to banking services.¹⁸⁷ Even if every “Marijuana Priority” report involved a separate marijuana business, the 502 reports cover far less than the state-legal marijuana industry. There are more than 502 state-licensed marijuana businesses in Colorado alone.¹⁸⁸

Second, it is far from clear that most financial institutions feel comfortable offering services to the marijuana industry. There are more than 13,000 banks and credit unions.¹⁸⁹ The 105 institutions that have filed “Marijuana Priority” reports are a small drop in the bucket when considering the larger banking industry.¹⁹⁰ Since the FinCEN guidance, some of the largest banks, including Bank of America and Wells Fargo, have reiterated their position: they do not offer services to the marijuana industry.¹⁹¹ Perhaps even more telling, press reports

186. *Id.* at 5.

187. *See* Rosenberg, *supra* note 11.

188. Memorandum from the Colo. Legis. Council Staff, to Use of Recreational Marijuana Sales Tax Revenue Comm., Background on Marijuana Policy and Tax Revenue 2 (Aug. 11, 2014), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1252029129668&sbinary=true> (listing 496 medical marijuana centers, 152 medical marijuana-infused product manufacturers, 221 retail marijuana stores, 66 retail marijuana product manufacturers, and 13 retail marijuana testing facilities). Data on marijuana businesses in other states are not comprehensive. *See, e.g.*, Jim Camden, *State to Pursue Dispensaries' Taxes*, SPOKESMAN-REV. (Spokane, Wash.), May 1, 2014, at A6 (reporting that Washington had 286 registered medical marijuana businesses); Emily Alpert Reyes, *Taxing Illegal Pot Shops Targeted*, L.A. TIMES, Dec. 10, 2014, at AA3 (reporting that “[m]ore than 450 medical marijuana shops have renewed their paperwork to pay business taxes”).

189. FED. DEPOSIT INS. CORP., ANNUAL REPORT 5 (2013) (reporting that the FDIC provided insurance for 6,800 institutions at the end of 2013); NAT'L CREDIT UNION ADMIN., ANNUAL REPORT 9 (2013) (reporting that there were 6,554 federally insured credit unions at the end of 2013).

190. Furthermore, it is not clear that these 105 financial institutions began offering banking services in response to the guidance. A FinCEN report stated that “87 banks in Colorado had business relationships with marijuana dispensary businesses between June 2011 and September 2012.” Wack, *supra* note 177.

191. John Hielscher, *The Problem with Financing Pot*, SARASOTA HERALD-TRIB., Aug. 6, 2014, at A01 (“We abide by all federal laws, and the

rarely identify financial institutions that will provide banking services to the industry.¹⁹² FinCEN's report data show that since the guidance, "[j]ust over 475 [reports] filed to date reflect 'Marijuana Termination.'"¹⁹³ This suggests financial institutions may actually be choosing to end relationships with state-legal marijuana businesses.¹⁹⁴

It is not hard to see why financial institutions are still skittish. Marijuana is still illegal under federal law. The FinCEN and Department of Justice guidance does not change that. Any bank or credit union providing services could face criminal prosecution at any time.¹⁹⁵ Even if financial institutions were willing to rely on public statements about enforcement priorities, the Department of Justice's assurance to banks is quite weak. It promises only that it "may not"

distribution and sale of marijuana is illegal, so we don't bank the sale of medical or recreational marijuana,' said Cristie Drumm, a spokeswoman for [Wells Fargo Bank.]); Rosenberg, *supra* note 11 ("As a federally regulated financial institution, we abide by federal law and do not bank marijuana-related businesses,' said Mark Pipitone, a spokesman for Bank of America.").

192. My news search found only seven: O Bee Credit Union, Numerica Credit Union, Salal Credit Union, First Security Bank of Nevada, Mechanics Bank, Community Bank of the Bay, and Sterling Bank. Michael Muckian, *Washington CUs Open "Joint" Biz Accounts*, CREDIT UNION TIMES, Feb. 4, 2015, at 1 (reporting that O Bee Credit Union was among the "about two dozen banks and credit unions serving the [marijuana] industry"); *Pot Banking Regulations So Close, Yet So Far Away*, SPOKESMAN-REV. (Spokane, Wash.), May 9, 2014, at A13 (reporting that in Washington Salal Credit Union and Numerica Credit Union will "accept growers and processors of marijuana as members"); Kathleen Pender, *Banking on Legal Pot Biz*, SAN FRANCISCO CHRON., May 25, 2010, at D1 (reporting that in California, Mechanics Bank, Community Bank of the Bay, and Sterling Bank all provide deposit and payment services for some medical marijuana dispensaries); Eli Segall, *CEO Exits Las Vegas Bank for Marijuana Startup*, LAS VEGAS SUN, Mar. 15, 2015, at 1 (reporting that First Security Bank of Nevada "had taken more than 50 clients who were looking to open medical marijuana companies"); see also David Migoya, *Pot Shops in Colo. Keeping Account Info in the Bag*, DENVER POST, Feb 28, 2014, at 9A ("Colorado Springs State Bank was the last institution in [Colorado] to openly bank marijuana businesses. That ended in 2011, when it closed about 300 accounts, worried about banking businesses that are, under federal law, illegal."). "Jenifer Waller, senior vice president at the Colorado Bankers Association, says she knows of fewer than 10 banks that have gone through a regulatory exam and gotten the OK" to offer banking services to the marijuana industry. Kevin Wack, *Banks "Loosen Up" on Pot Business as FDIC Adopts Fincen Guidance*, AM. BANKER, Oct. 27, 2014, at 1.

193. Shasky Calvery, *supra* note 184.

194. The data do not identify the location of the report or whether the report related to a business registered under a state marijuana law. *Id.*

195. See *supra* Parts I.A and I.B.

prosecute financial institutions who provide financial services to state-legal marijuana businesses.¹⁹⁶ Actual enforcement practices could change anytime—with or without warning.¹⁹⁷

Furthermore, the federal guidance seems to set the bar for financial institution compliance quite high. When comparing compliance costs with the profits available from the growing but still small marijuana industry, banking the industry may not make economic sense.¹⁹⁸ The paperwork associated with anti-money laundering reporting may be enough to dissuade some institutions from banking some marijuana businesses.¹⁹⁹ And then there is the problem of confirming that none of the institution's customers deal with marijuana in a way that implicates the Department of Justice's enforcement priorities. Among other things, a financial institution needs to ensure that its customers do not sell marijuana to minors and do not sell marijuana to customers that may transport it across state lines.²⁰⁰ Such due diligence efforts will be costly.²⁰¹ Due to these concerns,

196. See *supra* note 97 and accompanying text.

197. See Toni Lapp, *Legalized Marijuana Presents a Thorny Issue for Banks*, BANK NEWS, Apr. 2014, at 42 (“Furthermore, with regard to the banking activities of marijuana vendors, it is difficult to predict what stance the Justice Department in the next presidential administration will take.”). The statute of limitations for violations of the Controlled Substances Act and for money laundering is five years. 18 U.S.C. § 3282 (2012).

198. See Gordon Oliver, *Where Will Legal Marijuana Stash Its Cash?*, COLUMBIAN (Vancouver, Wash.), June 8, 2014, at A1 (observing that low interest rates and marijuana businesses' limited need for large, long-term capital investments mean that “the marijuana industry is not a sure-fire sugar daddy for Washington banks”); Kim Gittleson, *Colorado's Marijuana Firms Beg Banks to Take Their Cash*, BBC NEWS (Feb. 20, 2014), <http://www.bbc.com/news/business-26248396> (“Quite honestly banks don't care a lot right now—[marijuana business is] not a high priority for them at this point in time,’ says [Colorado Bankers Association President Don] Childears.”).

199. See Wack, *supra* note 192 (reporting that, according to Lance Ott, a principal in Guardian Data Systems, the small number of banks handling marijuana business are “doing a hell of a lot of due diligence”).

200. See *supra* notes 58, 94–99, and accompanying text.

201. According to Robert Rowe III, Vice President and Senior Counsel at the American Bankers Association's Center for Regulatory Compliance, “the only way [a bank] could even begin to come close to” ensuring that customers do not violate the Department of Justice and FinCEN guidance “would be [to have] an embedded employee who was at the business 24/7.” Josh Long, *Fearful of Prosecution, Banks Still Shunning Marijuana Dispensaries*, NATURAL PRODS. INSIDER (June 16, 2014), <http://www.naturalproductsinsider.com/news/2014/06/fearful-of-prosecution-banks-still-shunning-mj.aspx> (noting that even an embedded employee would not “guarantee[] . . . 100 percent compliance”); see also *Banking the “Legal” Marijuana Industry Is Still a Risky Business*,

some financial institutions that will accept accounts from marijuana growers will not accept accounts from marijuana dispensaries.²⁰² Most financial institutions, however, seem to avoid marijuana businesses altogether.

Finally, the Department of Justice and FinCEN are only two of the many federal authorities with regulatory oversight of financial institutions. Even if a financial institution felt confident that it could rely on Department of Justice and FinCEN guidance and that it could implement a robust (but economic) compliance program, the FDIC, NCUA, or Federal Reserve might determine that the institution was not effectively managing its risk and take civil enforcement action.²⁰³

Recognizing the broad regulatory oversight of the federal banking agencies, the governors of Colorado and Washington sent a letter to the agencies asking for further clarification on the marijuana banking question.²⁰⁴ The Federal Reserve, FDIC, NCUA, and OCC responded with a joint letter that did little but confirm the uncertain state of marijuana banking.²⁰⁵

SPENCER FANE BRITT & BROWNE LLP (Feb. 20, 2014, 9:35 AM), <http://www.spencerfane.com/communitybankcounselors/blog.aspx?entry=508> (“Based upon the plain language of the Guidance, it would appear that a bank seeking to provide financial services to the legal marijuana industry is essentially tasked with active, day-to-day policing of these businesses in a manner that extends far beyond account monitoring.”).

202. See Oliver, *supra* note 198 (reporting that Numerica Credit Union and Salal Credit Union do not bank marijuana retailers because “sales to minors or to out-of-state residents could put the credit unions at risk”); Missy Baxter, *Washington Credit Unions Move to Serve Pot Growers*, CREDIT UNION TIMES, May 21, 2014, at 7 (“Salal opted to focus on growers and producers because it’s anticipated they will have fewer[] but larger transactions, and require relatively less oversight to comply with federal guidelines.”); see also Pender, *supra* note 192 (reporting that one bank described medical marijuana dispensaries as “more work [because] they are cash intensive”).
203. See *supra* Parts I.C–I.F.
204. Letter from John W. Hickenlooper, Governor, Colorado, and Jay Inslee, Governor, Washington, to Janet Yellen, Chairman, Bd. of Governors of the Federal Reserve, Martin J. Gruenberg, Chairman, FDIC, Thomas J. Curry, Comptroller, OCC, and Debbie Matz, Chairman, NCUA (May 23, 2014), available at http://www.governor.wa.gov/documents/Financial_Regulation_Guidance_Request052314.pdf (stating that “[b]anks and credit unions in Colorado and Washington are waiting for the Federal Banking Agencies to furnish the instructions given to bank and credit union examiners before deciding whether and how to provide banking services to state licensed recreational marijuana businesses”).
205. Letter from Thomas J. Curry, Comptroller, OCC, Martin J. Gruenberg, Chairman, FDIC, Janet L. Yellen, Chair, Bd. of Governors of the Fed. Reserve, and Deborah Matz, Chairman, NCUA, to Jay Inslee, Governor, Washington (Aug. 13, 2014), available at <http://www.dfi.wa.gov/>

According to the joint letter, “[t]he DOJ is primarily responsible for the interpretation and enforcement of federal criminal laws related to marijuana.”²⁰⁶ The letter explains that the Federal Reserve, FDIC, NCUA, and OCC are reviewing both the FinCEN and Department of Justice marijuana guidance “for inclusion in the Federal Financial Institutions Examination Council BSA/Anti-Money Laundering Examination Manual.”²⁰⁷

The letter also notes that “[a]s the Agencies have stated previously, generally the decision to open, close, or decline a particular account or relationship is made by a bank or credit union, without involvement by its supervisor.”²⁰⁸ The letter suggests a financial institution’s decision to service an account should be “based on the bank or credit union’s particular business objectives, its evaluation of the risks associated with offering particular products or services, and its capacity and systems to effectively manage those risks.”²⁰⁹

Yet the banking regulators’ joint letter stops short of sanctioning marijuana banking. It explains that “further clarity from Congress on the legal treatment of state-licensed marijuana-related businesses under federal law would provide greater legal certainty for both marijuana-related businesses and banks and credit unions.”²¹⁰ This seems to acknowledge that the banking regulatory guidance does not override federal criminal law and is subject to change at any time.

In sum, non-binding guidance from some of the federal officials that oversee banking activity is not sufficient to assure financial

documents/banks/gov-inslee-interagency-response.pdf [hereinafter Joint Agency Letter].

206. *Id.*; see also Wack, *supra* note 192 (“The FDIC’s decision to use the guidance is significant because federal banking agencies had previously refused to say whether they’d align themselves with the document . . .”).

207. Joint Agency Letter, *supra* note 205. There are some anecdotal reports that after the FinCEN guidance, a very small number of banks have gone through a regulatory examination and received tacit approval from their regulators to engage in some form of marijuana banking. David Migoya, *Bank Regulators’ Thawing Position*, DENVER POST, Oct. 22, 2014, at 14A (reporting that some “banks have received ‘tacit’ and ‘passive’ approval from regulators to continue the banking relationship with marijuana businesses”); Wack, *supra* note 192 (reporting that fewer than ten banks had passed through a regulatory exam without receiving sanctions for marijuana banking). On the other hand, there are also anecdotal reports that after the FinCEN guidance, some NCUA examiners are instructing credit unions that there is no legal way to bank the marijuana industry. Missy Baxter, *CUs Forces [sic] to Close Marijuana Accounts*, CREDIT UNION TIMES, Oct. 29, 2014, at 1.

208. Joint Agency Letter, *supra* note 205.

209. *Id.*

210. *Id.*

institutions they can offer services to the state-legal marijuana industry without risking federal reprisal.

B. State-Chartered Financial Cooperatives

When the federal guidance failed to alleviate the marijuana banking problems, Colorado tried to take matters into its own hands. In 2014 Colorado passed legislation allowing licensed marijuana businesses to form financial services cooperatives.²¹¹ These “cannabis credit co-ops”²¹² are empowered to provide financial services, including deposit services and loans, to marijuana-related businesses.²¹³ Entities eligible for co-op membership include “licensed marijuana businesses, industrial hemp businesses, and entities that provide goods or services to licensed marijuana businesses and that provide documentation to the co-op of an inability to get comparable services from a bank or credit union.”²¹⁴

Although Colorado cannabis credit co-ops do not need to secure federal deposit insurance²¹⁵ and will not be owned by a federally regulated holding company,²¹⁶ the co-ops are still dependent upon federal banking regulators. To be granted a charter, each co-op must “provide the Commissioner written evidence of approval by the Federal Reserve System Board of Governors for access by the co-op to the

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211. COLO. REV. STAT. §§ 11-33-101 to -128 (2014); *see also* David Migoya, “*Is the Fed Going to Do What the Banks Won’t Already Do? No. Marijuana Financial Co-ops Face More Work, but Analysts Say They’re Unlikely to Succeed*,” DENVER POST, May 18, 2014, at 6K (noting that the legislation was passed because “[f]ederal regulators and prosecutors have done little to alleviate the [marijuana banking] logjam, offering advice on how to approach the issue, but ultimately causing banks to keep what could be a lucrative relationship at arm’s length”).
212. COLO. REV. STAT. §§ 11-33-104(1), -108(2) (noting that a co-op may be called a “cannabis credit cooperative,” “marijuana credit cooperative,” “cannabis credit co-op,” “marijuana credit co-op,” “cannabis financial services cooperative,” “marijuana financial services cooperative,” “cannabis financial services co-op,” or “marijuana financial services co-op”).
213. *See id.* § 11-33-107 (describing the powers of a cannabis credit co-op). A co-op may also “[m]ake deposits in state and national financial institutions insured by an agency of the federal government” and invest in government securities. *Id.*
214. *Id.* § 11-33-106(2)(a) (describing entities eligible for membership in a cannabis credit co-op).
215. Indeed, each co-op must disclose to its members and prospective members that it is “[n]ot federally insured.” *Id.* § 11-33-106(4)(a)(II)(B).
216. *See id.* § 11-33-116 (noting that “[t]he capital of a cannabis credit co-op consists of the payments that have been made to it in shares by its members”).

Federal Reserve System in connection with the proposed depository activities of the co-op.”²¹⁷

By requiring that any cannabis credit co-op get “approval . . . for access . . . to the Federal Reserve System,” the Colorado legislature was trying to ensure that any co-op would have access to the payment services provided by the Federal Reserve.²¹⁸ After all, lack of access to payment systems was the primary banking problem lawmakers hoped the cannabis credit co-ops would alleviate.²¹⁹ Unless the Federal Reserve granted access to its payment systems, the co-ops would not be able to effectively meet the marijuana industry’s banking needs.

Is the Federal Reserve likely to grant cannabis credit co-ops access to any of the Fed’s payment services? Most commentators say no, although few offer a precise legal basis for their conclusion.²²⁰

One potential problem is that, by design, cannabis credit co-ops are not banks or credit unions. Under the Monetary Control Act of

217. *Id.* § 11-33-104(4)(a).

218. The language of the statute is somewhat vague and could possibly be read as requiring membership in the Federal Reserve System. But it is not clear that a cannabis credit co-op would qualify for membership in the Federal Reserve System. Federal Reserve membership is open to all state-chartered banks. *See supra* note 136 and accompanying text. However, under Colorado law, a cannabis credit co-op is not a bank and cannot use “the word ‘bank’ . . . in its articles of incorporation, trade name, or an advertisement or offer of services.” *Id.* § 11-33-108. Furthermore, Colorado law regarding “bank” charters specifically authorizes banks to purchase Federal Reserve stock. *See id.* § 11-103-603. The cannabis credit co-ops were not granted that power. *Id.* at § 11-33-107 (describing the powers of a cannabis credit co-op).

219. *See id.* § 11-33-102 (noting that “most Colorado-licensed marijuana businesses must operate almost entirely on a cash-only basis”).

220. *See, e.g.,* Ray Birch, *Marijuana Industry Needs a Light From CUs and Banks*, CREDIT UNION J., Aug. 4, 2014, at 1 (“The cannabis credit co-ops will be violating federal law, as well, and the assumption is that the Federal Reserve won’t allow the cooperatives access to the ACH system if they are violating federal law,” [Michael Elliott, executive director of the Marijuana Industry Group,] said.); Heather Draper, *Colorado’s New Cannabis Co-Ops Law: Bankers, Pot Advocates Agree It Probably Won’t Work*, DENVER BUS. J. (June 9, 2014, 7:35 AM), http://www.bizjournals.com/denver/blog/finance_etc/2014/06/colorado-s-new-cannabis-co-ops-law-bankers-pot.html?page=all (“They’ll never get access to the Federal Reserve System, and if they can’t do that, the co-ops will never be formed,” [Don Childears, president and CEO of the Colorado Bankers Association,] said.); Migoya, *supra* note 211 (“Arguably it’s all a charade, thinking that some members of the (Federal Reserve) board . . . will allow access to the payment system,” said Bert Ely, a banking structure consultant in Alexandria, Va.”).

1980,²²¹ the Federal Reserve must provide services to “nonmember depository institutions” at the same price as it does to members of the Federal Reserve.²²² “Depository institution” is defined to include all federally insured financial institutions.²²³ “Depository institution” also includes banks, mutual savings banks, savings banks, credit unions, and savings associations that are eligible to apply for federal deposit or share insurance.²²⁴ The cannabis credit co-op does not fit into any of those categories. According to Colorado law, a cannabis credit co-op cannot be federally insured.²²⁵ Furthermore, a cannabis credit co-op is not a bank or credit union and cannot use “bank” or “credit union” in its name.²²⁶ Thus, the co-ops are not the type of financial institution to which Congress expected the Federal Reserve to regularly provide payment services.

Perhaps the Federal Reserve could interpret the Money Control Act to allow services to additional types of financial institutions, but so far it has not done so. Instead, Operating Circular 1, which governs access to Federal Reserve services, refers to the statutory definition of “depository institution,” which includes various types of banks and credit unions.²²⁷

Colorado cannabis credit co-ops might argue that under the Money Control Act, the Federal Reserve should give “due regard to . . . the provision of an adequate level of [payment] services nationwide.”²²⁸ The co-ops may argue that the marijuana industry clearly lacks access to basic payment services.²²⁹ The efficacy of this argument, however, would be undercut so long as marijuana is illegal under federal law. Any illegal enterprise is likely to have difficulty accessing payment systems. That is precisely the purpose of anti-money laundering laws.

If the Federal Reserve provided payment services to a cannabis credit co-op, the Federal Reserve and its employees would be engag-

221. Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections throughout 12 U.S.C.).

222. 12 U.S.C. § 248a (2012).

223. *Id.* § 461(b)(1)(a).

224. *Id.*

225. COLO. REV. STAT. § 11-33-106(4)(a)(II)(B) (2014).

226. *Id.* § 11-33-108.

227. FED. CIRCULAR 1, *supra* note 160, at § 2.2.

228. 12 U.S.C. § 248a(c)(3) (2012).

229. Members of any cannabis credit co-op must “provide[] documentation to the co-op of an inability to get comparable services from a bank or credit union.” COLO. REV. STAT. §§ 11-33-103(5), 11-33-104(2)(a)(II) (2014).

ing in money laundering.²³⁰ They might also be conspiring to manufacture and distribute marijuana, aiding and abetting the manufacture and distribution of marijuana, and acting as accessories after the fact for the manufacture and distribution of marijuana.²³¹ Even if many policymakers at the Federal Reserve were convinced of the necessity of marijuana banking, it is difficult to imagine the Federal Reserve openly defying federal drug law.²³²

But federal hurdles are not the only impediments to the creation of cannabis credit co-ops. First, a group of marijuana businesses must decide to form a co-op. Given the legal uncertainty, private actors may be unwilling to invest in start-up plans for a co-op. So far, Colorado has not received any applications.²³³ Indeed, one group of financial institution organizers interested in marijuana banking have decided to pursue a standard credit union charter rather than a cannabis credit co-op charter.²³⁴ Second, Colorado must develop an administrative structure for regulating co-ops²³⁵—a process that could take several years.²³⁶ According to Chris Myklebust, Colorado’s

230. *See supra* notes 63–66 and accompanying text.

231. *See supra* notes 52–56 and accompanying text.

232. The Federal Reserve is currently considering a master account application from Fourth Corner Credit Union. *See supra* notes 164–171 and accompanying text. While Colorado granted Fourth Corner’s charter under the standard credit union statute rather than the cannabis credit co-op statute, the credit union plans to primarily serve the marijuana industry. *See supra* notes 131–132. Thus, the Federal Reserve’s decision on Fourth Corner’s application may inform what the Federal Reserve would do if presented with an application from a cannabis credit co-op.

233. David Migoya, *Green Light Doesn’t Suffice*, DENVER POST, Sept. 14, 2014, at 7K.

234. *See supra* notes 131–135, 164–171, and accompanying text (describing organizers’ efforts to form Fourth Corner Credit Union in Colorado).

235. *See Migoya, supra* note 211 (quoting Chris Myklebust, Colorado Commissioner of the Division of Financial Services, as stating that Colorado needs to “put rules into place, come up with standards and bylaws, and a foundation for what one of these cooperatives will look like from an organizational standpoint”).

236. *See Migoya, supra* note 211 (reporting that Chris Mykelbust, Colorado Commissioner of the Division of Financial Services, believes the regulatory structure will not be completed until 2015, or “more likely 2016”). This timing could create a pointless standoff between federal and state regulators. In order for the Federal Reserve to grant access to its payment systems, Colorado would need to robustly regulate the co-ops. The Federal Reserve does not typically perform extensive due diligence before granting an eligible financial institution access to its services. *See supra* notes 161–162 and accompanying text. However, the Federal Reserve might rethink this policy if Colorado’s regulatory system was undeveloped or insufficient to inspire confidence and trust.

Commissioner of the Division of Financial Services, “[r]ule-making wouldn’t occur until after access to the federal system was granted and an application [was] approved by [the Colorado Commissioner].”²³⁷ As part of the approval process, Colorado regulatory authorities would “convene a stakeholder group, including all trade associations representing banks and credit unions, to identify conflicts that may exist” between the cannabis credit co-op law and other state law.²³⁸ Banking trade associations may be hostile to co-ops, particularly if co-ops can bank customers who are off limits to traditional financial institutions.²³⁹ Regulators may not grant any co-op charters “until the general assembly resolves all of the identified state law conflicts.”²⁴⁰

Finally, even if Colorado authorities issue a cannabis credit co-op charter, it is not clear that the co-op could operate consistent with Colorado law. Under Colorado law, the co-op must “comply with all applicable requirements of federal law, including . . . [t]he federal ‘Bank Secrecy Act.’”²⁴¹ Yet, elsewhere, the Colorado statute requires a co-op to disclose to its members that “[f]ederal law does not authorize financial institutions, including marijuana financial services cooperatives, to accept proceeds from activity that is illegal under federal law, such as that from licensed marijuana businesses.”²⁴² If a cannabis credit co-op must comply with federal law and cannot accept deposits from state-legal marijuana businesses, it will likely be of little use to the marijuana industry.

Colorado, on the other hand, seems unwilling to develop a regulatory structure until the Federal Reserve has granted access to its system. *See supra* note 235; *see also* Migoya, *supra* note 233 (“The legislation is still scant in details, with a cart-before-the horse sense about it. A group cannot apply to [Colorado] for approval until it has gotten tacit approval from the Federal Reserve board. And the Federal Reserve doesn’t usually do anything tacitly. But it also can’t approve access to the financial system without a formal application, and only a real bank or financial service can apply.”).

237. Migoya, *supra* note 233.

238. COLO. REV. STAT. § 11-33-104(4)(b)(II) (2014).

239. *See* Heather Draper, “Cannabis Credit Co-ops” Bill Aims to Get Colorado Pot Businesses Access to Fed Payment System, DENVER BUS. J. (May 1, 2014, 5:32 PM) http://www.bizjournals.com/denver/blog/finance_etc/2014/05/cannabis-credit-co-ops-bill-aims-to-get-colorado.html?page=all (reporting that the Colorado Bankers Association was “neutral” on the co-op legislation because it did not believe the legislation would work, and the Independent Bankers of Colorado were opposed to the legislation because it created “an entirely new type of financial institution”).

240. COLO. REV. STAT. § 11-33-104(4)(b)(II).

241. *Id.* § 11-33-126(1)(a).

242. *Id.* § 11-33-106(4)(a)(I).

Given the potential problems with cannabis credit co-ops, some believe that the primary utility of Colorado's legislation is to "force the federal government's hand" on the issue of marijuana banking.²⁴³ Colorado Commissioner Myklebust explains: "We want an answer, on the record, a written response. Can we do this?"²⁴⁴ Others think the co-op legislation might motivate Congress to address the marijuana banking issue.²⁴⁵ It is still too soon to say whether the co-op legislation will motivate action by federal legislators or regulators. One thing, however, is clear: Colorado's cannabis credit co-op legislation is not itself the solution to the marijuana banking problem.

III. THE PATH TO BANKING SERVICE

Department of Justice and FinCEN guidance failed to adequately address marijuana banking. Colorado's cannabis credit co-op legislation will also fail to provide banking for the marijuana industry. These failed attempts show that for banking services to become widely available to the marijuana industry, Congress must act. But federal legislation alone may not be enough. Federal financial regulators have broad authority over all financial institutions. Regulators may be tempted to use this authority to require that banks and credit unions police the marijuana industry's compliance with state and federal law. If compliance costs are too high or the risk of punishment too great, financial institutions will continue to avoid the marijuana industry. Marijuana banking requires not just clear statutory authority to provide services; it requires a regulatory and enforcement approach recognizing the benefits of bringing the state-legal marijuana industry within the mainstream banking system.

A. *Congressional Action*

Marijuana banking access problems cannot be solved by the states acting alone for two reasons. First, marijuana is illegal under federal law. Second, federal law enforcement and federal financial regulators

243. Migoya, *supra* note 211 ("[The cannabis credit co-op bill] was conceived by marijuana-industry stakeholders, with help from Gov. John Hickenlooper's office, as a means to force the federal government's hand at deciding with finality whether pot and banking can go together.").

244. *Id.*; see also Gail Sullivan, *With Regular Banks Wary of Pot, Colorado Lawmakers Okay Special Bank for Marijuana Trade*, WASH. POST (May 8, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/05/08/colorado-lawmakers-okay-pot-bank/> (reporting that Colorado state Senator Pat Stedman explained the co-op legislation was an attempt to "force a dialogue" in Washington).

245. Draper, *supra* note 239 ("If it doesn't work, this says to Congress, "Get off the dime. You need to address [marijuana banking]," [Don] Childears[, president and CEO of the Colorado Bankers Association,] said.").

have significant power to punish institutions that do not comply with federal law. Unless Congress acts to remove one or both of those barriers, most financial institutions will not provide services to the marijuana industry. Nearly all commentators agree congressional action is necessary.²⁴⁶ Even FinCEN Director Jennifer Shasky Calvery concedes marijuana banking is “a unique and complex issue” and “only legislative change can fully and completely address it.”²⁴⁷

Congress could facilitate banking services for the marijuana industry by legalizing or decriminalizing marijuana. Federal legislation would not necessarily mean that all marijuana-related activities are allowed. Congress could choose to legalize only some marijuana-related activities (medical use, use by adults, etc.). Alternatively, Congress could broadly decriminalize marijuana instead allowing states freedom to determine marijuana policies. Even if Congress chooses not to criminalize the possession, sale, or cultivation of marijuana, states could impose their own prohibitions and restrictions.²⁴⁸ From a banking perspective, the key is that marijuana-related entities must have the capacity to operate without running afoul of state or federal law. If marijuana businesses cannot operate without violating federal and state law, and banks must follow the law, then banks will not be able to provide services to marijuana businesses.

Another option for congressional action is legislation aimed narrowly at the marijuana banking problem. Rather than adjust the legality of marijuana, Congress could excuse banks from complying with the law.²⁴⁹ Proposals in this vein range from expansive to narrow.

246. See, e.g., Alex Altman, *Colorado's New Pot Banking Law Won't Solve Cash Problems*, TIME (June 6, 2014), <http://time.com/2839059/colorados-new-pot-banking-law-wont-solve-cash-problems/>; Don Childears, Opinion, *Marijuana Industry Banking Requires an Act of Congress*, DENVER POST, Feb. 12, 2014, at 19A; Jeffrey S. Gard, *Banks, Stay Wary of Marijuana-Related Businesses*, AM. BANKER (Mar. 18, 2014, 2:02 PM), <http://www.americanbanker.com/bankthink/banks-stay-wary-of-marijuana-related-businesses-1066321-1.html>.

247. Jennifer Shasky Calvery, Dir., FinCEN, Remarks at the Association of Certified Anti-Money Laundering Specialists (ACAMS) 19th Annual International AML and Financial Crime Conference (Mar. 18, 2014), available at http://www.fincen.gov/news_room/speech/html/20140318.html.

248. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 562 (2010) (“[U]nless the federal government decided to preempt state law, it could not unilaterally ‘legalize’ a controlled substance even if it wanted to.”).

249. See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 371 (2014) (noting that such legislation “may be . . . the only real solution to the [marijuana] banking dilemma”).

On the expansive end of the spectrum is a 2013 bill introduced by Representative Ed Perlmutter from Colorado—the Marijuana Business Access to Banking Act.²⁵⁰ Under the bill, “[a] depository institution that provides financial services to a marijuana-related legitimate business, and the officers, directors, and employees of that depository institution, shall be immune from Federal criminal prosecution or investigation for providing those services.”²⁵¹ Additionally, federal banking regulators could not “terminate or limit deposit insurance” or “prohibit, penalize or otherwise discourage a depository institution from providing financial services to a marijuana-related legitimate business.”²⁵² The bill, however, has not been reported out of committee and seems unlikely to gain traction.²⁵³ Still, legislation that, like Representative Perlmutter’s bill, directly addresses many of the impediments to marijuana banking may hold hope for future marijuana banking.²⁵⁴

Other proposed federal marijuana banking legislation is narrower. In July 2014, as part of the financial services appropriations bill, the House of Representatives passed a provision introduced by Representative Denny Heck from Washington.²⁵⁵ The provision would prohibit funds appropriated by the bill from being used

to penalize a financial institution solely because the institution provides financial services to an entity that is a manufacturer, producer, or a person that participates in any business or organized activity that involves handling marijuana or marijuana products and engages in such activity pursuant to a law established by a State or a unit of local government.²⁵⁶

To become law, the provision would need to be approved by the Senate and President as well. Even if enacted, the provision is insufficient to open doors to marijuana banking. Federal financial

250. Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. (2013).

251. *Id.* § 3.

252. *Id.* § 2.

253. See Blake & Finlaw, *supra* note 249, at 371 (noting that “the chances of [the Marijuana Business Access to Banking Act] moving through a gridlocked Congress any time soon seem very low”).

254. Even the proposed Marijuana Business Access to Banking Act is somewhat incomplete. For example, it does not address federal financial regulation or enforcement aimed at bank holding companies. It also does not mention share insurance provided by the NCUA and does not directly address access to the Federal Reserve’s payment systems services.

255. Financial Services and General Government Appropriations Act, H.R. 5016, 113th Cong. § 916 (as passed by House, July 16, 2014).

256. *Id.*

institution regulators generally do not rely on congressional appropriations for funding. The FDIC, NCUA, and Federal Reserve are all funded by assessments on regulated institutions and investment income.²⁵⁷ In addition, the provision does not change federal prosecutors' ability to bring criminal charges related to marijuana banking. Thus, even with the appropriations rider, federal law enforcement and federal financial regulators would retain significant power to punish financial institutions for providing marijuana banking services.

In sum, marijuana banking requires congressional action. Congress can either decriminalize marijuana or protect financial institutions from federal punishment or both. Congressional measures that leave open the possibility federal officials will punish financial institutions that provide services to the marijuana industry will not be sufficient.

B. Reasonable Federal Banking Regulation

While congressional action is a necessary first step toward banking the marijuana industry, congressional action may not be sufficient. Federal legislative reforms will almost certainly leave the system of federal financial regulators intact. Federal anti-money laundering laws will remain in effect. Federal regulators will retain their authority to supervise the safety and soundness of financial institutions. And the Federal Reserve will continue to offer its payment services. If current regulatory guidance is any indication,²⁵⁸ federal regulators may use anti-money laundering and safety and soundness concerns as justifications to set a high bar for financial institution due diligence when dealing with the marijuana industry. If the compliance bar is so high that any customer misstep can result in federal criminal or civil liability for the financial institution, then marijuana banking will not occur.

To be sure, some due diligence is reasonable and warranted. Financial institutions can and should check to make sure customers have the necessary permits to operate a marijuana-related business. Institutions can file suspicious activity reports when transactions seem inconsistent with normal business operations. Institutions could even monitor press reports to check for indications that customers are involved in illegal activity.²⁵⁹

257. See RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, *THE LAW OF FINANCIAL INSTITUTIONS* 61–62 (5th ed. 2013). FinCEN does receive congressional appropriations. See Financial Services and General Government Appropriations Act, H.R. 5016, 113th Cong. (as passed by House, July 16, 2014).

258. See *supra* notes 58, 94–99, and accompanying text.

259. Current FinCEN guidance requires that financial institutions check for these and other “red flags.” FINCEN MARIJUANA-RELATED BUSINESSES GUIDANCE, *supra* note 33, at 5–7.

On the other hand, financial institutions are not well equipped to ensure that marijuana-related businesses are fully compliant with federal and state law. For example, a financial institution cannot easily confirm that its customer is not selling marijuana to minors. Likewise, a financial institution cannot guarantee that its customer is not selling marijuana that is later transported to a state where marijuana is illegal.²⁶⁰ While such stringent compliance requirements may be justified when marijuana is illegal under federal law, such requirements would not be justified if Congress decriminalizes marijuana or prevents federal punishment for marijuana banking. If Congress opens the door for marijuana banking, federal financial regulators should ensure their efforts do not practically prevent banks from servicing the marijuana industry.

CONCLUSION

During the 1992 presidential campaign, a reporter asked candidate Bill Clinton whether he had ever smoked pot. Soon-to-become-President Clinton famously responded that he had “experimented” with it but “didn’t inhale.”²⁶¹ This provides an apt metaphor for the federal government’s current approach to banking the marijuana industry. On one hand, the Department of Justice and FinCEN seem to be experimenting with marijuana. Their guidance suggests they will not punish financial institutions for providing services to state-legal marijuana-related businesses. On the other hand, the federal government’s marijuana experimentation falls far short of a deep inhale. Marijuana is illegal under federal law. Financial institutions that service the marijuana industry face possible federal criminal and civil punishment. As long as marijuana banking is illegal and punishable under federal law, financial institutions will avoid state-legal marijuana businesses.

For the state-legal marijuana industry to access banking, reforms must begin with Congress. Congress could open the door to marijuana banking by either decriminalizing marijuana or by removing criminal and civil penalties associated with marijuana banking. At the same time, federal financial regulators must set achievable due diligence expectations for banks offering services to the marijuana industry. If federal regulators unreasonably require financial institutions to police marijuana businesses’ compliance with all federal and state law, institutions will continue to avoid the marijuana industry.

260. See *supra* note 201 and accompanying text.

261. Thomas Petzinger Jr., *Clinton and Brown Run into Questions Involving Some of Their Past Actions*, WALL ST. J., Mar. 30, 1992, at A12 (“[W]hen I was in England, I experimented with marijuana a time or two. And didn’t like it and didn’t inhale, and never tried it again.” (quoting Bill Clinton)).

