

No Credit for Cannabis: Legal Obstacles to Tech Use by State-Compliant Businesses

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Introduction

Modern technology affords businesses many luxuries. From the ease of communication via telephone and email to using electronic databases for records, advances in modern times have alleviated a good deal of traditional problems for business owners. But in one industry, one of the most widely used and beneficial technologies of the 21st century – the credit card – has been causing more issues than it fixes.

The recent wave of state level legalization of cannabis has been littered with confusion. States are attempting to figure out how to regulate the sale of a substance that has traditionally been illegal, and many of those attempts are centered around recordkeeping and tracking of product sales. However, states are dramatically hindered in pursuit of this goal by federal law and its continued classification of cannabis as a Schedule I drug.¹ This classification, as set by the Nixon administration, has been left

alone at the federal level for over 40 years – even as public opinion shifted in the opposite direction and states began to legalize the substance within their borders. This continued silence and lack of adaptation from the federal government on this issue has caused significant problems for cannabis businesses operating in legal states, including the topic of this essay: credit card payments.



The Root of the Issue

The effects of cannabis's placement on Schedule I of the Controlled Substances Act are wide ranging. In addition to the direct effect of making any activity involving cannabis illegal at the federal level,² the Schedule I classification also affects application of other federal legislation. The Bank Secrecy Act (BSA) is a perfect example, and lies at the center of the financial struggles of cannabis businesses across the country. The BSA is a federal banking regulation statute that makes it illegal for banks to knowingly engage in financial transactions involving the proceeds of unlawful activity, with vigorous sanctions (and the potential to lose their license) for financial institutions who don't comply.³ As cannabis is still federally unlawful activity, this statute effectively precludes financial institutions from doing business with compliant cannabis related businesses in legal states – unless they want to risk their entire business.

Under the BSA, financial institutions are required to assist the federal government in detecting and curtailing money laundering by submission of Suspicious Activity Reports (SARs).⁴ These reports have been subject to continually shifted goalposts in the form of

¹ 21 U.S.C. § 812.

² *Id.*

³ James J. Black, *Cannabis Banking: Proceed with Caution*, AMERICAN BAR (Feb. 6, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/.

⁴ *Id.*

constantly changing federal guidance, as each new Presidential administration in the past decade has issued different guidelines as to what constitutes suspicious activity—⁵ leading to confusion and risk-averse attitudes from financial institutions regarding cannabis businesses. As it currently stands, a memorandum issued by the Financial Crimes Enforcement Network in 2014 seems to have reassumed force under the Biden administration.⁶ However, these guidelines are little more than principles providing an avenue for discretionary enforcement— as their broad language potentially encompasses even state compliant cannabis businesses within the definitions of suspicious activity.⁷ This illustrates that while the SAR system is intended to curtail illegal activity, its practical effects on the state legal cannabis industry are doing more harm than help — and potentially making the illegal market more attractive to legal cannabis business owners.

The practical effects of these issues are wide-ranging. The uncertain nature of what classifies as suspicious activity and the gravity of the potential sanctions for a misstep have led to financial institutions simply steering clear of cannabis businesses, for the most part.⁸ Cannabis businesses are forced to find initial funding from non-traditional sources or their own pockets, as banks are hesitant to provide loans.⁹ Even businesses who surmount this barrier are unable to open lines of credit, and are forced to operate entirely in cash— as credit card companies won't even allow card purchases at cannabis businesses.¹⁰ This would seem contrary to the record-intensive nature of state cannabis regimes and concerns about theft, as it effectively prohibits a legal industry from reaping the benefits of modern technology in the form of credit cards and the financial tracking systems that they facilitate. This break from logic in the federal law is creating safety issues and barriers to compliance for the cannabis industry that don't exist anywhere else in state-legal industries.

Current Approaches

As the law currently stands, cannabis businesses are faced with unique challenges that aren't a concern for typical state compliant industries. Relative to the problems caused by their inability to open lines of credit or take credit card payments, both businesses in the industry and those in the banking industry have been forced to get creative. Some solutions on the banking side include issuing credit cards that are only for use in dispensaries¹¹ and use of eChecks or clearinghouse transfers for payment.¹² However, these methods require customers to take the extra steps of putting sensitive information into an often-unproven institution's hands— leading to practical issues with this method.

⁵ *See id.*

⁶ *See* Kyle Jaeger, *Biden AG Pick Restates Pledge to Respect State Marijuana Laws, In Writing*, MARIJUANA MOMENT (Mar. 1, 2021), <https://www.marijuanamoment.net/biden-ag-picks-restates-pledge-to-respect-state-marijuana-laws-in-writing/>.

⁷ *See, e.g.*, Black, *supra* note 3.

⁸ *See, e.g.*, Paul Dunford, *What to Know About Cannabis Banking in 2022*, BANK DIRECTOR (Oct. 15, 2021), <https://www.bankdirector.com/issues/regulation/what-to-know-about-cannabis-banking-in-2022/>.

⁹ Anh Hatzopoulos, *The Challenge of Building Credit in the Cannabis Industry*, FORBES (Feb. 9, 2021 at 7:40 A.M.), <https://www.forbes.com/sites/forbesfinancecouncil/2021/02/09/the-challenge-of-building-credit-in-the-cannabis-industry/?sh=3caa43fb778e>.

¹⁰ *Id.*

¹¹ Matt Burns, *Cannabis and Banking Vets Launch Credit Card for Dispensaries*, TECH CRUNCH (Dec. 1, 2021 at 10:19 A.M.), <https://techcrunch.com/2021/12/01/supernet-credit-card-cannabis-weed-dispensaries/>

¹² *Merchant Processing in the Cannabis Industry: Everything You Need to Know*, FINCANN (2021), <https://fincann.com/blog/cannabis-credit-card-processing/> [hereinafter *FinnCann*].

Some businesses have opted for the use of even shadier methods of circumvention. Many cannabis businesses create obscure names for their operations that allow them to fly under credit card companies' radars and accept credit payments at dispensaries.¹³ Those who are a bit more above the line have attempted to implement cashless ATMs – essentially a loophole that allows a customer to make an ATM withdrawal at the cash register for payment, simply handing the money to the dispensary upon purchase.¹⁴ The illicit nature of these solutions is a perfect illustration of the fact that the current laws aimed at curtailing illegal activity are often times leaving little avenue for recourse – even in a legal industry.

Conclusion

The dramatic shift in public opinion over the past 30 years relative to cannabis and constantly growing library of research supporting its medicinal qualities lead to one clear solution for the issues above: the federal government de-scheduling cannabis under the Controlled Substances Act. The continued federal classification of cannabis is causing problems in a legal industry like never before, and effectively preventing it from taking advantage of common modern technology that aids in the facilitation of nearly every business in existence. The law as it currently stands is having the opposite effect than intended – as it makes the illegal cannabis market infinitely more attractive to a potential business owner than the overregulated and impossibly-red-taped legal industry.

As Congress has given little indication in recent times that it is capable of functioning concurrently with overwhelming public sentiment and scientific evidence relative to the Controlled Substances Act, a solution short of de-scheduling looks more likely– and closer on the horizon. The SAFE Banking Act, first introduced in 2019, has passed the U.S. House five times to date.¹⁵ Bipartisan support for the Act has steadily grown over time, with 180 members of Congress and 39 Senators being cosponsors of the legislation as of November 2021.¹⁶ The Act would remove the potential for penalization of financial institutions transacting with state legal cannabis businesses– meaning that credit card companies could allow purchases at dispensaries and lines of credit to be opened by cannabis businesses.¹⁷

Although federal legalization is the only true solution to many of these issues, the SAFE Banking Act is assuredly a step in the right direction. If passed, it would allow state compliant cannabis businesses to finally step into the 21st century and take advantage of the modern technology that makes purchases easier for the customer, and makes recordkeeping easier for businesses.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Ed Perlmutter, *A House Bill Would Help Cannabis Companies Work with Big Banks and Let You Use Your Credit Card When Shopping for Marijuana*, U.S. House of Representatives Blog (Nov. 2021), <https://perlmutter.house.gov/safe-banking-act/#:~:text=To%20date%2C%20the%20SAFE%20Banking,106%20Republicans%20voting%20in%20support.>

¹⁶ *Id.*

¹⁷ Christopher Butler, *SAFE Banking Act Would Make Cannabis Business Easier*, BOSTON.COM (Oct. 3, 2021), <https://www.boston.com/news/local-news/2021/10/03/safe-banking-act-would-make-cannabis-business-easier/#:~:text=The%20SAFE%20Banking%20Act%20will%20allow%20these%20major%20credit%20card,apps%20like%20Venmo%20and%20CashApp.>