



MERITAS CAPABILITY WEBINAR

CANNABIS BANKING AND INSURANCE: A PRACTICAL PERSPECTIVE

Moderated by:

Alex Malyshev, Carter Ledyard & Milburn LLP

Wednesday, June 3, 2020

Panelists:

Holly DeLorenzo, Hardenbergh Insurance Group

Angela Lucas, Integrated Compliance Solutions

Frank Smith, Republic Bank of Arizona

Peter Su, BNB Bank

HOUSEKEEPING ITEMS

- Audio will be broadcasted through your computer speakers
- To listen through your telephone
Dial:
(US & Canada): 1-877 309-2074
(International): +1-213 929-4221
Enter Participant Code:
638-802-985
- Your phone line will be muted
- Dial *0 at any time for technical support
- Questions may be submitted to the presenter via the Questions Pane on your computer



MODERATOR / PANELISTS



Alexander Malyshev
Carter Ledyard & Milburn LLP
New York, New York, USA



Holly DeLorenzo
Business Development
Cannabis Division
Hardenbergh Insurance



Frank Smith
VP of Operations
Republic Bank of
Arizona



Angela Lucas, CCBP
Chief Risk Officer
Integrated Compliance
Solutions, LLC



Peter Su
VP – Private Banking
BNB Bank



SOME USEFUL DEFINITIONS TO GET US STARTED

- **Cannabis** is a plant belonging to the Cannabaceae family and containing a variety of biologically active chemical compounds. **Hemp and marijuana are both varieties of cannabis**, though “cannabis” is often used interchangeably with “marijuana.”
- **Marijuana** is cannabis containing over 0.3% THC on a dry weight basis. It is designated as a “controlled substance,” due to its intoxicating and psychoactive qualities. It is a “scheduled” drug under both U.S. law and under several U.N. conventions (to which most nations are signatory).
- **Hemp** is cannabis containing less than 0.3% THC. Used to be a major industrial crop, but was swept up in the drug war along with Cannabis. In the U.S. legalized as part of the 2018 Farm Bill, if it meets the definition of “Hemp.”
- **THC**: Tetrahydrocannabinol. One of the main intoxicating constituents of cannabis. THC concentration is what distinguishes Cannabis from Hemp.
- **CBD**: Cannabidiol. The main non intoxicating constituent of Cannabis, which can be derived from hemp, and has exploded in popularity recently.



IS IT MARIJUANA OR HEMP?

“Hemp” is defined in the [2018 Farm Bill](#) (7 U.S.C. 1639o) as cannabis containing less than 0.3% THC on a dry weight basis. Not all countries (or U.S. states) distinguish the two.

CANNABIS	
HEMP Legalized under the Farm Bill	MARIJUANA Illegal under the Controlled Substances Act
<.3% THC	>20% THC
Regulated by the FDA when used for consumption	All extracts from Marijuana remain illegal
HIGH CBD	LOW CBD
LOW THC	HIGH THC

[See Hemp v. Marijuana: The Difference Explained](#)



LAW APPLICABLE TO CANNABIS

- Under the Controlled Substances Act (“CSA”) cannabis (excluding hemp) is listed as a Schedule I drug. The same category as heroin, LSD, GHB or MDMA .
- It is the Federal Government’s stance that cannabis (a) has a high potential for abuse, (b) has no currently accepted medical use in treatment in the United States, and (c) lacks safety in use under medical supervision.
- This is at odds with various state laws, as well as international drug treaties that schedule cannabis differently, including those specifically regulating “medical” marijuana. But those state laws (and treaties) do not override federal prohibition.

See CSA ([21 U.S.C.A. § 812\(b\)\(1\)](#)); [Single Convention on Narcotic Drugs](#) (1961) (Article 28) as amended.



MARIJUANA ENFORCEMENT PRIORITIES

- The DOJ previously had a published set of enforcement priorities (the [Cole Memo](#)), which has been incorporated by [FINCEN](#). They are preventing:
 - the distribution of marijuana to minors;
 - revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
 - the diversion of marijuana from states where it is legal under state law in some form to other states;
 - state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
 - violence and the use of firearms in the cultivation and distribution of marijuana;
 - drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
 - the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
 - marijuana possession or use on federal property.
- Cole Memo was [rescinded](#) by AG Jeff Sessions in 2018.
- Federal prosecutors retain prosecutorial discretion.
- AG William Barr has indicated dissatisfaction with the inconsistent state and federal laws.
- No indication to date federal prosecutors have plans to prosecute state-legal marijuana activities differently than before (though subpoenas have gone out in connection with WeedMaps).



LAWS APPLICABLE TO HEMP

- Hemp was considered to be no different than Cannabis until late 2018. This included most derivative products.
- The 2018 Farm Bill changed this drastically by:
 - Removing Industrial Hemp and its derivatives (like CBD) from Schedule I;
 - Allowing its cultivation (in accordance with plans approved by the USDA); and
 - Preempting states which forbid Hemp from interfering with its transportation.
- It appears that some of these changes were immediate (like trademark eligibility and de-scheduling), and some were not (like cultivation). Others, like conflicts with state law, are in limbo.
- Hemp production is permissible under in three scenarios, two of which are not yet available.
 1. In accordance with a state plan under the 2014 Farm Bill or waiver under the CSA.
 2. In accordance with a state plan approved by the USDA under the 2018 Farm Bill (no state plan has been approved yet).
 3. In accordance with a USDA plan, subject to state laws.



LAWS APPLICABLE TO CBD

- The 2018 Farm Bill preserved the FDA's authority over CBD and THC.
 - According to the FDA, both are active drug ingredients in Epidiolex (an epilepsy medication approved in 2018).
 - As a result, the Federal Food, Drug, and Cosmetic Act and section 351 of the Public Health Service Act potentially apply.
- The CBD Industry and the FDA are at odds as to whether CBD should be treated as a drug or a dietary supplement, and a rulemaking process is underway.
- Certain state and local laws also govern the use of CBD in certain products (like food).
- Products containing CBD are also be subject to other laws, aimed at truthful advertising, safety and products liability.
- FDA appears most concerned CBD sales accompanied by medical claims. To date, there have been no enforcement actions, and the FDA has limited itself to sending warning letters so far.



IMPACT OF FEDERAL LAWS AND REGULATIONS

Those doing business with Cannabis companies are potentially liable for:

- Conspiring to manufacture and distribute marijuana ([18 U.S.C. § 846](#));
- Aiding and abetting the manufacture and distribution of marijuana ([18 U.S.C. § 2](#));
- Acting as an accessory after the fact for the manufacture and distribution of marijuana ([18 U.S.C. § 3](#)); and
- Violating the Money Laundering Control Act (18 U.S.C. § § [1956](#) and [1957](#)).

In addition Federal agencies, like the [IRS](#), [CBP](#), [USCIS](#), and [FINCEN](#), have specific Cannabis related policies.

Federal prohibition also impacts Federal rights, like [Intellectual Property](#) (Trademark and Patent) and [Bankruptcy](#), as well as eligibility for certain programs (like the SBA administered PPP).



NECESSARY LINES OF INSURANCE

- General Liability
- Property & Equipment Breakdown
- Crop Insurance – Indoor and Outdoor (what is available for outdoor)
- Commercial Auto Delivery
- Products Liability
- Directors & Officers



NECESSARY LINES OF INSURANCE

- General Liability – Property damage or bodily injury to a 3rd party
- Property & Equipment break down
- Commercial Auto & Stock Throughput Insurance
- Crop Insurance – Indoor crop vs. Outdoor crop
 - Indoor programs are readily available because risk is contained in building
 - Outdoor crop is hard to come by but is offered through the Farming Service Act through the USDA.



NECESSARY LINES OF INSURANCE

■ Products Liability

- Growers
- Wholesalers & Distributors
- Manufacturing
- Dispensary

■ Directors & Officers Coverage

- What does it cover
- Why is it hard to find a D&O insurance for a cannabis company
- Tips to securing D&O for a reasonable price.



WHAT ARE BANKERS LOOKING FOR?

- Transparency and Cooperation
 - Open your books and your POS
 - Ask for permission not forgiveness
- State oversight
 - State applications
 - State reporting resources
- Business Acumen
- Robust reporting and compliance capabilities



WHAT CAN ONE EXPECT IN AN APPLICATION?

- Requests for
 - historical financials
 - Retail and wholesale reporting, past and present
 - Back ground investigations on all beneficial owners, directors and/or signers
 - Site visits by bank or third party
 - Documentation for specific transactions or activities
- Transparency with
 - Source of funds
 - Knowing our customer's customer – approved vendors



WHAT DO BANKERS NOT WANT TO SEE?

- Transactions that would indicate a potential FinCEN Red Flag
 - Movement of inventory across state lines
 - Movement of money to unexpected third parties
 - Deposit of funds from unknown sources
- Refusal to provide supporting documentation
- Asking for forgiveness and not permission
- Inability to produce retail or wholesale data sets
- Negative News



HOW TO IMPROVE BANKABILITY

- Uniform Point Of Sale (POS) data sets and better reporting
- Develop ANSI type standards for cultivation and production to establish normal parameters
- Better state oversight and reporting



QUESTION & ANSWER



Alexander Malyshev
Carter Ledyard & Milburn LLP
New York, New York, USA
Malyshev@clm.com



Holly DeLorenzo
Business Development
Cannabis Division
Hardenbergh Insurance
hdelorenzo@hig.net



Frank Smith
VP of Operations
Republic Bank of
Arizona
fsmith@republicaz.com



Angela Lucas, CCBP
Chief Risk Officer
Integrated Compliance
Solutions, LLC
angela.lucas@ICSLV.com



Peter Su
VP – Private Banking
BNB Bank
psu@bnbbank.com

