



TO: Chief Executive Officers or Equivalents of New York State-Chartered Banks & Credit Unions

FROM: Maria T. Vullo, New York State Superintendent of Financial Services

DATE: July 3, 2018

RE: GUIDANCE ON PROVISION OF FINANCIAL SERVICES TO MEDICAL MARIJUANA & INDUSTRIAL HEMP-RELATED BUSINESSES IN NEW YORK STATE

The New York State Department of Financial Services (the “Department”) is issuing this guidance in response to inquiries received from financial institutions regarding provision of financial services to medical marijuana related businesses licensed by New York State and those participating as research partners in the New York State Industrial Hemp Research Pilot Program.

New York has made significant progress in creating a supportive economic development and regulatory landscape for companies interested in commencing medical marijuana and individuals or entities interested in conducting industrial hemp research. New York State statutes passed in 2015, 2016 and 2017 have created a legal framework for registered organizations producing and dispensing medical marijuana and for pilot projects conducting industrial hemp research in the State of New York. The 2017-2018 State budget made available up to \$10 million in grants for research and capital investments in industrial hemp growing and processing.¹ The current 2018-2019 budget provides \$650,000 for a brand-new \$3.2 million industrial hemp processing facility in the Southern Tier, and New York State will invest an additional \$2 million in a seed certification and breeding program, to begin producing unique New York seed.²

The Department of Financial Services is aware, however, that the unsettled legal environment at the Federal level has discouraged institutions from providing financial services to companies with medical marijuana or industrial hemp operations. This guidance is intended to clarify the regulatory landscape and encourage New York State-chartered banks and credit unions to offer banking services to these New York businesses. Institutions prepared to apply sound practices of customer due diligence and transaction monitoring, in accordance with established principles and

¹ <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-and-announces-new-initiatives-support-growth-industrial-hemp>

² <https://www.governor.ny.gov/news/governor-cuomo-outlines-fy-2019-budget-realizing-promise-progressive-government>

procedures, should consider to commence providing financial services. The Department stands ready to work with our chartered institutions to assist them in moving forward towards commencing operations in a safe and sound manner.

BACKGROUND

Lack of Access to Regulated Financial Services

Because marijuana currently is still listed on Schedule I under the Federal Controlled Substances Act, medical marijuana and industrial hemp-related businesses operating in accordance with New York State laws and regulations continue to have difficulty establishing banking relationships at regulated financial institutions. The ability to establish a banking relationship is an urgent issue today for the legal cannabis industry. So long as it remains difficult to open and maintain bank accounts, the industry will largely rely on cash to conduct business and operate.

These limitations create unique burdens for legal marijuana businesses. For example, companies pay employees with envelopes of cash, carry bags containing thousands of dollars to purchase money orders, and some pay taxes in cash. It also has been reported that some businesses have opened bank accounts through holding companies or use of personal bank accounts. Forcing medical marijuana and industrial hemp businesses to operate solely with cash creates a public safety issue, as cash intensive businesses and their suppliers, employees and customers become targets for criminals. Large amounts of cash distributed outside the regulated banking system is unacceptable and creates risks to the companies, and their employees and business partners. Further, large scale cash operations impede tracking funds for tax and anti-money laundering purposes. None of this is necessary. Positions taken by the federal government are only exacerbating these problems, rather than remedying them. New York must act.

New York Laws and Regulations Relating to Medical Marijuana and Industrial Hemp

1. Medical Marijuana

In recognition of the demonstrable medical benefits of marijuana, New York State has taken a compassionate approach to patient care by considering the findings of respected medical practitioners and researchers, as well as the reports of patients in need of medical marijuana's unique properties, in enacting legislation that allows treatment options to seriously ill individuals. New York State has been careful in precisely delineating the conditions that warrant permitting registered medical practitioners making medical marijuana available to certified patients.³ The New York medical marijuana program created by the Compassionate Care Act (N.Y. Pub.Health L.

³ There were 1629 Registered Practitioners and 55,136 Certified Patients (as of May 15, 2018).
https://www.health.ny.gov/regulations/medical_marijuana/

§3360(1), provides for medical marijuana “for use as part of the treatment of the patient's serious condition.”⁴

New York’s medical marijuana program allows patients who suffer from specific serious conditions who also have a condition clinically associated with, or a complication of, the serious condition to be certified by a practitioner to receive medical marijuana products for medical use. Practitioners must complete a four-hour New York State Department of Health (“NYDOH”)-approved course and register with NYDOH to certify patients. Patients who are certified by their practitioners must apply to NYDOH to obtain a registry identification card. During the patient registration process, certified patients may designate up to two caregivers to obtain and possess medical marijuana products on their behalf. Caregivers who are designated during the patient registration process must also separately register with NYDOH in order to obtain a registry identification card.

Certified patients and designated caregivers who have been issued a registry identification card may visit one of the Registered Organizations' dispensing facilities in New York State to purchase approved medical marijuana products. Registered Organizations are responsible for manufacturing and dispensing medical marijuana in New York State. There are currently ten Registered Organizations in New York. The organizations were selected by NYDOH after a rigorous application process. Applicants were required to submit extensive operating plans, certified financial statements, architectural drawings, security plans, and were subject to criminal history background checks. Out of the 43 applications received, NYDOH has registered ten Registered Organizations. Each Registered Organization is permitted by statute to have up to four dispensing facilities. To protect the public's health and safety, Registered Organizations must meet high product quality standards in New York State. New York State's medical marijuana program includes detailed product and dispensing label requirements, which can be found in the regulations at 10 NYCRR § 1004.11(k) and 1004.12(h). Registered Organizations are required to report all dispensing data to the New York State Prescription Monitoring Program Registry within 24 hours of dispensing, and are required to consult the Registry prior to all dispensing transactions.

⁴ (a) "Serious condition" means:

(i) having one of the following severe debilitating or life-threatening conditions: cancer, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, amyotrophic lateral sclerosis, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, post-traumatic stress disorder, or as added by the commissioner; and

(ii) any of the following conditions where it is clinically associated with, or a complication of, a condition under this paragraph or its treatment: cachexia or wasting syndrome; severe or chronic pain; severe nausea; seizures; severe or persistent muscle spasms; or such conditions as are added by the commissioner.

Registered Organizations are required to track and trace all medical marijuana manufactured and sold, from seed to sale. NYDOH has full access to these data and frequently audits such data to ensure strict compliance with all New York applicable laws and regulations. NYDOH retains the authority to revoke a Registered Organization's registration at any time for failure to meet New York State's regulatory requirements.

2. Industrial Hemp

Following the passage by Congress of the Agricultural Act of 2014 (the "Farm Bill"), which, among other things, permitted industrial hemp research authorized pursuant to state law, New York authorized the cultivation of industrial hemp pursuant to the New York Agriculture and Markets Law Sections 505 to 508 (McKinney 2016). Section 506 of the New York Agriculture and Markets Law provides that "Notwithstanding any provision of law to the contrary, industrial hemp and products derived from such hemp are agricultural products which may be grown, produced and possessed in the State, and sold, distributed, transported or processed either in or out of State as part of agricultural pilot programs pursuant to authorization under federal law and the provisions of this article." On July 12, 2017, Governor Andrew Cuomo signed legislation to amend the New York Agriculture and Markets Law to ensure that industrial hemp will be considered an agricultural product and that it will be treated the same way as other crops and seed. The continued production of industrial hemp is an economic development opportunity for farmers and businesses across New York State.

To date, the New York State Department of Agriculture and Markets ("NYDAM") has issued 123 permits to individuals and entities researching industrial hemp and products derived from industrial hemp. The projects, which are regulated through agreements with NYDAM, engage in research concerning the cultivation, the many uses and marketing of industrial hemp and hemp products, including food, fiber, construction materials, energy storage, nutritional supplements, and personal care and wellness products.

Federal Law and Guidance Relating to Marijuana and Industrial Hemp

1. Marijuana

Federal law does not specifically address medical marijuana, or its benefits. The federal Controlled Substances Act (the "CSA") makes it unlawful⁵ to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense a controlled substance. Marijuana is listed on Schedule I of Section 812 of the CSA as a controlled substance.

⁵ 21 U.S.C. Section 841.

In recognition of the on-going expansion of legalization of marijuana in many States, both the U.S. Department of Justice (the “DOJ”), and the Financial Crimes Enforcement Network (“Fincen”) had issued guidance to assist financial institutions in providing services to marijuana-related businesses. However, DOJ’s 2013 memorandum from Deputy Attorney General James M. Cole (the “Cole Memo”) ⁶, which had provided detailed guidance to law enforcement and federal prosecutors to focus enforcement resources on conduct that raised threats of criminal harm over and above merely operating in accordance with State law, was recently withdrawn by U.S. Attorney General Sessions. The Cole Memo had concluded that “Outside of [specified] enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”

Notably, the Fincen guidance, issued in 2014, has remained in effect. That guidance clarifies Bank Secrecy Act (“BSA”) expectations for financial institutions that provide financial services to marijuana-related businesses, and details how to provide services consistent with BSA obligations. These principles are the same principles applicable to all banking relationships. In issuing the guidance, Fincen sought to enhance the availability of financial services for, and the financial transparency of, legal marijuana-related businesses.

The Fincen guidance instructs that in assessing whether to engage in a banking relationship with a marijuana-related business, required due diligence includes:

- (i) verifying with the appropriate State authorities whether the business is duly licensed and registered;
- (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a State license to operate its marijuana-related business;
- (iii) requesting from State licensing and enforcement authorities available information about the business and related parties;
- (iv) developing an understanding of the normal and expected activity of the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers);
- (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in the Fincen guidance; and

⁶ Guidance Regarding Marijuana Enforcement (August 29, 2013).

(vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.

The guidance further provides that financial institutions considering providing financial services to marijuana-related businesses should consider whether it implicates one of the Cole Memo priorities or violates State law. The guidance also provides instructions concerning the filing of suspicious activity reports (“SARs”). A financial institution that provides financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, (i) does not implicate one of the Cole Memo priorities and does not violate State law, should file a “Marijuana Limited” SAR; or (ii) implicates one of the Cole Memo priorities or violates State law, should file a “Marijuana Priority” SAR. If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, the institution should file a SAR and note in the narrative the basis for termination.

On January 4, 2018, Attorney General Jeff Sessions issued a memorandum to all U.S. attorneys rescinding the various memoranda related to enforcement of federal marijuana laws, including the Cole Memo. As noted, the Fincen guidance remains in effect. Indeed, in the wake of the General Sessions’ rescission of the Cole Memo, members of Congress have advocated for retaining the Fincen guidance. A bipartisan group of 31 members of the House of Representatives and a bipartisan group of 15 Senators have sent letters to Fincen encouraging Fincen to continue following its 2014 guidance and to continue supporting banking infrastructure and access to financial institutions for businesses that are operating in accordance with State and local law and abiding by the stated factors in the Fincen guidance. These letters note that Fincen’s stated priorities have allowed legal marijuana-related businesses to conduct commerce more safely through financial institutions which reduces the use of cash, improves public safety, reduces fraud, and provides for regulatory oversight through suspicious activity reports. The Congressional letters further indicate that rescinding the Fincen guidance will inject uncertainty in the financial markets, and that any attempt to disrupt this market is dangerous and imprudent. The Treasury Department has responded by stating that the Treasury is reviewing the Fincen guidance in consultation with law enforcement, and the guidance remains in effect in the meantime.

2. Industrial Hemp

Section 7606 of the Farm Bill, provides that “Notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), the Safe and Drug Free Schools and Communities Act (20 U.S.C. 7101 et seq.), chapter 81 of title 41, United States Code, or any other Federal law, an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) or a State department of agriculture may grow or cultivate industrial hemp if –

- (1) The industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and
- (2) The growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

Industrial hemp is defined under the Farm Act as “the plant *cannabis sativa* L. and any part of such plant whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 per cent on a dry weight basis.”

In 2016, the U.S. Department of Agriculture, in consultation with the U.S. Drug Enforcement Administration and the U.S. Food and Drug Administration, issued a Statement of Principles on Industrial Hemp (the “Statement of Principles”) to inform the public how federal law applies to activities associated with industrial hemp that is grown, cultivated, and marketed in accordance with Section 7606 of the Farm Act. The Statement of Principles states as follows:

Section 7606 of the Agriculture Act of 2014 legalized the growing and cultivating of industrial hemp for research purposes in States where such growth and cultivation is legal under State law, notwithstanding existing Federal statutes that would otherwise criminalize such conduct.

The guidance document further states that “...Federal law continues to restrict hemp-related activities, to the extent that those activities have not been legalized under section 7606.”

In 2018, Congress, expanding on language contained in Section 763 of the Omnibus Budget Bill of 2016, further supported the implementation of the provisions of Section 7606 of the Farm Bill through Section 537 of the Consolidated Appropriations Act of 2018, providing that no funds made available by the Appropriations Act may be used to “prohibit the transportation, processing, sale, or use of industrial hemp, or seeds of such plant, that is grown or cultivated in accordance with subsection 7606 of the Agricultural Act of 2014, within or outside the State in which the industrial hemp is grown or cultivated.”

GUIDANCE FROM THE DEPARTMENT OF FINANCIAL SERVICES

1. Medical Marijuana

As described above, the New York Compassionate Care Act allows patients suffering debilitating symptoms and diseases access to medical marijuana. Healthcare and patientcare are fields that States have traditionally regulated. Congress has specifically left a significant role for

States in regulating controlled substances like marijuana.⁷ Indeed, the Cole Memo had specifically recognized States' roles by stating that outside of certain listed enforcement priorities, "the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws." New York State's legalization of medical marijuana has provided important services for New Yorkers in need.

Many States, including New York, have passed laws creating legal access to medical marijuana for seriously ill patients. According to a statement by New York Physicians for Compassionate Care, a growing body of scientific evidence, including gold-standard randomized, double-blinded, placebo-controlled trials, have made it clear that medical marijuana can be effective in controlling chronic pain, alleviating certain side effects associated with chemotherapy, treating wasting syndrome associated with HIV/AIDS, controlling muscle spasms due to multiple sclerosis, and managing epilepsy, and that there is an emerging evidence that suggests that medical marijuana may help patients living with cancer and other chronic and debilitating illnesses.

As described above, the New York Compassionate Care Act has careful and strict controls that are intended to assure access to patients who could truly benefit from medical marijuana, while preventing diversion and misuse. Denying patients access to a medication that can relieve their suffering is neither warranted nor compassionate.

As mentioned above, lack of access to regulated financial services compels legitimate marijuana-related businesses, that are operating in full compliance with New York State laws and regulations, to conduct their operations using cash. There is an increasing level of concern from many stakeholders, including members of Congress, numerous State law enforcement and other State officials, that limiting legal medical marijuana businesses to operating with cash, and preventing them from establishing and maintaining relationships with regulated financial service providers, is not in the public interest. Being forced to handle large amounts of cash can make these businesses, their employees and their customers, targets for violent crime. Providing access to regulated banking services is an essential part of taking the legal cannabis industry out of the shadows and establishing it as a transparent, regulated, tax-paying part of our economy, and a necessary part of fulfilling the goal of relieving the suffering of seriously ill patients.

While the rescission of the Cole Memo may indicate the viewpoint of federal government officials, the Department is not aware of any actual changes in the priorities of the four U.S. Attorneys serving in the State of New York. Nor does it change the fact that many States, including New York, have legalized medical marijuana. And it does not change the position of banking

⁷ 21 U.S.C. Section 903- Chapter 13- Drug Abuse Prevention and Control: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together".

regulatory agencies that, generally, the decision to open, close, or decline a particular account or relationship is made by a bank or credit union based on its particular business objectives, its evaluation of the risks associated with offering products and services, and its ability to manage such risks.

In light of the above, the Department encourages New York State chartered banks and credit unions to consider establishing banking relationships with medical marijuana-related businesses that are operating in New York in full compliance with all applicable New York State laws and regulations, including the New York Compassionate Care Act, and the applicable regulations and requirements of NYDOH. The Department further provides guidance that it will not impose any regulatory action on any New York State chartered bank or credit union solely for establishing a banking relationship with a medical marijuana-related business that operates a compliant business in New York, as long as the New York State chartered bank or credit union complies with the requirements of the 2014 Fincen guidance, the guidance and priorities set forth in the Cole Memo, and subject to the institution's own evaluation of the risks associated with offering products and services and its ability and systems to effectively manage those risks – as our institutions do with regard to all their banking relationships.

2. Industrial Hemp

Both Federal and New York State law expressly authorizes the growth, cultivation, marketing and sale of industrial hemp and products derived from industrial hemp for research purposes under a licensing system which requires the submission of information concerning the applicant, the proposed research, the facilities and security measures to be employed. Projects are controlled under a research agreement that, among other things, establishes the scope of the research, conditions under which the research may be performed, requires reporting, record keeping and regulatory testing, as well as provides established procedures for termination of the research.

Accordingly, New York State chartered banks and credit unions are encouraged to support this development in the State of New York. An institution that seeks to provide financial services to entities that are or wish to be engaged in the growing or cultivation of industrial hemp should assess and verify the eligibility and authority of the entity for participation in a research program, as authorized under the New York Agriculture and Markets Law. As with any other lending activity, banking institutions should establish and conduct appropriate underwriting and customer due diligence, including verification of eligibility of a research program and other requirements of Section 7606 and New York State law.

Conclusion

New York State's efforts to promote responsible businesses, including businesses engaged in the business of industrial hemp and medical marijuana, promote sustainable economic development and provide needed services to New Yorkers. The banking industry is a vibrant part of New York's economy, where businesses cannot flourish without appropriate banking relationships. Accordingly, the Department encourages all New York State chartered banks and credit unions to further support New York's economy, and strengthen these legal businesses by providing safe and sound access to financial services provided in a rigorous regulatory environment.

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