Cash Transportation for Cannabis-Related Businesses

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With the ever-expanding legalization of medical and adult-use cannabis across the United States, an ever-expanding problem is coming to the forefront: cash transportation.

While marijuana remains illegal under federal law, most plant-touching businesses are — and will remain for the foreseeable future — cash-intensive. For the most part, licensed marijuana businesses are unable to access traditional banks or reliably use credit cards for either incoming or outgoing transactions. That means there is a lot of cash on hand that needs to find its way from one location to another, raising complicated issues for parties engaging in any transaction with a cannabis business, as well as for cash transportation companies.

Complicating the issues caused by the cash-intensive nature of the marijuana industry is the fact that marijuana is not legal in all 50 states. Further, even within states that have legalized marijuana, some allow local jurisdictions to opt out of some or all aspects of the state's marijuana industry.

What happens when a party wishes to transport marijuana-related cash from a state in which there is a regulated marijuana industry to or through a state where marijuana is still illegal? What happens when that same cash is transported through a local jurisdiction that has expressly opted out of the marijuana industry? Do the funds become "tainted" once they cross these imaginary lines, and therefore become subject to seizure and forfeiture?

Intrastate Law Concerns

As a preliminary matter, in order to avoid issues that arise in the marijuana-derived cash context, the plant-touching business generating the cash must comply with all relevant state and municipal laws, regulations, and rules. If the business is not in complete compliance, the cannabis-related income — regardless of where it was originally generated or is presently located — could be treated as if it were "tainted" income from illegal activities. The tainted nature of those funds could then subject the cash to seizure.

With respect to the intrastate transportation issues, some states' regulations specifically allow residents in such opt-out jurisdictions to, nevertheless, possess and transport cannabis within the opt-out jurisdiction; however, other states do not. These legal differences and distinctions among state and municipal laws greatly impact the legal analysis regarding potential risks and liabilities arising from the transportation of marijuana-related cash.

Interstate-State Law Issues

With respect to interstate issues, on the one hand, an argument can be made that marijuana-related funds are legal so long as the money was earned in a legal and compliant state-licensed marijuana business. That is, while a business may be illegal under state law in a neighboring state, that fact alone does not make it illegal for a business or individual to possess those same funds.

In this regard, a gaming analogy may be the most appropriate: Casinos are legal only in a small number of states, and, in most cases, they are only legal in small areas within those states. Yet, it is not illegal for employees or patrons to carry their earnings from the casino into other parts of that particular state or into neighboring states.

On the other hand, an argument can be made that the funds were directly obtained from an illegal cannabis operation, necessarily subjecting them to seizure under state and/or federal law.

Because of these conflicting arguments and the lack of legal certainty with respect to these interstate issues, these issues continue to come up on a daily basis for marijuana businesses. In some cases, these complications have resulted in real-world applications which provide practicable insights.

For example, federal prosecutors recently dismissed a cash forfeiture case involving the transportation to Colorado of more than $165,000 in cash collected from medical cannabis dispensaries in Missouri. In October 2021, the marijuana-related cash was being transported from Missouri to its final destination in Colorado by a Denver-based courier company (Empyreal Logistics). While en route, the cash was transported through the state of Kansas, where neither medical nor recreational marijuana is legal. Federal prosecutors argued that the money was subject to seizure and forfeiture because of federal law forbidding the manufacture and distribution of a controlled substance. However, the prosecutors dismissed the case without explanation approximately one year later.

In another recent case involving cash seized from the same company, the Department of Justice, on April 13, 2022, agreed to return roughly $1.1 million dollars of proceeds from legal marijuana sales from Empyreal vehicles in San Bernardino County, California. Following the seizures, Empyreal filed a civil lawsuit against the DOJ, the DEA, and the FBI alleging that the government entities acted beyond their legal authority. The DOJ agreed to return the proceeds to Empyreal as part of a settlement in which, in exchange, Empyreal agreed to dismiss its civil lawsuit against these federal agencies. Pursuant to the terms of the settlement agreement, the federal government declined to initiate forfeiture proceedings.

Other Issues

While cannabis remains a Schedule I controlled substance under federal law, there will always be federal law-related risks and concerns when dealing with cash directly attributable to a marijuana-touching business. Below are a handful of common issues raised by the conflicts between state and federal law when it comes to cash handling.

– **Money laundering:** Federal anti-money laundering and racketeering laws prohibit private enterprises from engaging in "a financial transaction which in fact involves the proceeds of specified unlawful activity," or "engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." The term "criminally" in this context includes the following conduct: the "manufacture, importation, sale, or distribution of a controlled substance (as defined in the Controlled Substances Act)."

To address this conflict of laws, the Treasury Department's Financial Crimes Enforcement Network (FinCen) has issued guidance on how financial service firms can provide services to the marijuana industry. This guidance refers to, and attempts to address, the eight enforcement priorities set forth in the Cole Memo, a DOJ memorandum published by U.S. Department of Justice Deputy Attorney James M. Cole in 2013. The Cole Memo instructed prosecutors to consider these eight enforcement priorities with respect to alleged offenses involving money laundering, money transmitting, and the Banking Secrecy Act predicated on marijuana-related violations of the Controlled Substances Act.

While compliance with this FinCen guidance may limit the risk of exposure for money laundering, it is not a guaranteed shield from federal enforcement. Under this guidance, federal prosecutors are only required to consider these eight factors before deciding whether to prosecute a case for money laundering.

– **Racketeering:** Under the Racketeer Influenced and Corruption Act (RICO), "racketeering activity" includes "any offense involving […] the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in a controlled substance" as defined in the Controlled Substances Act (which includes marijuana). Two federal appellate courts have recognized that cultivating cannabis for sale constitutes racketeering activity under RICO, even if the same conduct is legal under state law. Further, a RICO claim is not dependent on the racketeering activity crossing state lines.

– **Tax implications:** 26 U.S.C. § 280E denies deductions and credits for amounts paid or incurred while carrying on the trade or business of trafficking controlled substances (within the meanings of Schedules I and II of the Controlled Substances Act), in violation of federal law. This is certainly an issue to take into consideration. Plant-touching, ancillary, and cash transportation companies are all well advised to take these tax-related issues into consideration in deciding whether, how, and under which terms to engage in dealings with cash-intensive marijuana businesses.

– **Employment concerns:** State laws generally prohibit an employer from requiring its employees to participate in illegal activities; nor may employers terminate or discharge those employees who refuse to participate in illegal activities. Under such laws, an employee's refusal to participate cannot be the sole reason he or she is terminated from employment from a plant-touching, ancillary, or even cash transportation business.

– **Creditors and insurance:** Many credit agreements and insurance contracts prohibit participation by the debtor/insured in illegal activity. It is important to review contractual agreements and insurance policies carefully and to address any such concerns on the front end through special provisions, riders, etc.

Conclusion

While cannabis remains illegal under federal law, as well as some state and local laws, transportation of cash derived from a marijuana-touching business carries inherent risks. As the industry continues to expand both within and throughout the United States, we expect — or, at least, can hope — to gain clarity with respect to how to manage the risks posed by these issues facing both marijuana-touching and wholly ancillary companies today.

In the meantime, it is imperative that companies engaged or interested in transacting with cash-intensive marijuana businesses, or in any transaction which involves the transportation of cash derived from cannabis-related activities, stay abreast of these inherent risks.

This article was first published in Marijuana Venture.

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