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To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who are Unable to Serve Them

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To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them

Rachel Cheasty Sanders*

ABSTRACT

In 2012, Colorado voters passed Amendment 64, legalizing recreational marijuana. Marijuana, however, remains an illegal controlled substance under federal law. As a result of federal anti-money laundering laws, financial institutions risk prosecution if they provide services to customers whose funds derive from illegal activities. The Obama Administration issued guidance to help both law enforcement and financial institutions navigate this murky area. This guidance directed U.S. Attorneys to focus their resources on prosecuting persons whose activities implicate any federal priority designated by the Department of Justice. If state-legal marijuana businesses adhere to state law and financial institutions follow proper protocol, there should be little chance of prosecution. However, the guidance provides no guarantees, and most financial institutions refuse to take the risk.

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The lack of available banking services forces marijuana businesses to function as cash-only operations. This not only leads to tax, payroll, and vendor problems, but also makes the operation a target for crime. To tackle this problem, Colorado passed legislation to create cannabis cooperatives, which would allow marijuana businesses to pool their resources and offer bank accounts and credit to members. For the state to implement these cooperatives, according to the legislation, the Federal Reserve must approve the plan.

This Comment examines the federal banking laws that inhibit financial institutions from offering services to state-legal marijuana businesses and the Obama Administration's guidance. This Comment will also consider the obstacles marijuana businesses face due to the lack of banking services and the problems with relying on administrative guidance. This Comment posits that, in the absence of congressional action, Colorado can provide a short-term solution by implementing cooperatives, without approval from the Federal Reserve, under the authority of its traditional police powers.

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I. INTRODUCTION

Despite the federal Controlled Substances Act¹ (“CSA”) criminalizing marijuana possession and distribution, a majority of states have legalized marijuana use for medicinal purposes, and four states along with the District of Columbia have legalized marijuana for recreational use.² In November 2012, voters in Colorado and Washington voted to legalize recreational marijuana.³ In November 2014, citizens of Oregon, Alaska, and the District of Columbia also cast votes to permit recreational marijuana.⁴ All three of the initiatives passed, sparking discussions that other states, such as California, Arizona, Nevada, Massachusetts, and Maine, will place similar initiatives on their ballots in 2016.⁵ But how can a state legalize an activity that the federal government has deemed unlawful? Presumably, it cannot. Yet, that is exactly what these states did. The focus of this Comment, however, will not revolve around the legalization of marijuana, but rather the federal laws that inhibit the nation’s financial sector from serving these state-legal businesses.

After Colorado legalized recreational marijuana, the Obama Administration issued administrative guidance directing U.S. Attorneys to conserve their resources by prosecuting only those marijuana businesses and financial institutions whose activities implicated important federal interests.⁶ These guidance documents, however, failed to create any legal

1. Controlled Substances Act, 21 U.S.C. §§ 801-971 (2014).

2. See *State Medical Marijuana Laws*, NAT’L CONF. OF ST. LEGIS., tbl.1 (Nov. 13, 2014), <http://bit.ly/1MQp6Z7> (indicating which states have comprehensive medical marijuana programs, legal marijuana retailers, and limited medical marijuana access).

3. See Philip A. Wallach & John Hudak, *Legal Marijuana: Comparing Washington and Colorado*, BROOKINGS INST. (July 8, 2014, 9:51 AM), <http://brook.gs/1OuzfuX>.

4. See Dan Merica, *Oregon, Alaska, and Washington, D.C. Legalize Marijuana*, CNN (Nov. 5, 2014, 2:39 PM), <http://cnn.it/10sOgdL>; See also Matt Ferner & Arthur Delaney, *D.C. Marijuana Law Blocked By Congress, But There May Be A Loophole*, HUFFINGTON POST (Dec. 10, 2014, 11:29 PM), <http://huff.to/139m9lG> (reporting that Congress’s spending bill “prohibits both federal and local funds from being used to implement a referendum legalizing recreational marijuana use in the District”).

5. See Merica, *supra* note 4.

6. See Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys (Feb. 14, 2014), <http://1.usa.gov/1kLGqn6> [hereinafter Feb. Cole

protections in the event that U.S. Attorneys decide to prosecute.⁷ Instead of treating these documents as a “green-light” to bank with the state-legal marijuana industry, financial institutions continue to refuse to offer services to these businesses.⁸

Without banking services, state-legal marijuana businesses must operate on a cash-only basis.⁹ Thus, marijuana businesses become targets for robberies due to the large amount of cash they keep on hand.¹⁰ Additionally, some third parties who engage in business with marijuana establishments cannot secure banking services as a result of their connection to the industry.¹¹ Other issues arise in conjunction with reporting and paying local, state, and federal taxes, as well as paying employees and vendors.¹²

Although many believe that congressional action is the best solution to this dilemma,¹³ Congress thus far has failed to act. Nevertheless, a so-

Memo]; U.S. Dep’t of Treasury, Financial Crimes Enforcement Network, FIN-2014-G001: BSA Expectations Regarding Marijuana-Related Businesses, (Feb. 14, 2014), <http://1.usa.gov/1U11dIK> [hereinafter FinCEN Guidance]; Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys (Aug. 29, 2013), <http://1.usa.gov/1AT1b1e> [hereinafter Aug. Cole Memo]. See discussion *infra* Parts II.B.5.a, II.B.5.b, II.B.5.c.

7. See Feb. Cole Memo, *supra* note 6, at 3; Aug. Cole Memo, *supra* note 6, at 4.

8. See John B. Stephens, *Pot Shops Shunned by Banks Haul in the Cash*, USA TODAY, Aug. 31, 2014, <http://usat.ly/17jPif> (quoting Jennifer Waller, senior vice president of Colorado Bankers Association, stating “[the] media was saying it was a green light. We said, ‘No, it continues to be a very solid red light; not even yellow, to be honest’”); Pete Williams & Herb Weisbaum, *US Government Issues Rules for Banks on Dealing with Legal Marijuana Vendors*, NBC NEWS (Feb. 14, 2014, 2:00 PM), <http://cnb.cx/1hjdQcf> (quoting Amanda Averch, director of communications at the Colorado Bankers Association, stating “[w]e don’t see that guidance as giving banks a full green light to bank these businesses”).

9. See David Migoya, *State Banks Pot Money That Industry is Unable to do Itself*, DENVER POST, Jan. 5, 2014, <http://dpo.st/1VHpgRF>; Jacob Sullum, *Marijuana Money is Still a Pot of Trouble for Banks*, FORBES (Sept. 18, 2014, 5:42 PM), <http://onforb.es/1DnUWZZ> [hereinafter “Sullum, *Marijuana Money*”].

10. See Trevor Hughes, *Pots of Marijuana Cash Cause Security Concerns*, USA TODAY, July 13, 2014, <http://usat.ly/1n2aXi6>.

11. See *id.*

12. See Marcie Geffner, *Banks Just Say No to Marijuana Businesses*, FOX BUSINESS (July 24, 2014), <http://fxn.ws/1fxpBMo>; Matt Ferner, *House Votes to Allow Banking Access for Marijuana Businesses*, HUFFINGTON POST (July 17, 2014, 5:15 PM), <http://huff.to/1I31Wv5> [hereinafter “Ferner, *House Votes*”]; Sullum, *Marijuana Money*, *supra* note 9.

13. See S. Res. 14-003, 69th Gen. Assemb., Reg. Sess., at 5 (Colo. 2014) (adopted May 5, 2014) [hereinafter “Colo. S. Res. 14-003”] (“[T]he best solution to the problem . . . will be comprehensive federal legislation”); Julie Andersen Hill, *Banks, Marijuana, and Federalism*, CASE W. RES. L. REV. (forthcoming)(manuscript at 44), <http://bit.ly/1OuzExu> (“Department of Justice and FinCEN guidance failed to adequately address marijuana banking. . . . Congress must act.”); Danielle Douglas, *Banks Are Slowly Welcoming Legal Marijuana Dealers*, WASHINGTON POST, Aug. 12, 2014, <http://wapo.st/1p59Spt> [hereinafter “Douglas, *Banks Slowly Welcoming*”] (“[W]e need

lution may exist in the executive branch because the Attorney General has the authority under the CSA to reclassify controlled substances.¹⁴ President Obama, however, has stated that he feels this action should be undertaken by the legislature regardless of the express authority vested in the Attorney General by the CSA.¹⁵

The issue for analysis, therefore, becomes what power Colorado has to solve the marijuana banking problem in the interim until Congress or the President chooses to act. Instead of sitting idly, Colorado passed the Marijuana Financial Services Cooperatives Act¹⁶ (“Cooperatives Act”), which would form cannabis cooperatives, member-owned organizations that would offer banking services to state-legal marijuana businesses that meet certain conditions prescribed by the law.¹⁷ Although the law calls for approval from the Federal Reserve System before implementation, this Comment argues that Colorado, under its traditional police powers discussed by the U.S. Supreme Court in its 2006 decision *Gonzales v. Oregon*,¹⁸ should implement its cannabis cooperatives plan regardless of federal approval.

This Comment will analyze the *Gonzales* decision alongside the Cooperatives Act to demonstrate that Colorado has the authority under its traditional police powers to implement the Act without Federal Reserve approval. Part II of this Comment outlines the laws governing marijuana and the financial industry, including the United States Constitution, Colorado state laws, federal drug and banking laws, and administrative guidance issued by federal agencies. Part III analyzes the problems arising from cash-only marijuana businesses, the efforts in Colorado to provide financial services to these businesses, and the solution to utilize its traditional police powers. In conclusion, Part IV summarizes the issues raised in this Comment.

Congress’ to intervene.”); Stephens, *supra* note 8 (“Financial institutions aren’t going to wade into the marijuana business until they’re confident they won’t face legal action. . . . They point to legislation.”).

14. See Controlled Substances Act, 21 U.S.C. § 811(a) (2014) (“[T]he Attorney General may by rule— (1) add to such a schedule or transfer between such schedules any drug or other substance . . . (2) remove any drug or other substance from the schedules.”).

15. See Jacob Sullum, *Obama, Who Evidently Has Not Read The Controlled Substances Act, Denies That He Has the Power to Reclassify Marijuana*, FORBES (Jan. 31, 2014, 1:22 PM), <http://onforb.es/LxGOGT> (reporting a CNN interview where President Obama stated “what is and isn’t a Schedule I narcotic is a job for Congress”).

16. Marijuana Financial Services Cooperatives Act, H.B. 1398, 69th Gen. Assemb., Reg. Sess. (Colo. 2014) (enacted June 6, 2014 as COLO. REV. STAT. §§ 11-33-101 to -128 (2014)) [hereinafter cited as COLO. REV. STAT.].

17. See *id.*

18. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

II. BACKGROUND

A. Amendment 64: Colorado Legalizes Recreational Marijuana

In 2012, Colorado citizens voted to pass Amendment 64, an amendment to the state constitution legalizing the use and sale of marijuana for recreational purposes.¹⁹ On January 1, 2014, consumers formed lines outside of cannabis retail stores and participated in the nation's first day of legal recreational marijuana sales.²⁰ On this day, cannabis retail shops sold approximately \$1 million worth of marijuana products.²¹

Amendment 64 permits persons 21 years of age and older to purchase one ounce or less of marijuana daily²² and allows individuals to grow no more than six marijuana plants for strictly personal use.²³ Additionally, Amendment 64 allows individuals to gift one ounce or less to another person, provided the recipient is 21 years of age or older.²⁴ Furthermore, Amendment 64 requires all marijuana consumption to take place in private.²⁵

Although Amendment 64 legalizes recreational marijuana, the sale or transfer as a gift to a minor is strictly prohibited, as are the possession and use of marijuana by minors.²⁶ Moreover, Amendment 64 prohibits operating a vehicle while under the influence of the drug.²⁷ Additionally, employers are not restricted from banning marijuana use in the workplace, nor from implementing policies banning employees from using marijuana elsewhere.²⁸

Furthermore, because Amendment 64 is a constitutional amendment, legal recreational marijuana can only be eliminated by a further amendment to the state's constitution. Conversely, in states where mari-

19. COLO. CONST. art. XVIII, § 16 (2012) (incorporating Amendment 64: Use and Regulation of Marijuana which was proposed May 20, 2011 and enacted Nov. 6, 2012). See also *Amendment 64—Legalize Marijuana Election Results*, DENVER POST, Nov. 8, 2012, <http://dpo.st/1yGvPOP> (reporting Amendment 64 passed with 54.8% of voters).

20. See John Ingold, *World's first legal recreational marijuana sales begin in Colorado*, DENVER POST, Jan. 1, 2014, <http://dpo.st/Kje3xy>.

21. See Andrea Rael, *Colorado Marijuana Sales Surpass \$1 Million on First Day*, HUFFINGTON POST, (Jan. 23, 2014, 2:44 PM), <http://huff.to/19GgwNY>.

22. COLO. CONST. art. XVIII, § 16(3)(a).

23. *Id.* § 16(3)(b) (restricting the number of mature, flowering plants to three at one time).

24. *Id.* § 16(3)(c).

25. *Id.* § 16(3)(d).

26. *Id.* § 16(6)(c).

27. COLO. CONST. art. XVIII, § 16(6)(b).

28. *Id.* § 16(6)(a) (“Nothing in this section is intended to require an employer to permit or accommodate the use . . . of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees). See also *id.* § 16(6)(d) (permitting those who “occupy, own, or control” property to ban the drug from their premises).

juana laws are enacted as statutes, changes to the laws can be accomplished through typical legislative action.²⁹ Therefore, because repealing Amendment 64 would require the approval of a simple majority of Colorado's voters,³⁰ Colorado citizens enjoy an enormous amount of power.³¹

Although repealing the amendment may not be an easy task, Amendment 64 provides a loophole for municipalities that do not wish to have cannabis businesses in their communities.³² Local governments are given wide discretion in enacting ordinances to govern cannabis businesses within their jurisdiction.³³ If a locality desires to prohibit the operation of any state-legal marijuana-related facility, it may enact an ordinance to that end.³⁴

B. Federal Law: The Controlled Substances Act, The Supremacy Clause, and Federal Laws Prohibiting Financial Services to Illegal Enterprises

1. The Supremacy Clause³⁵

Regardless of the differences between Colorado marijuana laws and those of other states, all of the legislation shares one important aspect: it runs afoul of federal law prohibiting the growth, sale, and use of marijuana.³⁶ Article VI of the U.S. Constitution declares that federal law "shall be the supreme Law of the Land."³⁷ According to the U.S. Supreme Court, federal law preempts state law in three ways. First, Congress can expressly preempt state law through explicit statutory language.³⁸ Second, federal law preempts state law if Congress demonstrates their intent to exclusively occupy an entire regulatory field.³⁹ Here, in areas tradi-

29. See Wallach & Hudak, *supra* note 3.

30. COLO. CONST. art. V, § 1(3), (4); *id.* XIX, § 1.

31. See *id.* V, § 1(2) (stating that the governor has no veto power over referendums).

32. *Id.* XVIII, § 16(5)(f).

33. *Id.*

34. COLO. CONST. art. XVIII, § 16(5)(f).

35. U.S. CONST. art. VI, cl. 2.

36. See David Blake, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 360 (2014) (noting that Amendment 64 conflicts with U.S. Dept. of Justice); Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 39 (2014) ("[S]tates cannot simply legalize that which the federal government prohibits."). *But see* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1422 (2009) ("Contrary to conventional wisdom, state laws legalizing conduct banned by Congress remain in force and, in many instances, may even constitute the de facto governing law of the land.").

37. U.S. CONST. art. VI, cl. 2.

38. *English v. Gen. Elec. Co.*, 496 U.S. 77, 78 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983)).

39. *Id.* at 79 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

tionally occupied by the states, Congress's intent to "supersede state law must be 'clear and manifest.'"⁴⁰ Finally, federal law preempts state law in cases where it is impossible to comply with both federal and state laws,⁴¹ or where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴²

As *Gonzales* indicates, Congress did not intend the CSA to preempt state law, but rather contemplated a state role in the statute.⁴³ The nation's banking system similarly operates on both federal and state laws, a feature that has existed for centuries.⁴⁴ Thus, according to the preemption doctrine, federal law should trump these state laws only if they prove to be an obstacle to congressional purpose, or if compliance with both federal and state laws is impossible. Seemingly, both of these conditions are met, but as will be shown, the federal government declining enforcement in the area of state-legal marijuana has created an anomaly.

2. The Controlled Substances Act⁴⁵

Congress enacted the CSA in 1970 as part of a larger regulatory scheme to prevent drug abuse and to control illicit trafficking of regulated and illegal drugs.⁴⁶ To effectuate this goal, the CSA established five schedules under which to classify all drugs.⁴⁷ The CSA classifies marijuana as a Schedule I drug.⁴⁸ Schedule I drugs are characterized as drugs that have a "high potential for abuse,"⁴⁹ that have "no currently accepted medical use,"⁵⁰ and that lack "accepted safety for use . . . under medical supervision."⁵¹ The CSA declares it unlawful "to manufacture, distribute, or dispense . . . a controlled substance."⁵² Due to the Supremacy Clause, state laws permitting these marijuana-related actions presumably

40. *Id.* (citing *Jones v. Rath Packing, Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice*, 331 U.S. at 230)).

41. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

42. *Hine v. Davidowitz*, 312 U.S. 52, 67 (1941).

43. *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006). See discussion *infra* Parts III.D, III.E.

44. See Comptroller of the Currency Adm'r of Nat'l Banks, National Banks and the Dual Banking System 1 (2003), <http://1.usa.gov/1Ey7sVS> [hereinafter Comptroller] ("The federal system is based on a federal bank charter, powers defined under federal law, operation under federal standards, and oversight by a federal supervisor. The state system is characterized by state chartering, bank powers established under state law, and operation under state standards, including oversight by state supervisors.").

45. Controlled Substances Act, 21 U.S.C. §§ 801-971 (2014).

46. *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

47. 21 U.S.C. § 812(a).

48. *Id.* at § 812(c)(10) (using the alternate spelling "marihuana").

49. *Id.* at § 812(b)(1)(A).

50. *Id.* at § 812(b)(1)(B).

51. *Id.* at § 812(b)(1)(C).

52. 21 U.S.C. § 841(a)(1).

should be struck down because they are in conflict with the CSA.⁵³ There seems to be no way to comply with Colorado state law permitting marijuana-related activities while also complying with federal law.⁵⁴

3. The Bank Secrecy Act⁵⁵

In 1970, Congress enacted the Bank Secrecy Act (BSA) based upon a congressional finding that maintenance and mandatory reporting of financial records provided authorities with a high level of aid in criminal investigations.⁵⁶ Specifically, Congress found records revealing account holders' identities and those authorized to conduct transactions on behalf of account holders to be particularly helpful.⁵⁷ Thus, the BSA requires both insured and uninsured financial institutions to keep records of these individuals' identities.⁵⁸ The BSA defines "financial institution" broadly to include institutions such as FDIC-insured banks,⁵⁹ insurance companies,⁶⁰ and issuers of travelers' checks and money orders.⁶¹ Furthermore, the BSA permits both civil and criminal sanctions be levied upon those who willfully violate the Act.⁶²

The BSA gives the Secretary of Treasury the authority to promulgate rules in accordance with the Act.⁶³ The Secretary determines which records should be maintained,⁶⁴ how long the records should be kept,⁶⁵ and which reports should be compiled and filed with the Department of Treasury.⁶⁶ Specifically, the BSA requires financial institutions to file Currency Transaction Reports.⁶⁷ These reports must be filed for every "deposit, withdrawal, exchange of currency or other payment or transfer"

53. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hine v. Davidowitz*, 312 U.S. 52, 67 (1941).

54. See, e.g., *Florida Lime*, 373 U.S. at 142.

55. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970).

56. *Id.* § 101, at 1115.

57. *Id.* at 1114.

58. *Id.* at 1115; *id.* § 123, at 1117.

59. Pub. L. No. 91-508, § 203(e)(1), 84 Stat. at 1119.

60. *Id.* § 203(e)(13), at 1119.

61. *Id.* § 203(e)(11) ("[A]n issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments.").

62. *Id.* §§ 125, 126, at 1117-1118.

63. See Pub. L. No. 91-508, § 101, 84 Stat. at 1115; *id.* §§ 122, 123, at 1116-17; *id.* § 204, at 1120.

64. *Id.* §§ 101, 123, at 1115, 1116-17.

65. *Id.* § 101, at 1115.

66. Pub. L. No. 91-508, § 204, 84 Stat. at 1120, ("The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title" which is specifically Title II of the BSA. According to § 202 of Title II, the purpose is "to require certain reports of records where such reports or records have a high degree of usefulness in investigations or proceedings.").

67. *Id.* § 221, at 1122.

that involves currency of more than \$10,000.⁶⁸ The Secretary also requires the filing of Suspicious Activity Reports (“SARs”), “a report of any suspicious transaction relevant to a possible violation of law or regulation.”⁶⁹ The regulation designates a transaction as suspicious if it is conducted (or *attempted*) and involves at least \$5,000.⁷⁰ The bank must also know, suspect, or have reason to suspect⁷¹ that the transaction: (1) involves funds derived from unlawful activities;⁷² (2) is designed to evade BSA reporting requirements;⁷³ or (3) has no evident lawful purpose or is not the type of transaction in which the customer usually engages.⁷⁴

Additionally, the Secretary prohibits financial institutions from conducting particular transactions without recording them in monetary instrument logs.⁷⁵ Financial institutions may not issue bank checks or drafts, cashier’s checks, money orders, or travelers’ checks for amounts greater than \$3,000, unless particular identifying information is collected about the purchaser of these monetary instruments.⁷⁶ Additionally, the financial institution must verify the person’s identity.⁷⁷

Due to the requirements placed on financial institutions by the BSA and federal anti-money laundering laws, which will be discussed below, institutions violate federal laws when they knowingly provide financial services to marijuana businesses. Compliance with stringent reporting requirements could provide federal authorities with detailed evidence in the event they decide to prosecute. Furthermore, these detailed records would also lead the authorities directly to the financial institutions’ customers who work in the marijuana industry.

68. 31 C.F.R. § 1010.311 (2014). “Currency” is defined as the coin and paper money of the United States or a foreign country, including U.S. silver certificates, U.S. notes, Federal Reserve notes, and official foreign bank notes. 31 C.F.R. § 1010.100(m) (2014).

69. 31 C.F.R. § 1020.320 (2014).

70. *Id.* § 1020.320(a)(2).

71. *See, e.g., What Banks Look For-Suspicious or Unusual Activity*, Cook & Co., <http://bit.ly/1U11wgf> (last visited July 4, 2015) (describing various situations that banks may consider suspicious, including transactions that are kept just below the requisite amount for reporting; transactions that are made at multiple times a day in smaller amounts, deposited at various bank branches, or with different bank tellers; transactions conducted by various people on the same account; customers who alter the type or details of a transaction upon learning that identification is required).

72. *Id.* § 1020.320(a)(2)(i).

73. *Id.* § 1020.320(a)(2)(ii).

74. *Id.* § 1020.320(a)(2)(iii).

75. 31 C.F.R. § 1010.415(a) (2014).

76. *Id.* (requiring that institutions record name, date of transaction, type of monetary instrument purchased, serial number, and dollar amount, and sometimes requires social security number, address, and date of birth).

77. *Id.* § 1010.415(a)(1)(ii).

4. Federal Anti-Money Laundering Laws

After its enactment, Congress has bolstered the BSA by passing various federal money laundering laws. Congress defines money laundering as the “movement of illicit cash . . . into, out of, or through the United States, or . . . [its] financial institutions.”⁷⁸ Criminals launder money to conceal the “proceeds, sources, or nature” of their criminal activities.⁷⁹ To launder money, proceeds are deposited into a bank account and moved through a series of transactions to distance the funds from their source.⁸⁰ The funds are then integrated into the economy, often mixed with legitimate funds, thus causing illegal proceeds to be nearly indistinguishable from their legal counterparts.⁸¹

Initially, Congress passed the Money Laundering Control Act of 1986,⁸² which established money laundering as a federal crime. Specifically, the Act amended the BSA to prohibit individuals from organizing their transactions to evade currency transaction reporting requirements.⁸³ The Act also provides for civil and criminal forfeitures for violations of the BSA.⁸⁴

In 1992, Congress passed the Annunzio-Wylie Anti-Money Laundering Act.⁸⁵ This Act amended the BSA to permit the Secretary of Treasury to require the filing of suspicious activity reports as previously noted.⁸⁶ Additionally, the Annunzio-Wylie Act designates penalties for financial institutions convicted of money laundering, including revocation of bank charters and termination of federal deposit insurance.⁸⁷ Because of these anti-money laundering laws, financial institutions face dire consequences if they choose to offer financial services to marijuana businesses.

5. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001⁸⁸

78. Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. 105-310, § 5340(2)(A), 112 Stat. 2941, 2941 (1998).

79. U.S. Dep’t of Treasury, *Money Laundering*, TREASURY.GOV, <http://1.usa.gov/1CZIB11> (last visited Dec. 29, 2014).

80. See CHRISTIAN DESILETS & GERALD CLIFF, NAT’L WHITE COLLAR CRIME CENTER, *MONEY LAUNDERING 2–3* (2013), <http://bit.ly/1DHcH4k>.

81. See *id.*

82. Money Laundering Control Act of 1986, 18 U.S.C. § 1956 (2012).

83. *Id.* at § 1956(a)(1)(B)(ii), (a)(2)(B)(ii), (a)(3)(c).

84. *Id.* at § 1956(b)(4)(A).

85. Annunzio-Wylie Anti-Money Laundering Act, Pub. L. 102-550, 106 Stat. 4044, §§ 1500–1565 (1992).

86. *Id.* § 1517(b)(g)(1), at 4059–60.

87. *Id.* § 1502(c)(1)(B), at 4045; *id.* § 1503(a), at 4049; *id.* § 1503(b), at 4050.

88. USA Patriot Act, Pub. L. No. 107-56, 111 Stat. 272 (2012).

(“Patriot Act”)

In response to the terrorist attacks of September 11, 2001,⁸⁹ Congress enacted the Patriot Act. Congress intended the Patriot Act to deter future terrorist attacks and to capture and punish those committing acts of terror throughout the world.⁹⁰ Although preventing terrorist activity may not seem directly related to state-legal marijuana businesses, the Patriot Act nonetheless amended portions of the BSA, providing for stricter requirements on financial institutions, thus affecting the businesses’ access to financial services.⁹¹

The Patriot Act requires financial institutions to establish mandatory anti-money laundering programs that were previously optional.⁹² Although financial institutions are responsible for implementing their own programs, the programs must meet certain minimum requirements.⁹³ The Act also added a section to the BSA concerning the Financial Crimes Enforcement Network (“FinCEN”).⁹⁴ In 1990, the Secretary of Treasury created FinCEN to provide intelligence to law enforcement agencies on all levels within the country to combat domestic and international money laundering.⁹⁵ The Patriot Act, however, expanded the scope of FinCEN’s mission to furnish intelligence information on all financial crimes.⁹⁶ FinCEN was additionally tasked with providing policymakers analysis of financial crime patterns around the world.⁹⁷

6. Administrative Guidance

Although laws have not been passed to address the predicament of recreational marijuana businesses, the Obama Administration has offered administrative guidance to help both law enforcement and financial insti-

89. See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM’N REPORT (2004), <http://1.usa.gov/17jI0bw> (detailing the events of September 11, 2001 when terrorists hijacked four airplanes and crashed them into the World Trade Center, the Pentagon, and an area of Pennsylvania killing thousands of Americans); *Sept. 11th and Its Aftermath: Highlights from the Archives*, N.Y. TIMES, <http://nyti.ms/1FDk5m1> (last visited Dec. 23, 2014).

90. Pub. L. No. 107-56, 111 Stat. at 272.

91. *Id.* § 351, at 320.

92. *Id.* § 352(a)(h)(1), at 322.

93. *Id.* § 352(a)(h)(1)(A)–(D), at 322 (listing the minimum requirements to include: “the development of internal policies, procedures, and controls; the designation of a compliance officer; an ongoing employee training program; and an independent audit function to test programs.”).

94. *Id.* § 361, at 329–32.

95. Treas. Order 105-08 (Apr. 25, 1990).

96. Pub. L. 107-56, § 361, 115 Stat. at 329–32; Treas. Order 180-01 (Mar. 24, 2003).

97. Treas. Order 180-01 (Mar. 24, 2003).

tutions navigate this uncharted territory.⁹⁸ Deputy Attorney General Cole issued two memorandums instructing U.S. Attorneys how to approach prosecutorial decisions of marijuana businesses and financial institutions.⁹⁹ Additionally, the Department of Treasury, through FinCEN, issued a memorandum to aid financial institutions in providing banking services to state-legal marijuana businesses.¹⁰⁰

a. Memorandum from Deputy Attorney General James M. Cole (“August Cole Memo”)

On August 29, 2013, Deputy Attorney General Cole issued a memorandum, addressed to U.S. Attorneys, concerning marijuana enforcement.¹⁰¹ The August Cole Memo addresses Congress’s classification of marijuana as a dangerous drug and reaffirms the commitment of the Department of Justice (DOJ) to enforcing the CSA based on this congressional determination.¹⁰² Cole also notes, however, that the DOJ possesses limited resources to deploy in the investigation and prosecution of violators of federal law.¹⁰³ In order to achieve the best balance between prosecuting criminals and enforcing the CSA, Cole sets out eight federal priorities about which the DOJ are particularly concerned.¹⁰⁴ While U.S. Attorneys are still given prosecutorial discretion, Cole instructs them to conduct case-by-case analyses to determine whether these federal priorities are implicated and to focus their resources on those individuals and enterprises.¹⁰⁵

Cole expressly articulates an expectation that states, such as Colorado, that have legalized recreational marijuana, will enact and enforce rigorous regulatory schemes to govern its growth, sale, and possession.¹⁰⁶

98. See generally Feb. Cole Memo, *supra* note 6; FinCEN Guidance, *supra* note 6; Aug. Cole Memo, *supra* note 6.

99. See Feb. Cole Memo, *supra* note 6, at 1; Aug. Cole Memo, *supra* note 6, at 1.

100. See FinCEN Guidance, *supra* note 6, at 1.

101. Aug. Cole Memo, *supra* note 6, at 1.

102. *Id.*

103. *Id.*

104. *Id.* at 1–2. These priorities include preventing: (1) “distribution of marijuana to minors;” (2) “revenue from the sale of marijuana from going to criminal enterprises . . . ;” (3) “the diversion of marijuana from states where it is legal under state law in some form to other states;” (4) “state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;” (5) “violence and the use of firearms in the cultivation and distribution of marijuana;” (6) “drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;” (7) “the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;” and (8) “marijuana possession or use on federal property.” *Id.* at 1–2.

105. Aug. Cole Memo, *supra* note 6, at 2, 3.

106. *Id.* at 2.

The August Cole Memo further declares that jurisdictions with robust and effective regulation will be less likely to interfere with federal priorities.¹⁰⁷ Thus, federal authorities should leave enforcement of state and local cannabis laws to local law enforcement.¹⁰⁸

Although the August Cole Memo presumably assures state-legal marijuana businesses they will not be prosecuted if they comply with state laws governing marijuana, the memo warns that prosecutors might choose to disregard the guidance and prosecute them for violations of the CSA regardless of the guidance.¹⁰⁹ Moreover, the memorandum fails to address concerns that marijuana businesses have in acquiring financial services. Additionally, the memorandum creates no legal defenses in the event of prosecution.¹¹⁰ Seemingly, even if marijuana businesses comply with Colorado's cannabis laws, the August Cole Memo affords them no real protection.

b. Memorandum from Deputy Attorney General James M. Cole
("February Cole Memo")

Six months later, the Deputy Attorney General issued another memorandum to U.S. Attorneys concerning marijuana enforcement, this time addressing the financial sector.¹¹¹ In this subsequent memorandum, Cole clarifies that financial laws, such as the BSA, remain in effect, and transactions conducted by marijuana businesses may be in violation of these laws.¹¹² Specifically, financial institutions providing services to state-legal marijuana businesses could be held criminally liable for reporting violations under the BSA.¹¹³ However, due to the limited resources noted before, prosecutors should subject financial crimes to the "same consideration and prioritization" as described in the August Cole Memo.¹¹⁴

Although state-legal marijuana businesses acting in compliance with Colorado law may not implicate federal priorities, the February Cole Memo instructs financial institutions to continue their "risk-based anti-money laundering policies."¹¹⁵ Moreover, institutions must still conduct "customer due diligence" to identify situations that implicate the

107. *Id.* at 3.

108. *Id.*

109. *Id.* at 4.

110. Aug. Cole Memo, *supra* note 6, at 3.

111. Feb. Cole Memo, *supra* note 6, at 1.

112. *Id.* at 2.

113. *Id.*

114. *Id.*

115. *Id.* at 3.

priorities.¹¹⁶ Like its August counterpart, the February Cole Memo creates no legal defenses to provide protection to the institutions.¹¹⁷

c. Financial Crimes Enforcement Network Guidance (“FinCEN Guidance”)

On the same day the February Cole Memo was issued, FinCEN released corresponding guidance.¹¹⁸ FinCEN intended to clarify what was expected from financial institutions serving marijuana businesses.¹¹⁹ While hoping to “enhance the availability of financial services for [these] businesses,”¹²⁰ FinCEN Guidance did not remove the obligations banks have in reporting potentially criminal activities.¹²¹ Instead, the guidance sets out marijuana-specific procedures to follow so that financial institutions may serve these businesses while still meeting their obligations under the federal banking laws.¹²²

FinCEN Guidance provides an extensive list of “red flags” to help financial institutions determine whether a marijuana business is engaged in activities that implicate federal priorities.¹²³ Moreover, the guidance gives individual financial institutions the discretion to determine whether or not to “open, close, or refuse any particular account.”¹²⁴ The guidance stresses customer due diligence as a “critical aspect” of an institution’s assessment of whether to offer financial services to marijuana businesses.¹²⁵ Under this principle, banks must verify the identity of its customers, the source of their funds, and monitor its customers’ banking activities continuously to ensure legality.¹²⁶

116. Feb. Cole Memo, *supra* note 6, at 3. See also Genci Bilali, *Know Your Customer—Or Not*, 43 U. TOL. L. REV. 319, 319, 322–23 (2012) (noting that customer due diligence is also known as the know-your-customer principle, requiring institutions “to monitor, audit, collect, and analyze relevant information about their customers (or potential customers) before engaging in financial business with them”).

117. Feb. Cole Memo, *supra* note 6, at 3.

118. FinCEN Guidance, *supra* note 6, at 1.

119. *Id.*

120. *Id.*

121. See *id.* at 3.

122. *Id.* at 2.

123. FinCEN Guidance, *supra* note 6, at 5 (enumerating “red flags” to include transactions that do not reasonably compare to those of other marijuana businesses in the area; inability to demonstrate licensing or revenue source; if account holders reside in a different state; if cash deposits are received from outside of the state; if account holder attempts to disguise involvement in the industry; if business declares its involvement in a non-marijuana business, but deposits cash “smelling of marijuana”).

124. *Id.*

125. *Id.* at 2.

126. See Bilali, *supra* note 116, at 322–23) (noting that customer due diligence is also known as the know-your-customer principle, requiring institutions “to monitor, audit,

According to FinCEN Guidance, financial institutions should continue to file currency transaction reports and SARs for marijuana-related accounts just as they would for other customers.¹²⁷ The guidance creates separate classes of SARs to address the uniqueness of state-legal marijuana businesses while still furthering the BSA's objective of collecting and providing law enforcement with access to highly useful information in criminal investigations: marijuana limited, marijuana priority, and marijuana termination SARs.¹²⁸ After complying with customer due diligence requirements, if banks do not reasonably believe that a marijuana business's activities violate state law or implicate one of the federal priorities, a marijuana limited SAR should be filed.¹²⁹ On the other hand, if a financial institution "reasonably believes, based on its customer due diligence"¹³⁰ that a marijuana business's activities *do* violate state law or *do* implicate one or more federal priority, then a marijuana priority SAR should be filed.¹³¹ In the event a financial institution determines it can no longer maintain a relationship with a marijuana business and comply with effective anti-money laundering programs, a marijuana termination report should be filed explaining the reasons for termination.¹³²

Deputy Attorney General Cole's August and February memoranda, along with FinCEN Guidance, were intended to ease the difficulties faced by state-legal marijuana businesses and financial institutions. By operating within the confines of state law, marijuana businesses should be able to access banking services, as long as their activities do not implicate any of the DOJ's federal priorities. Despite this guidance, however, financial institutions largely refuse to conduct business with state-legal marijuana operations.¹³³

collect, and analyze relevant information about their customers (or potential customers) before engaging in financial business with them").

127. See *supra* Part II.B.2.

128. FinCEN Guidance, *supra* note 6, at 3, 4, 5.

129.. *Id.* at 3–4 (indicating that marijuana limited reports must include information to identify the parties involved, the parties' addresses, and a statement that the filing of the report occurred only because a marijuana business was involved and no other suspicious activity has been observed).

130. *Id.* at 4.

131. *Id.* (indicating that marijuana priority reports should include "comprehensive detail" of identifying information about the parties, the specific priorities the bank believes are implicated, and the details of the involved transactions).

132. *Id.* at 4–5.

133. See Stephens, *supra* note 8; Geffner, *supra* note 12; Williams & Weisbaum, *supra* note 8.

III. ANALYSIS

A. *Problem with Administrative Guidance*

Although the media lauded the issuance of the DOJ and FinCEN guidance as a “green light” to financial institutions to do business with marijuana establishments, the institutions themselves remain wary, and for good cause.¹³⁴ Financial institutions face steep penalties if the DOJ decides to prosecute them, including civil and criminal sanctions, asset seizure, bank charter revocation, and loss of federal deposit insurance.¹³⁵ Furthermore, financial institutions’ employees, directors, and officers all face civil and criminal penalties, including lifetime bans from the banking industry, if the DOJ decides to prosecute for the facilitation of federally unlawful transactions.¹³⁶ Financial institutions have largely determined that the benefits of providing services to the lucrative marijuana industry do not outweigh the risks.¹³⁷

Administrative guidance lacks the force of law and does not afford any legal defenses in the event of prosecution.¹³⁸ In essence, the federal government is simply choosing to look the other way, at least for the time being.¹³⁹ However, the next presidential administration, which will take office after the November 2016 general election, could decide it no longer wishes to look the other way. The new administration could easi-

134. See Danielle Douglas, *Obama Administration Clears Banks to Accept Funds from Legal Marijuana Dealers*, WASHINGTON POST, Feb. 14, 2014, <http://wapo.st/17As7x9>; Andrew Grossman, *Banks to be Allowed to do Business with Marijuana Dispensaries: Federal Regulator Issues Guidance to Address Contradictory Laws*, WALL STREET JOURNAL, Feb. 14, 2014, <http://on.wsj.com/1OuzV3o>; David Migoya & Allison Sherry, *Banks Given the Go-Ahead on Working with Marijuana Businesses*, DENVER POST, Feb. 14, 2014, <http://dpo.st/1LK0MuO>.

135. See Grossman, *supra* note 134 (“[B]anks that provide support for those activities face the risk of prosecution and assorted sanctions.”); Stephens, *supra* note 8 (“[B]anks that followed the guidance could be exposed to civil or criminal liability.”); Williams & Weisbaum, *supra* note 8 (listing federal penalties banks face, including “civil money penalties, fines . . . withdrawal of FDIC insurance”); AMERICAN BANKING ASSOCIATION, FREQUENTLY ASKED QUESTIONS: MARIJUANA AND BANKING I (2014), <http://www.aba.com/Tools/CommTools/Documents/ABAMarijuanaAndBankingFAQFeb2014.pdf>.

136. See Sullum, *Marijuana Money*, *supra* note 9; Williams & Weisbaum, *supra* note 8 (noting that individuals can face a lifetime ban from the banking world). See *supra* Parts II.B.2 & II.B.3.

137. See Ferner, *House Votes*, *supra* note 12 (estimating the national legal marijuana market to reach \$2.3 billion in 2014 and exceed \$10 billion by 2019); Stephens, *supra* note 8 (estimating marijuana sales in Colorado nearing \$1 billion in 2014); Geffner, *supra* note 12; Williams & Weisbaum, *supra* note 8.

138. See *supra* Parts II.B.5.a & II.B.5.b.

139. Billy Hamilton, *Joint Venture: Colorado, Washington, and the Great Pot Experiment*, STATE TAX NOTES MAGAZINE, June 16, 2014, at 647, available at LEXIS, 72 State Tax Notes 647.

ly repeal the guidance and instruct the DOJ to begin prosecuting all violators of the CSA and banking laws, especially if the new administration wishes to thwart the growing trend of legalized recreational marijuana among the states. Furthermore, if banks and businesses trust the guidance and begin conducting business with one another, if and when the new administration chooses to eliminate the guidance, the government will have a database of individuals to prosecute through the marijuana-related SARs. With the precarious character of this guidance, it is unsurprising that banks are less than eager to accommodate the cannabis industry.

B. Effect of Financial Laws on Marijuana Establishments

Marijuana establishments that are unable to acquire banking services find themselves operating on an entirely cash basis. This means these businesses not only accept cash from their customers, but that they must pay their employees, their suppliers, their utilities, and their taxes entirely in cash as well.¹⁴⁰ At first glance, a cash-only business may not seem particularly problematic, but an analysis of what “cash-only” entails exposes the many difficulties and dangers this model presents.

1. Crime

Perhaps the most glaring danger posed by a cash-only business model is the vulnerability to burglaries and robberies that results from storing immense amounts of untraceable cash.¹⁴¹ According to a local news report, Denver Police encountered 49 burglaries and 1 robbery of marijuana businesses in the first quarter of 2014.¹⁴² Marijuana establishments are attractive to thieves, because when “[y]ou hit a 7-Eleven, you’ll get 20 bucks. [But when] [y]ou hit a dispensary, you’ll get \$300,000 on a good day.”¹⁴³ Additionally, strict zoning regulations further entice criminals to target marijuana businesses because marijuana facilities are restricted largely to remote, sparsely populated, industrial areas.¹⁴⁴ These conditions have forced many marijuana businesses to

140. See Geffner, *supra* note 12.

141. See Hughes, *supra* note 10.

142. See *Marijuana Industry Skeptical of Banking Bill, Beefs Up Security*, CBS DENVER, MAY 12, 2014, <http://cbsloc.al/1g2NtXy> [hereinafter CBS Denver, *Beefs Up Security*].

143. Tony Dokoupil & Bill Briggs, *High Crimes: Robber Gangs Terrorize Colorado Pot Shops*, NBC NEWS, Feb. 3, 2014, <http://nbcnews.to/1kUFIBy> (quoting Denver District Attorney Mitch Morrissey).

144. See Hughes, *supra* note 10 (“[S]tores and grow operations are in remote industrial areas.”); *Vice: Rocky Mountain High & North Korean Defectors* (HBO television broadcast Apr. 25, 2014) (interviewing Ted Daniels, owner of Blue Line Protection

hire armed security guards,¹⁴⁵ employees who hold concealed-carry permits,¹⁴⁶ armored truck services, and security firms that specialize in the cannabis industry.¹⁴⁷ Despite these precautions, marijuana businesses remain targets for criminals.¹⁴⁸

2. Efforts to Acquire Banking Services

While some facilities are dealing with the all-cash conundrum, other cannabis establishments attempt to circumvent the banks' refusal to do business with the marijuana industry. For example, some owners use their personal bank accounts rather than attempting to open business accounts.¹⁴⁹ Additionally, other owners play "cat and mouse" with banks, attempting to hide the source of their funds by using holding companies to open bank accounts or business names that mask the true character of their business.¹⁵⁰ These actions typically result in businesses receiving banking services for a few months before banks "get wise" and close these accounts.¹⁵¹ Those individuals attempting to mislead banks as to their business's true nature may run into problems when depositing their cash. FinCEN's long list of red flags contains a roadblock for these sneaky account holders: if cash possesses the scent of marijuana and the business purports to be non-marijuana related, the bank should investi-

Group, who describes the heightened security threat due to strict zoning laws that place marijuana businesses in isolated and dangerous areas).

145. See Hughes, *supra* note 10 (stating that marijuana businesses are required by state law to have security systems and cameras, but that many businesses also hire armed guards as well).

146. See Stephens, *supra* note 8.

147. See Hughes, *supra* note 10 (interviewing CEO of Blue Line Protection Group, a marijuana security firm that employs former law enforcement officers and former military); CBS Denver, *Beefs Up Security*, *supra* note 142 (interviewing CEO of Canna Security America, which serves exclusively the cannabis industry and helped formulate regulations which mandate high tech security systems for marijuana establishments).

148. See Hughes, *supra* note 10 (quoting Sean Campbell, CEO of Blue Line Protection Group, stating, "[y]ou're effectively creating a magnet for crime").

149. See Geffner, *supra* note 12; *Planet Money, Episode 420: The (Legal) Marijuana Business*, NPR (Dec. 4, 2012), <http://n.pr/1KsB7Gt> [hereinafter Planet Money].

150. See Hughes, *supra* note 10; Geffner, *supra* note 12; Alison Vekshin, *Pot Shops Can't Take American Express of Deposit in Banks*, BLOOMBERG NEWS (May 12, 2013 8:00 PM), <http://bloom.bg/1IyljBL>.

151. See Hughes, *supra* note 10 (noting that marijuana business owners are able to keep bank accounts open for a few months before banks close the accounts); Stephens, *supra* note 8 (noting that a co-founder of a marijuana dispensary had access to banking services, but the bank shut down his accounts after receiving a telephone call from the Drug Enforcement Agency); Geffner, *supra* note 12 ("Such accounts are likely to be denied or terminated once the bank gets wise to the try type of business."); Vekshin, *supra* note 150 (explaining that financial institutions terminate services without notice upon discovering the "subterfuge" of marijuana businesses using innocent-sounding names or personal accounts for their business needs).

gate further.¹⁵² The smell of cannabis is unique and difficult to describe because so many different strains exist, but by and large, marijuana smells similar to a skunk's spray.¹⁵³ If cash is kept in the same safe or vault as marijuana, the marijuana's odor latches onto the money and causes concern when the bills are brought to the bank.¹⁵⁴

Some lucky owners of marijuana businesses report that banks are willing to do business with them.¹⁵⁵ The CEO of a prominent marijuana products manufacturer claims his company has "strong banking relationships," but simply does not discuss them with others.¹⁵⁶ Presumably, if word circulated that specific institutions were accepting cannabis accounts, the provision of financial services would cease. The president of the Colorado Bankers Association warns institutions to "[s]erve these customers at your own risk."¹⁵⁷ FinCEN's director announced in August 2014 that 105 banks and credit unions were currently providing services to marijuana businesses.¹⁵⁸ She declined, however, to disclose the names or locations of these institutions.¹⁵⁹ Financial institutions' desire to remain anonymous, along with requests that marijuana businesses stay quiet about acquired banking services, lend support to the theory that financial institutions distrust the administrative guidance.

3. Non-Cannabis-Related Third Party Effects

Some non-cannabis businesses also find themselves without banking services because they provide services to the marijuana industry.¹⁶⁰ Several banks have refused to provide banking services to a Colorado lawyer due to the clients she represents as part of her specialized practice in tax and marijuana law.¹⁶¹ The president of an Ohio company, which manufactures oil extraction equipment, found his accounts closed after he opened deposit accounts for his customers to prevent them from

152. FinCEN Guidance, *supra* note 6, at 6.

153. See Barbara Brotman, *Skunk Smell Spreading Like Weed Through City*, CHICAGO TRIBUNE, Apr. 2, 2012, <http://trib.in/17AsoAj>.

154. Planet Money, *supra* note 149.

155. See Douglas, *Banks Slowly Welcoming*, *supra* note 13; Sullum, *Marijuana Money*, *supra* note 9; Williams & Weisbaum, *supra* note 8.

156. Sullum, *Marijuana Money*, *supra* note 9 (interviewing CEO of Dixie Elixirs & Edibles in Denver, about where he stores his cash); See also Douglas, *Banks Slowly Welcoming*, *supra* note 13 (quoting the spokeswoman for the National Cannabis Industry Association stating that members who have secured banking services have been told not to discuss it).

157. Sullum, *Marijuana Money*, *supra* note 9.

158. See Douglas, *Banks Slowly Welcoming*, *supra* note 13.

159. See *id.*

160. See Hughes, *supra* note 10.

161. See *id.*

transporting large amounts of cash.¹⁶² Subsequently, numerous banks denied the Ohio company president's loan applications to expand his company because its profits were derived from the marijuana industry.¹⁶³

Presumably, if banks refused services to account holders who conduct business with state-legal marijuana businesses, the ripple effect could be felt nationally, as evidenced by the dilemma of the Ohio company. What about utility companies that provide electricity, water, and natural gas to cannabis businesses? Are they at risk of losing access to financial services? They are, after all, doing business with marijuana establishments. If financial institutions are in danger of prosecution for aiding and abetting marijuana distribution by providing these services, then seemingly, so is every other establishment that provides marijuana businesses with various services and supplies. The implications of this stance are extraordinarily far-reaching.

4. Payments of Payroll, Vendors, and Taxes

A further problem facing marijuana businesses is their ability to make payments: to vendors, to employees, and to the government.¹⁶⁴ Vendors who receive large cash payments may find themselves in the same boat as marijuana businesses—facing the dangers involved in transporting large amounts of money. Moreover, paying bills in cash is time-consuming. Because sending cash through the mail is ill advised, as it could easily get lost, marijuana businesses likely pay their utilities in person. The United States Postal Service advises the purchase of money orders as an alternative to mailing cash.¹⁶⁵ However, because financial institutions are largely not offering these services to marijuana businesses, owners are back at square one.

Employers must pay their employees wages, but without bank accounts, cannabis establishments must distribute payroll in cash.¹⁶⁶ This

162. Connor Adam Sheets, *Marijuana Industry: Congress Helping Pot Growers Become More Attractive Partner for Banks*, INT'L BUS. TIMES (July 18, 2014, 2:00 PM), <http://bit.ly/1VHq6Ve> (reporting that the bank terminated accounts upon determining the number of deposits being made resembled money laundering).

163. *Id.* Cannabis extraction equipment is used to extract cannabis oil from the marijuana plant. Cannabis oil is a more potent form of marijuana. See *Extraction: A Complex and Potentially Dangerous Art*, CANNLABS, <http://bit.ly/1KsBa5n> (last visited July 4, 2015).

164. See Ferner, *House Votes*, *supra* note 12; Geffner, *supra* note 12; Sullum, *Marijuana Money*, *supra* note 9.

165. See UNITED STATES POSTAL SERVICE, A CUSTOMER'S GUIDE TO MAILING 22 (2014), <http://1.usa.gov/1U120Dd>.

166. See Ferner, *House Votes*, *supra* note 12 (“[C]reating issues involving . . . employee payroll.”); Geffner, *supra* note 12 (“[B]usinesses also pay their employees . . . in cash.”).

means workers are walking around with cash, at least until they make it to their own bank (which is hopefully oblivious to their occupations, as they might lose their accounts). And thus, these employees become targets of thieves.

Federal taxes present an additional issue due to a ten percent tax the Internal Revenue Service levies on employment taxes paid in cash.¹⁶⁷ This could add up to an exorbitant amount in penalties resulting from circumstances outside of the taxpayer's control.¹⁶⁸ Additionally, while some marijuana businesses likely keep meticulous records to ensure their compliance with the laws,¹⁶⁹ without a payroll paper trail, those businesses that choose to skirt the rules could easily avoid collecting taxes from their employees to forward to the government and simply pay their workers under the table.

Relatedly, although the businesses are unlawful under federal law, marijuana establishments must pay taxes to Colorado and the federal government, like any other business.¹⁷⁰ Paying these taxes, as well as licensing fees, becomes tricky when the only method to do so is to use cash. One business owner reported that he pays roughly \$35,000 in sales tax to the state every month.¹⁷¹ He pays another \$45,000 annually to cover his licensing fees in Denver.¹⁷² To remit these payments, this business owner must bring thousands of dollars in cash to Colorado's Department of Revenue ("DOR").¹⁷³ Upon arrival at the DOR, presumably a DOR employee must account for the cash to assure the tax or fee is paid in full. Then, the DOR likely must solve the problem of where to store the large amount of cash and how to transport the money to its bank.

Moreover, without a paper trail of the revenue earned and the business's outgoing overhead costs, white-collar crime, such as tax evasion,

167. See Hughes, *supra* note 10; Stephens, *supra* note 8; Sullum, *Marijuana Money* *supra* note 9.

168. See Hughes, *supra* note 10 (stating that "[w]ith some marijuana businesses paying payroll taxes of \$100,000 a quarter, those penalties are substantial). See also Sullum, *Marijuana Money*, *supra* note 9 (detailing a recent IRS dispute where a marijuana business unsuccessfully challenged the ten percent penalty in U.S. Tax Court based on payments in cash are not within his control).

169. See Stephens, *supra* note 8.

170. See *James v. United States*, 366 U.S. 213, 218 (1961) (clarifying when Congress amended the Income Tax Act of 1913, the omission of the word "lawful" proved that Congress intended to tax income derived from both legal and illegal sources).

171. Vekshin, *supra* note 150.

172. *Id.*

173. *Id.* See also Hughes, *supra* note 10 (describing the various ways in which marijuana business owners bring their payments into the DOR, including shoeboxes, locked briefcases, buckets).

could more easily be perpetrated.¹⁷⁴ Cash-only businesses frustrate efforts to conduct audits of business records and trace transactions.¹⁷⁵ Without measures in place to corroborate the income marijuana businesses or their vendors report to the IRS, how does the federal government know it is receiving all of the taxes it is due?¹⁷⁶

Furthermore, the financial handling of these taxes that marijuana businesses have paid their local government, the Colorado DOR, and the IRS presents an anomaly. While cannabis establishments are unable to keep their money in the bank, these respective government entities seem to have no problem keeping the revenue they acquire from the marijuana industry in their financial institutions. Specifically, J.P. Morgan Chase & Co., among others, maintains a policy of not offering services to the marijuana industry.¹⁷⁷ However, J.P. Morgan Chase is one of three financial institutions that contract with the state of Colorado to hold their funds,¹⁷⁸ funds that clearly include tax revenues derived from the marijuana industry. The General Counsel of the American Bankers Association (ABA) attempts to reconcile this inconsistency by explaining that tax dollars are legal even when derived from illegal sources.¹⁷⁹ However, even the ABA acknowledges, “this is not entirely clear.”¹⁸⁰

Marijuana businesses face many difficulties due to their inability to access banking services, and these difficulties affect those who conduct business with them as well as those who regulate the industry. The lack of faith displayed by banks in the administrative guidance inhibits the marijuana industry’s efforts to operate as a legitimate industry. The general consensus is that additional measures must be taken to address this issue.¹⁸¹

174. See Ferner, *House Votes*, *supra* note 12 (quoting Colorado Representative Ed Perlmutter stating that the potential for both white collar and violent crime are somewhat substantial for all-cash businesses); Sullum, *Marijuana Money*, *supra* note 9 (“[T]ax collectors should worry about the opportunities for evasion that a cash-only business offers.”).

175. See Vekshin, *supra* note 150.

176. A bill has been introduced in the House of Representatives which would amend the IRS tax code to provide for excise taxes on marijuana sales and distributions. The bill would also require a permit for anyone involved in a “marijuana enterprise.” The bill was introduced on February 20, 2015 and assigned to committee, but not further action has been taken. See H.R. Res. 1014, 114th Cong. (2015); *H.R. 1014-Marijuana Tax Revenue Act of 2015*, GOVTRACK.US, <http://bit.ly/11ylGwj> (last visited July 4, 2015).

177. Grossman, *supra* note 134.

178. Migoya, *supra* note 9.

179. See Megan Michiels, *The Cannabis Conundrum: The Changing Legal Landscape for Marijuana Use Puts Banks in Several Difficult Spots*, ABA BANKING JOURNAL, Feb. 2014, at 32.

180. *Id.*

181. See sources cited *supra* note 13; See also Williams & Weisbaum, *supra* note 8 (“This guidance . . . [is] not enough”); Sheets, *supra* note 162 (quoting a partner in a Chi-

C. *Legislative Efforts to Address the Issue*

Although it may seem that the simplest solution is for the federal legislature to act, immediate congressional action seems unlikely. The 113th Congress, which ended on January 5, 2015, took the title of the second least productive Congress in modern history¹⁸² and was often referred to as a “do nothing Congress.”¹⁸³ Instead of tackling the recreational marijuana problem, Congress allowed proposed solutions to die at the committee level.¹⁸⁴ On April 22, 2015, a bill was introduced in the House of Representatives that would exempt from the CSA those who comply with state marijuana laws.¹⁸⁵ The bill was assigned to a committee, but has not yet been voted upon.¹⁸⁶

1. Failed Attempts in United States Congress

In July 2013, Representative Ed Perlmutter of Colorado introduced the Marijuana Businesses Access to Banking Act, which would have provided a “safe harbor” for financial institutions wishing to offer banking services to marijuana businesses.¹⁸⁷ The bill, however, was referred to the committee in September and never emerged for a vote.¹⁸⁸ The bill was reintroduced to the 114th Congress on April 28, 2015, but no action has been taken.¹⁸⁹ Additionally, Colorado Representative Jared Polis in-

cago law firm stating that permitting lenders to lend funds to legal businesses without fear is one of the most important federal priorities “by more than just government guidance”).

182. See Mark Murray, *113th Congress Not the Least Productive in Modern History*, NBC NEWS, Dec. 29, 2014, <http://nbcnews.to/1JXYXHQ>.

183. *113th Congress Set to Become the Most “Do Nothing Congress” on Record*, NAACP, <http://bit.ly/1HSL4t4>, (last visited Jan. 22, 2015); see Manu Raju, *The (really) Do Nothing Congress*, POLITICO (Nov. 22, 2013 4:12 PM), <http://politi.co/1erdKi7>; Becky Sarwate, *113th Congress Produces 22% of “Do Nothing” 1947-1948 Counterpart*, POLITICUS USA (Dec. 20, 2014, 2:13 PM), <http://bit.ly/1DHdIcB>.

184. While Congress did nothing to progress a solution for recreational marijuana, they did pass a spending bill, which prohibits federal funds to be used in prosecuting “state-legal cannabis programs” in states that have legalized the drug for medical purposes. See Matt Ferner, *Congress Passes Historic Medical Marijuana Protections in Spending Bill*, HUFFINGTON POST, Dec. 14, 2014, <http://huff.to/1vOwGbL>. However, the same Congress did not allow a similar measure to pass concerning recreational marijuana as discussed *infra* Part III.C.1.

185. H.R. Res. 1940, 114th Cong. (2015).

186. See *H.R. 1940-Respect State Marijuana Laws Act of 2015*, GOVTRACK.US, <http://bit.ly/1Ip7UKq> (last visited July 4, 2015). Govtrack.us estimates a zero percent chance of this bill being enacted.

187. H.R. Res. 2652, 113th Cong. §2 (2013).

188. See *H.R.2652—Marijuana Businesses Access to Banking Act of 2013*, CONGRESS.GOV, <http://1.usa.gov/1MQqd14> (last visited Jan. 23, 2015).

189. H.R. Res. 2076, 114th Cong. (2015). See *H.R. 2076-Marijuana Businesses Access to Banking Act of 2015*, GOVTRACK.US, <http://bit.ly/1LMbb7I> (last visited July 4,

roduced the Ending Federal Marijuana Prohibition Act of 2013 in February 2014, which would have removed marijuana from Schedule I drug classification.¹⁹⁰ After being referred to the same subcommittee as its predecessor, this bill also died without action.¹⁹¹

In a more promising display, the Financial Services and General Government Appropriations Act passed the House of Representatives on July 16, 2014, with 228 votes in favor of and 195 votes against it.¹⁹² This bill was introduced in an effort to prohibit federal funds from being used to penalize financial institutions that offer banking services to state-legal marijuana businesses.¹⁹³ The bill was received in the Senate and referred to the Appropriations Committee, where it met the same fate as the other recreational marijuana legislation introduced in the 113th Congress.¹⁹⁴ While bipartisan support exists for solving the marijuana banking problem, a recent Gallup poll found that Republicans tend to be less receptive than Democrats, with only 39 percent of Republicans supporting legal marijuana compared to 64 percent of Democrats.¹⁹⁵ Now that Republicans dominate Congress, if congressmen mirror their Republican voter counterparts on marijuana issues, a prompt congressional solution seems unlikely in the near future.

2. Marijuana Financial Services Cooperatives Act¹⁹⁶

On March 5, 2014, the Colorado Senate adopted Senate Resolution 14-003, which declared that the best solution to the lack of financial services provided for the marijuana industry is “comprehensive federal leg-

2015). Govtrack.us offers a prognosis of zero percent chance that this legislation will be passed.

190. H.R. Res. 499, 113th Cong. (2014).

191. See *H.R.499—Ending Marijuana Prohibition Act of 2013*, CONGRESS.GOV, <http://1.usa.gov/1D3HTQj> (last visited Jan. 23, 2015).

192. *H.R.5016: Financial Services and General Government Appropriations Act, 2015*, GOVTRACK.US, <http://bit.ly/1MuZi7F> (last visited Jan. 23, 2015) (breaking down the July 16, 2014 vote on the bill).

193. H.R. Res. 5016, 113th Cong. § 916 (2014).

194. See *H.R.5016—Financial Services and General Government Appropriations Act, 2015*, CONGRESS.GOV, <http://1.usa.gov/1HSLn7i> (last visited Jan. 23, 2015).

195. Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP.COM (Nov. 6, 2014) <http://bit.ly/1GckZUa> (noting also that 73 percent of liberals, 31 percent of conservatives and 58 percent of moderates support marijuana legalization); See also, Pew Research Center, *America's New Drug Policy Landscape*, (Apr. 2, 2014), <http://pewrsr.ch/1mWHkLI> (reporting Feb. 2014 poll results of 59% of Republicans against and 39% in favor of marijuana legalization); Pollingreport.com, <http://bit.ly/1Jo2Gzq> (last visited Feb. 16, 2015) (reporting multiple partisan support polls: a Jan. 2014 CNN poll revealed 34% of Republicans in favor of and 64% against legalization and a Feb. 2014 CBS News poll resulted in 36% of Republicans in favor of and 61% against legalization).

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

isolation authorizing banks and credit unions to serve legal marijuana . . . businesses.”¹⁹⁷ Although Colorado called for Congress to act, it did not sit quietly and await a congressional solution. Instead, the Colorado General Assembly passed its own legislation to address the banking dilemma.¹⁹⁸

The Marijuana Financial Services Cooperatives Act passed both the House and Senate of the Colorado General Assembly in May and was signed into law by the governor on June 6, 2014.¹⁹⁹ The Cooperatives Act amends Title 11 of the Colorado Revised Statutes to add a section devoted to the establishment of cooperatives to offer banking services to legal marijuana businesses within the state.²⁰⁰ A cooperative is a business that functions democratically and is formed by a group of like-minded people for a collective purpose.²⁰¹ Member-owners pool their resources to provide services for which they have a common need.²⁰² In this case, the common need is access to financial accounts and credit.²⁰³

The Assembly issued its findings concerning the negative effect the lack of banking services has on the state, such as increased crime and the inability of the state to accurately track and verify the revenue of marijuana establishments.²⁰⁴ Additionally, the Assembly clarified that cannabis cooperatives are not banks or credit unions that benefit from federal deposit insurance.²⁰⁵ The lack of FDIC or NCUA protection, in addition to the lack of full faith and credit backing, must be disclosed to customers along with the acknowledgement that funds may still be subject to seizure by the federal government.²⁰⁶ Moreover, access to these cooperatives would be limited to only those marijuana businesses that can prove they are unable to secure banking services elsewhere.²⁰⁷ Furthermore, cooperative services would not be available to individuals regardless of licensing.²⁰⁸

197. Colo. S. Res. 14-003, at 5.

198. See COLO. REV. STAT. §§ 11-22-101 to -128 (2014).

199. See Daniel Wilson, *Colo. Gov. Signs World-First Marijuana Co-Op Law*, LAW360, June 6, 2014, <http://bit.ly/1IymQ13>.

200. See Marijuana Financial Services Cooperatives Act, H.B. 1398, 69th Gen. Assemb., Reg. Sess., §§ 1 (Colo. 2014) (enacted June 6, 2014 as COLO. REV. STAT. §§ 11-33-101 to -128 (2014)).

201. See *What is a Cooperative?*, COOP. CTR. FED. CREDIT UNION, <http://bit.ly/1GRKMyC> (last visited Feb. 2, 2015).

202. See *id.*

203. See COLO. REV. STAT. § 11-33-104(1).

204. *Id.* § 11-33-102(B).

205. See *id.* § 11-33-108(1)(A).

206. *Id.* § 11-33-106(4)(A).

207. *Id.* § 11-33-104(1).

208. COLO. REV. STAT. § 11-33-106(2).

Cannabis cooperatives would also be held to the same due diligence standards as banks, including ensuring that their customers' actions are not implicating any of the DOJ's federal priorities.²⁰⁹ All eight federal priorities are expressly incorporated into the text of the Cooperatives Act itself.²¹⁰ Additionally, cooperatives must comply with all federal requirements, such as the BSA and SARs filing.²¹¹ Presumably, cannabis cooperatives are not intended to be a permanent solution to the marijuana banking problem. A provision in the Cooperatives Act declares that cooperatives would potentially be unnecessary in the event that federal deposit insurance is extended to banks meant to provide services to marijuana businesses.²¹²

Although the Cooperatives Act has been signed into law, a substantial hurdle still impedes the successful implementation of the cannabis cooperatives.²¹³ According to the Cooperatives Act, the Federal Reserve System must approve the bill, specifically with respect to merchant services such as debit and credit card processing.²¹⁴ Critics speculate, however, that, due to the absence of federal deposit insurance, the Federal Reserve will likely withhold its approval.²¹⁵ Perhaps if Colorado could provide an alternative to FDIC insurance, such as pooling marijuana tax revenues to create state insurance for cooperative deposits, the Federal Reserve may give the bill the go-ahead. Additionally, if the state could provide an alternative to merchant services, such as cashless ATMs located in marijuana retail stores, then the Federal Reserve's approval may be unnecessary.

Without the Federal Reserve's stamp of approval, the Cooperatives Act appears obsolete unless the Act is amended to remove the need for its approval. This leads one to wonder if Colorado can solve this problem without federal assistance. Colorado would not be the first state to devise a plan addressing an issue the state felt compelled to solve in the absence of federal action. In 1994, Oregon voters approved a ballot measure to legalize a form of physician-assisted suicide, resulting in the enactment of the Oregon Death With Dignity Act²¹⁶ ("ODWDA"). In

209. *Id.* § 11-33-126(D)(2)(A).

210. *Id.*

211. *Id.* § 11-33-126(A), (D).

212. *See id.* § 11-33-104(3)(A).

213. *See* Ivan Moreno, *Colorado Law Sets Up World's First Marijuana Banks; Feds Must Ok*, COLO. SPRINGS GAZETTE, June 6, 2014, <http://bit.ly/1MQqyT>.

214. COLO. REV. STAT. § 11-33-104(4)(A). *See also* *Colorado Lawmakers Approve Plan for Pot Banking*, NY POST, May 8, 2014, <http://bit.ly/1OId6dg> (reporting that Colorado must "ask the U.S. Federal Reserve System to let them access so-called "merchant services," a broad category that includes accepting credit cards").

215. *See* Keith Coffman, *Colorado Lawmakers OK Co-Op Banking Option for Marijuana Sellers*, REUTERS (May 8, 2014, 1:45 AM), <http://reut.rs/1nwk6wN>.

216. ORE. REV. STAT. §§ 127.800—127.995 (2013).

2006, the issue made its way to the U.S. Supreme Court when Oregon challenged federal action to thwart the ODWDA.²¹⁷ The Court, although not directly ruling on the constitutionality of the ODWDA, let the statute stand and found that governing the state's medical practice was well within Oregon's traditional police powers.²¹⁸ By relying on the treatment of police powers in *Gonzales v. Oregon*, Colorado can go forward with the Cooperatives Act if it amends the Act to remove the need for Federal Reserve approval.

D. *Gonzales v. Oregon*

By enacting the ODWDA, Oregon asserted its police powers to regulate the medical field within the state. The ODWDA permits state-licensed physicians to prescribe lethal doses of Schedule II controlled substances to terminally ill patients who wish to end their lives.²¹⁹ Those physicians who choose to act under the ODWDA are exempt from civil and criminal liability for doing so.²²⁰ The Act possesses a number of safeguards to ensure the proper results intended under the Act. Oregon residents who wish to acquire a lethal prescription must have a diagnosis from their primary physician that confirms the he or she has an "incurable or irreversible disease that, within reasonable medical judgment, will cause death within six months."²²¹ This determination must receive a concurring opinion by a second physician, who must examine the patient and review his or her medical records.²²² Additionally, the primary physician must ensure that the patient's request has been made voluntarily and that the patient has given informed consent.²²³ In the event that the patient is suffering from depression or a psychological disorder, the physician must refer the patient to counseling.²²⁴ The ODWDA, furthermore, prohibits physicians from administering the legal drug themselves.²²⁵

In 1997, Congress invited the Drug Enforcement Agency to prosecute physicians who acted under the ODWDA as violators of the CSA, but Attorney General Janet Reno found the authority for such action lacking.²²⁶ In 2001, Attorney General John Ashcroft, however, disagreed

217. *Gonzales v. Oregon*, 546 U.S. 243, 254 (2006).

218. *Id.* at 274–75.

219. ORE. REV. STAT. § 127.885. *See Gonzales*, 546 U.S. at 248.

220. ORE. REV. STAT. § 127.885. *See Gonzales*, 546 U.S. at 248.

221. *Gonzales*, 546 U.S. at 252. *See* ORE. REV. STAT. §§ 127.815, 127.800(12).

222. ORE. REV. STAT. § 127.800(8).

223. *Id.* § 127.815.

224. *Id.* § 127.825.

225. *Id.* § 127.880.

226. *Gonzales*, 546 U.S. at 252–53.

and issued an Interpretive Rule, stating physician-assisted suicide is not a “legitimate medical purpose” and the prescription of lethal doses to assist in suicide is illegal under the CSA.²²⁷

Oregon responded to the rule by filing suit in federal court, joined by a physician, pharmacist, and a few terminally ill patients.²²⁸ The district court found for the Oregon plaintiffs and issued a permanent injunction to enjoin the Attorney General from enforcing the rule.²²⁹ The Ninth Circuit upheld the injunction, reasoning, “the Interpretive Rule altered the ‘usual constitutional balance between the States and the Federal Government’ without the requisite clear statement that the CSA authorized such action.”²³⁰ The U.S. Supreme Court granted certiorari²³¹ and held that the Attorney General lacked the broad authority under the CSA needed to issue the rule restricting physicians from prescribing lethal doses of controlled substances when permitted under state law.²³² Furthermore, the *Gonzales* Court recognized that the CSA did not intend to preempt state action in this field.²³³

The Supreme Court could have explicitly addressed the constitutionality of the ODWDA, but refrained from doing so. Instead, the Court noted that the CSA contemplates a state role in regulating controlled substances²³⁴ and that the medical field falls under the police powers traditionally reserved for the states.²³⁵ This *Gonzales* decision has been interpreted to show that, by affirming the Ninth Circuit ruling that physician-assisted suicide under the ODWDA was not violative of the CSA, the U.S. Supreme Court, “for all [i]ntents and purposes,” was upholding the constitutionality of the Act.²³⁶ This interpretation came from a state court, however, and carries no binding precedent. Yet, it could have persuasive value if Colorado found itself defending the constitutionality of the Cooperatives Act.

E. Colorado’s Solution

According to the U.S. Supreme Court, *Oregon v. Gonzales* was determined on the basis of health care being firmly within the realm of a

227. *Id.* at 254.

228. *Id.*

229. *Id.*

230. *Id.* at 255 (quoting *Oregon v. Ashcroft*, 368 F.3d 1118, 1124-25 (2004)).

231. *Gonzales*, 546 U.S. at 255.

232. *Id.* at 274-75.

233. *Id.* at 251.

234. *Id.*

235. *Id.* at 270, 274.

236. *Konopka-Sauer v. Colgate-Palmolive Co.*, No. 190078/08, 2011 N.Y. Misc. LEXIS 1015 (N.Y. Sup. Ct. Mar. 11, 2011).

state's traditional police powers.²³⁷ Traditional police powers are not found expressly in the U.S. Constitution.²³⁸ Instead, the phrase is a judicial creation, first coined by Chief Justice Marshall.²³⁹ Police powers, "commonly equated with powers of sovereignty, especially with respect to the states,"²⁴⁰ "extend to the protection of public health, safety, welfare, and morals."²⁴¹ As previously discussed, the cash-only nature of the marijuana industry poses a threat to the safety of Colorado's citizens,²⁴² and its inability to accurately track taxes presumably affects Colorado's revenue, which in turn affects its citizens' welfare. Thus, the state could cite its traditional police powers as its authority to provide a state-based solution to the cash-only problem.

Although the banking dilemma stems from the federal banking laws, the problem originates with the CSA's characterization of marijuana as a Schedule I drug. As the *Gonzales* Court noted, the "CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision."²⁴³ Thus, the *Gonzales* Court's determination that the CSA does not preempt all state law provides additional support for Colorado's authority to handle this issue itself.

As exhibited by the various federal banking laws discussed, the federal government regulates financial institutions.²⁴⁴ However, the banking structure in the United States is a "dual banking system," meaning that "parallel state and federal banking systems . . . co-exist."²⁴⁵ Although the Cooperatives Act expressly denies that cannabis cooperatives are banks or credit unions and prohibits them from using these designations,²⁴⁶ the cooperatives undoubtedly qualify as financial institutions under the

237. *Gonzales*, 546 U.S. at 274.

238. See Christopher Supino, *The Police Power and "Public Use": Balancing the Principle Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 722 (2008).

239. See *id.* (quoting *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 431 (1827), "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States Indeed, the laws of the United States expressly sanction the health laws of a State.").

240. David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 510 (2004).

241. Supino, *supra* note 238, at 723 n.46 (quoting Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1075).

242. See *supra* Part III.B.1.

243. *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006).

244. See *supra* Parts II.B.3, II.B.4, II.B.5.

245. Comptroller, *supra* note 44, at 1.

246. COLO. REV. STAT. § 11-33-108(1)(A).

BSA.²⁴⁷ Therefore, Colorado could rely on its ability to charter state-based financial institutions under the dual banking system to authorize the cannabis cooperatives.

An important aspect of Colorado's ability to effectuate this plan is the implementation of safeguards. The DOJ based both the August and February Cole Memos on the assumption that the states enacted robust regulatory schemes to govern their legal marijuana industries.²⁴⁸ One might assume from the absence of federal prosecutions of state-legal marijuana businesses that the regulatory structures are operating as expected. Along with Colorado's stringent laws governing the recreational marijuana industry, the Cooperatives Act includes restrictions to ensure compliance with the guidance offered by the DOJ and FinCEN, such as including the DOJ's federal priorities and requiring that cooperatives comply with all pertinent federal laws.²⁴⁹ These safeguards ensure that the cooperatives do not operate as a free-for-all, providing services to anyone who walks through their doors. Instead, the Cooperatives Act, like the ODWDA, requires certain conditions to be met before the benefits of the Act take effect.²⁵⁰ The *Gonzales* Court noted that Oregon did not simply decriminalize physician-assisted suicide, but limited the prescription of lethal doses for that purpose to terminally ill patients who meet certain criteria.²⁵¹ Similarly, Colorado is not creating cannabis cooperatives to provide indiscriminate banking services to every marijuana-related business. Rather, Colorado ensures that services are offered only to specific businesses that meet particular conditions as set out in the Cooperatives Act.²⁵²

To be sure, cooperatives would face similar problems as banks do in providing marijuana businesses with financial services through their compliance with federal regulations. However, because cannabis cooperatives are member-owned, the members already function in a gray legal area by operating state-legal marijuana businesses that are technically illegal under federal law. By deciding to enter the marijuana industry, these business owners have already placed themselves at risk of prosecution. Additionally, marijuana business owners seemingly placed faith in the August Cole Memo that advised they would not face prosecution if they adhered to Colorado law and did not implicate federal priorities.

247. See Bank Secrecy Act, Pub. L. No. 91-508, § 203(e)(11), 84 Stat. 1114, 1119 (including "an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments" in the definition of "financial institution").

248. See Feb. Cole Memo, *supra* note 6, at 3; Aug. Cole Memo, *supra* note 6, at 3.

249. See *supra* Parts II.A, III.C.2.

250. See *supra* Part III.C.2.

251. *Gonzales v. Oregon*, 546 U.S. 243, 271 (2006).

252. See *supra* Part III.C.2.

Having already taken the risk, marijuana business owners are invested in finding a solution that would permit them to operate their businesses more safely and more effectively. Therefore, they are better positioned to take this additional risk.

It has long been recognized that states occupy a unique position in our federal system of government. Before *Gonzales*, the U.S. Supreme Court previously held that the right to assisted suicide was not a fundamental liberty.²⁵³ However, the Court expressly stated that the debate over whether states should permit assisted-suicide should continue.²⁵⁴ This decision comports with the concept that states are “laboratories of democracy,” a phrase coined by Justice Brandeis in *New State Ice Co. v. Liebman*.²⁵⁵ As laboratories of democracy, “states are closer to the people and thus more likely to be responsive to public needs and concerns.”²⁵⁶ Colorado and others have been labeled laboratories in the recreational marijuana experiment.²⁵⁷ Moreover, President Obama agrees that the state recreational marijuana “experiment[s]” should “go forward” in an interview with *The New Yorker* shortly before sales began in Colorado.²⁵⁸ If the government is permitting states to conduct this experiment, the states should be allowed to find solutions to the problems they encounter along the way if the federal government refuses to act. Without this flexibility, the experiment may be doomed from the beginning.

253. *Wash. v. Glucksberg*, 521 U.S. 702, 728 (1997) (“[O]ur decisions lead us to conclude that the asserted “right” to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”).

254. *Id.* at 735 (“Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society”).

255. *See New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.”).

256. Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 49 WAYNE L. REV. 911, 927 (2001).

257. *See Alex Leary, Colorado’s Marijuana Experiment*, MIAMI HERALD, Oct. 28, 2014, <http://hrl.d.us/1w5RT8y>; *see also* Matt Ferner, *Hillary Clinton Leaves Door Open on Marijuana legalization*, HUFFINGTON POST (June 17, 2014, 8:11 PM), <http://huff.to/1lQIqKN> (reporting former Secretary of State Hillary Clinton stated, “On recreational, states are the laboratories of democracy”); Dylan Stableford, *Bill Clinton: States Should Experiment With Marijuana Legalization*, YAHOO NEWS (June 19, 2014, 1:11 PM), <http://yhoo.it/TJIMsI> (reporting that former President Bill Clinton stated “I think we should leave it to the states. If the state wants to try it, they can”); Philip A. Wallach, *Washington’s Marijuana Legalization Grows Knowledge, Not Just Pot*, BROOKINGS INST. (Aug. 25, 2014), <http://brook.gs/1lu785X> (“Washington’s government is taking its role as laboratory of democracy very seriously . . .”).

258. David Remnick, *Going The Distance*, NEW YORKER (Jan. 27, 2014), <http://nyr.kr/1nPcqTZ> (reporting that when President Obama was asked about Colorado and Washington’s legalization of marijuana, he replied “it’s important for it to go forward.”).

IV. CONCLUSION

Due to federal laws governing marijuana and financial services, Colorado's legal marijuana businesses are operating on a cash-only basis. Largely unable to access banking services, marijuana businesses have become targets for crime. Businesses must pay their employees, vendors, and taxes in cash, a situation ideal for tax fraud and evasion. Congress has failed to address this issue, and the executive branch has gone only so far as issuing administrative guidance intended to spark financial relationships between banks and marijuana businesses while providing no real protections for either party.

While this Comment recognizes that Colorado's cannabis cooperatives unlikely are the most ideal answer to the marijuana industry's financial services problem, the cooperatives provide a potentially workable solution for the short term until the federal government provides a permanent alternative. Colorado should employ its traditional police powers, similar to Oregon's assertion of its police powers in enacting the ODWDA, to solve this problem that is of great concern to its citizens. State-legal marijuana businesses operating on a cash-only basis is not a viable option for Colorado.
