



New York Bankers Association  
99 Park Avenue, 4<sup>th</sup> Floor  
New York, New York 10016

Michael P. Smith  
President & CEO

February 12, 2019

Honorable Helene Weinstein  
Chairwoman  
Assembly Ways and Means Committee  
New York State Assembly  
Albany, NY 12224

Honorable Liz Krueger  
Chairwoman  
Senate Finance Committee  
New York State Senate  
Albany, NY 12224

Dear Chairwoman Weinstein and Chairwoman Krueger:

On behalf of the New York Bankers Association (NYBA), we are pleased to submit the attached statement to the Joint Legislative Hearing Committee on Taxes, as it examines the 2020 Executive Budget Proposal, specifically provisions related to the legalization of recreational cannabis in New York State. NYBA is comprised of approximately 150 community, regional, money-center and foreign commercial banks and thrift institutions operating in New York State, with over 200,000 New York employees.

Though NYBA takes no position on the legalization of recreational marijuana in New York, we thought it important to give an overview of the federal law implications of banking cannabis, as it pertains to state legalization.

Thank you for the opportunity to provide our insight on this very important issue, and we look forward to working with you in changing the federal law and in implementing practical programs for marijuana banking.

Sincerely,

A handwritten signature in black ink that reads "Michael P. Smith". The signature is written in a cursive, flowing style.

Michael P. Smith



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**Statement of the  
New York Bankers Association  
Before the  
Joint Legislative Budget Hearing**

**February 12, 2019  
Albany, New York**

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**Joint Legislative Budget Hearing**

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The New York Bankers Association (“NYBA”) appreciates the opportunity to submit this statement for the record of the hearing regarding the tax provisions of the 2020 Executive Budget proposal, particularly Part VV of the Revenue Article VII bill, the “Cannabis Regulation and Taxation Act.” Though NYBA takes no position on the legalization of recreational marijuana in New York, it is important for lawmakers to understand the current legal climate regarding cannabis banking. NYBA is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State and employing approximately 200,000 New Yorkers.

By way of background, the Controlled Substances Act of 1970 makes the possession and distribution of marijuana illegal under federal law. As a result, movement of funds derived from a marijuana-related business is considered money laundering. The law covers “the illegal importation, manufacture, distribution, and possession and improper use of controlled substances” including marijuana. To protect the public, the statute imposed a series of restrictions in the form of five different levels or schedules, starting with Schedule 1. Drugs classified on Schedule 1 are substances which have been determined to be the most dangerous or those with a high potential for abuse but which lack accepted medical use. “Marihuana,” as it’s spelled in the statute, is listed between LSD and mescaline on Schedule 1.

Currently, thirty-three states, the District of Columbia, Guam and Puerto Rico all permit some form of cannabis use for medical purposes and ten states and the District of Columbia have legalized adult recreational use. Interestingly, nine out of the ten states that have legalized recreational marijuana have done so after a statewide ballot initiative or referendum. The tenth, Vermont, passed legislation that allowed for the personal use (not sale) of marijuana. New York would be the first state to legalize the sale of recreational marijuana through legislation without a statewide referendum.

The legalization of marijuana use by the states sets up a classic conflict between state and federal law. The Department of Justice, in a series of four memos beginning in 2009, attempted to offer guidance for U.S. Attorneys on the matter. Essentially, the guidelines, often referred to as the Cole Memo, emphasized that cannabis is illegal at the federal level but that U.S. Attorneys could make better use of limited resources than investigating and prosecuting an activity that is legal under state law. However, then-Attorney General Jeff Sessions rescinded that guidance in early January 2018, but emphasized that it is still up to individual prosecutors to make a final determination about whether to investigate and prosecute individual cases. Despite rescission of the DOJ guidance, we are not aware of any banks that have been prosecuted to date. The risk, though, is that if a bank is prosecuted and found criminally liable, the bank could lose its charter to operate.

As noted, although cannabis is legal in some way in two-thirds of the country, it is still considered a Schedule 1 drug under federal law. That makes it nearly impossible for banks to do business with companies involved in the cannabis industry at any level—be they growers, sellers, landlords or employees—because they risk criminal prosecution

for money laundering and “aiding and abetting” a federal crime. The government requires banks to file suspicious activity reports (“SARs”) for every transaction involving a cannabis company.

In 2014 the Department of the Treasury, through the Financial Crimes Enforcement Network (“FinCEN”), issued guidance for banks on how to report suspicious activity identified while providing bank accounts and services to state-legal marijuana businesses. The focus of that guidance, according to FinCEN, is how banks should comply with their duties to report suspicious or possible criminal activity when that activity is otherwise legal under state law. FinCEN has not indicated they plan to withdraw the guidance and Treasury has emphasized that the FinCEN guidance is still in full effect.

The federal banking agencies have taken no official position, although when pressed, they defer to the 2014 FinCEN guidance. As a result, there are no guidelines for examiners informing the supervision of banks that offer banking services to marijuana businesses or the secondary businesses that support the industry. Anecdotal reports suggest some examiners make it difficult to offer banking services for marijuana-related businesses, even “secondary” relationships, including landlords, employees and suppliers of marijuana-related businesses.

The rift between federal and state law has left banks trapped between their mission to serve the financial needs of their local communities and the threat of federal enforcement action. As a result, there is currently a significant state-legal business sector that is left largely without access to banking products and services. These

businesses often operate on an all-cash basis, which makes them vulnerable to violent criminal activity, as well as fraud, theft, operational and tax reporting and payment challenges. These businesses must be brought into the banking system to increase the transparency and accountability of the industry and ensure public safety for our communities.

We believe that only Congress can resolve the divide between state and federal law on this matter. As an alternative, there have been attempts to create closed loop systems or special state banks to serve the needs of marijuana businesses. The problem that these entities face, though, is that there will come a point when any of closed systems need to tap into the federal payment system for access to the mainstream economy. Federal law still prevents any way to bridge that gap. It simply does not solve the problem. Until Congress changes federal law, possession and distribution of marijuana is still illegal no matter the mechanism for deposits or lending.

While NYBA takes no position on the legalization of recreational marijuana, New York's proposal to allow its recreational sale and use raises practical issues that must be addressed. NYBA believes the time has come for Congress and the regulatory agencies to provide greater legal clarity to banks operating in states where marijuana has been legalized for medical or recreational use. Those banks, including institutions that have no interest in directly banking marijuana-related businesses, face rising legal and regulatory risks as the marijuana industry grows.

We look forward to working with you in changing the federal law and in implementing practical programs for marijuana banking.