

MINUTES
SENATE COMMITTEE ON INSURANCE AND COMMERCE
HOUSE COMMITTEE ON INSURANCE AND COMMERCE
MEETING JOINTLY
MAC, Room A
Little Rock, Arkansas
Tuesday, June 4, 2019

The Senate and House Interim Committees on Insurance and Commerce met jointly on Tuesday, June 4, 2019, at 1:00 p.m., Multi-Agency Complex (MAC), Room A, Little Rock, Arkansas.

Committee members present: Senators Jason Rapert, Chairman; Cecile Bledsoe, Vice Chairman; Linda Chesterfield, Jane English, Missy Irvin, and Mark Johnson. Representatives Mark Lowery, Chairman; Robin Lundstrum, Vice-Chair; Bruce Coleman, Kenneth Ferguson, Grant Hodges, Roger Lynch, John Maddox, Reginald Murdock, Mark Perry, Aaron Pilkington, Chris Richey, and James Sorvillo.

Also attending: Senators Trent Garner, and Kim Hammer and Representatives Bruce Cozart, Steve Hollowell, Joe Jett, Jack Ladyman, Fredrick Love, Nelda Speaks, and Danny Watson.

Senator Rapert called the meeting to order and made reference to the recent flooding in the state. He stated in 2015 the Senate and House Insurance and Commerce Committees held joint hearings with the Senate and House Agriculture, Forestry, and Economic Development Committees on flooding issues at that time. He stated this issue need to be readdressed. Bureau staff was directed to retrieve all agenda items and legislation from those hearings for his review for another potential joint hearing of these committees. Senator Irvin stated she would like the Senate Public Health, Welfare, and Labor Committee to be authorized to attend.

CONSIDERATION TO APPROVE MEETING MINUTES FOR DECEMBER 10, 2018. [EXHIBIT B]

Senator Bledsoe made a motion to approve the December 10, 2018, Senate and House Insurance and Commerce Committee meeting minutes, and without objection the motion carried.

CONSIDERATION OF A MOTION TO AUTHORIZE CHAIRMEN TO APPROVE SPECIAL EXPENSES INCURRED BY THE SENATE AND HOUSE INSURANCE AND COMMERCE COMMITTEES. [EXHIBIT C]

Senator Bledsoe made a motion to authorize chairmen to approve special expenses incurred by the Senate and House Insurance and Commerce Committees. Representative Lundstrum seconded the motion, and without objection the motion carried.

CONSIDERATION AND ADOPTION OF INTERIM STUDY PROPOSALS (ISPs). [EXHIBITS D-1, D-2, D-3, D-4, D-5, D-6].

Senator Mark Johnson made a motion to adopt the following ISPs: 2019-003, 2019-047, 2019-066, 2019-080, 2019-089, and 2019-090. The motion was seconded by Representative Lowery, and without objection the motion carried.

HEARING ON THE FEDERAL PROHIBITION OF BANKS FROM HANDLING MONEY RELATED TO THE MARIJUANA BUSINESS AND ALSO IMPACTS ON INSURANCE AND FINANCIAL SERVICES.

Senator Rapert stated that the Attorney General's Office and the Marijuana Commission were unable to attend the meeting, but have provided the committee with written statements [Exhibits E-6, and E-7]. Bold

Team, LLC-cultivator, and Green Springs Medical, LLC-dispensary, were asked to attend, but declined the invitation.

Mr. Dan Roda, Attorney, Co-Founder and CEO, Abaca, was recognized. He stated there is a challenging conflict between state and federal law regarding the marijuana industry and the availability of financial services to marijuana businesses. Abaca uses regulatory technology developed in Arkansas of which Financial Crimes Enforcement Network (FinCEN) is the core guidance for providing financial services to marijuana related businesses (MRB). The guidance from FinCEN does not provide a safe harbor or legal protection for financial institutions to serve the marijuana business industry. Instead it sets out a framework that banking institutions must follow in order to serve the industry consistent with the Bank Secrecy Act (BSA) and anti-money laundering laws. Mr. Roda stated in Handout #1 – “Cannabis Banking Facts,” that most Arkansas medical marijuana businesses are banked today. Abaca is enabling a state-chartered bank to serve the medical marijuana industry while meeting its obligation under the FinCEN guidance. Abaca is also deploying a secure, cashless payment method across dispensaries statewide this summer called MediPays which will further reduce the volume of cash moving across the state, with a clear benefit to public safety.

Mr. Roda stated that he believes the proposed Safe Banking Act is a step in the right direction, but does not go far enough to open all financial institutions to the industry. He stated he believes the federal government will need to change marijuana laws but in the absence of that, the industry will require a high level of compliance and due diligence to be able to provide financial services.

Mr. Roda stated Abaca provides the following services.

- Arkansas marijuana businesses that Abaca works with, hold their bank accounts directly.
- Marijuana business bank accounts are held by the chartered bank that Abaca works with.
- Arkansas marijuana business accounts are titled directly to licensed businesses.
- Licensed marijuana businesses’ depository relationships are directly with the chartered bank institution, but the institution uses Abaca technology.
- Licensed marijuana businesses that hold accounts of the bank are the beneficiary of the bank’s FDIC insurance policy.
- Monitors all transaction activity and assist the institution in its compliance burdens.
- Replaces web banking interface with Abaca technology, designed to force business owners to place themselves in compliance with FinCEN guidance.
- Determines marijuana businesses licensed in Arkansas are not pretexts (deters money laundering)
- Business owners and places where business money is sent are heavily vetted to assure the bank institution of legitimate transactions funded by licensed Arkansans.

He stated the authority Abaca operates under is the bank that Abaca partners with, an Arkansas chartered financial institution. The regulatory frame work under which Abaca operates is primarily the FinCEN guidance from 2014 that remains in effect. Despite lack of clarity from the federal government, there is no known example or instance of a financial institution losing its charter, or losing its depository insurance solely for providing financial services to the marijuana industry in a manner that is consistent with the guidance. FinCEN guidance is Abaca’s framework and Magna Carta.

He noted different government agencies have regulatory purview over financial technology, which is an emerging industry and sometimes falls into regulatory gray areas. There is a regulatory component under FinCEN. Also there are regulatory components at the state level, the Arkansas Banking Department which regulates Abaca’s partner bank and the Arkansas Securities Department which regulates money transmitters.

He stated Master Card and VISA credit card companies do not allow transactions of cannabis in the U.S., but there are other solutions that require having one’s own proprietary payment rail including what Abaca has

developed on the payment side in Arkansas. This summer 2019, Abaca is launching a payment application, which will link to a designated medical marijuana patient's card that can be linked to the patient's bank account. It can be used across the state to purchase at any dispensary that is participating in Abaca's program. Depository banking, lending and merchant processing are issues of the industry that Abaca technology is able to address with its banking interface.

Senator Rapert responded to Mr. Roda's presentation by stating that it is clear that this is illegal under federal law, but you are proceeding anyway. He stated he has never been in a hearing in which illegal activity under federal law has been identified and is occurring as if it is normal for our state, and that it is interesting that Mr. Roda refused before a legislative committee to reveal the name of his partner bank said to be operating within the law.

Senator Rapert stated the FinCEN position mentioned with the Suspicious Activity Reports (SARs) having to be reported, only has latitude on the basis of the Cole Memorandum. Today's hearing is about federal and state law and the guidance for the rule of law in Arkansas and the country. The interest of the committee is to move our society forward in a civilized way in a nation that is based on the rule of law. There has been no congressional law passed that has changed the standard in which marijuana is a Schedule I classification and it is illegal to possess, distribute, grow, cultivate or to handle money related to it. Senator Rapert also called attention to the latest information from the National Conference of State Legislatures (NCSL), Exhibit F-3, which states the Safe Act may falter and not be passed.

Ms. Doralee Chandler, Director, Arkansas Beverage Control (ABC), Department of Finance and Administration, was recognized and provided the following information concerning sales for cultivations and dispensaries for the month of May.

- Currently, there are two cultivation units that are operational and they have a combined accumulated sales of approximately \$776,000.
- Dispensaries – There are two dispensaries that are currently operational and they have a combined total sale of \$856,000.

Ms. Chandler noted financial information is reported to ABC through the Seed to Sell Software. Cultivator and dispensary point of sale systems are interlinked with a program that is used to track all sales and inventory from point of entry through exit from the facilities. ABC monitors and enforces sales to be within the parameters of the constitutional amendment, which has provision for taxes and statutes in place for tax collection. The first set of sales tax is due June 20, 2019, however, it may be in violation of federal law to handle this money, as with any financial transaction having to do with marijuana businesses.

The law states Arkansas dispensaries must purchase seeds and plants from Arkansas cultivators. ABC does not regulate where plants or seeds originate, but once the plant or seed enters an Arkansas cultivator, ABC begins monitoring with Seed to Sell Software. ABC deals with the regulation of cultivators, dispensaries and to the patient. A bar code is put on each plant and tracked as it goes through the system from harvest to when the plant is destroyed. The seeds of a plant are collected in batch trays and each seed has a bar code associated with it. Enforcement agents have full access to the entire facility to do their inspections as they physically check plant and seed bar code numbers against ABC records.

Ms. Sabrina Bergen, Vice President and Sr. Counsel, American Bankers Association (ABA), was recognized and stated ABA is not a stakeholder in the debate over marijuana legalization. However its member banks find themselves in a difficult situation due to the conflict between state and federal law, with local communities encouraging them to bank marijuana businesses, and federal law banning this practice. Each bank will make its own risk analysis of whether or not it will serve marijuana related businesses. ABA does not take a position on whether or not member banks choose to serve the marijuana industry.

She stated that any person or business that derives revenue from a marijuana firm, is violating federal law and consequently putting their own access to banking services at risk. All proceeds generated by a marijuana related business, even when operating in compliance with state law are unlawful under federal law. Any attempt to conduct a transaction with that money including simply accepting a deposit, is considered money laundering. All banks, whether state or federally chartered, or institutions that move money or accept deposits are subject to federal anti-money laundering laws and all banks must have access to the federal payment system to operate, which is under the regulation and purview of federal authority.

Currently the only direction available to financial institutions in connection with marijuana related accounts comes from the guidance issued by the FinCEN in 2014. That guidance which references the now rescinded Cole Memorandum describes how financial institutions can report marijuana related business activity consistent with the Bank Secrecy Act. It does not protect banks from criminal and civil liability for money laundering. It is a system for reporting activity that is illegal under federal law but otherwise legal under state law.

Federal government opposition to this issue is coming from a variety of stand points, but at this stage it is recognized that thirty-three states with medical, ten states with recreational laws, is an issue that needs to be addressed. It is believed that the disagreement is about addressing just the banking / cash issue apart from national drug policy and medical use of marijuana, and social justice issues.

She noted that a small number of financial institutions have decided to shoulder the risk in order to serve the needs of their community, the majority of financial institutions will not accept the legal regulatory or reputational risk associated with banking with MRBs. Hence, that entire portion of economic activity in legal marijuana states will continue to be marginalized from the banking system. It is an issue that has a broad impact and spreads through the economy through small businesses, service providers, accountants, lawyers, and others, it is not contained to the MRBs. There are two bipartisan pieces of legislation in congress that address the banking issues of the marijuana problem. They are as follows:

- The Safe Banking Act, which specifies that proceeds from a state licensed marijuana business would not be considered unlawful under federal money laundering statues or any other federal law. It would direct FinCEN and the federal banking regulators to issue guidance and examine procedures for banks doing business with legitimate MRBs. ABA support this measure.
- The States ACT, which exempts any person acting in compliance with state marijuana laws from penalties and provisions of the Controlled Substances Act. It specifies that proceeds from marijuana businesses operating in compliance with state law, would not be considered unlawful under federal money laundering statues or any other federal law.

While congress continues to grapple with the broader questions implicit in the decisions about national drug policy, neither of the bills cure all of the marijuana related banking challenges, they will help the thirty-three states that have legalized cannabis:

- to make their community safer
- to collect their taxes
- to regulate their marijuana market effectively

Mr. Robert L. Robinson IV, Chairman, Arkansas Bankers Association, was recognized and stated the Arkansas Bankers Association takes no position on the legalization of marijuana. The Controlled Substances Act classifies marijuana as an illegal drug and banks are subject to federal law, which prohibits banks from doing business with any MRB. Banks are trapped between the mission to serve the financial needs of their communities and the threat of federal enforcement action, violation of federal law could subject a bank to loss of its charter. The summation is that this is a federal issue.

Senator Rapert stated that in many arenas of mandated reporting, there is a burden upon reporting an illegal activity or breaking of federal law. He asked in the arena of banking, what is the onus upon Arkansas banks and banks in general, if proceeds have come from illegal activity under the federal law? What is their mandate to report that to authorities? Mr. Robinson stated it is absolute.

Senator Rapert stated that from earlier testimony there is a state bank that is currently taking deposits from MRB; a willful violation of federal law. The issue is referred to the FinCEN and the Cole Memorandum, but in general we are a nation of laws not memos. The reason for today's hearing is to lay aside the façade, the charade, and return to the business of ruling the country by law because the rule of law has broken down. Regardless of opinions, the committee sees an absolute disengagement from the enforcement of federal law on this issue. Willful ignorance of the law is to decide an issue as a double standard and to choose laws to enforce while other laws are ignored, causing frustration for everyone concerned.

Ms. Candice Franks, Commissioner, Arkansas State Bank Department, was recognized and stated she agrees this issue need to be clarified at the federal level. Banks need legislative guidance and a safe harbor if they are going to bank the marijuana industry. Banks need correct and legal channels for the purpose of servicing this industry. She also stated that if banks are doing business with MRBs, they are not required to notify the department. If through the bank examination process this is discovered, it is confidential.

Mr. Allen Kerr, Commissioner, Arkansas Department of Insurance (AID), was recognized and stated the AID takes no position on the legalization of marijuana and also does not promote or advance cannabis based businesses in Arkansas. AID's position is that a legally licensed business in Arkansas should have the same access to insurance products as any other lawful business and are therefore supportive of HR1595; the proposed bill to allow banks to handle funds from cannabis based businesses without current money laundering restrictions. Honest businesses deserve to have their investments, buildings, vehicles, and equipment insured and worker's compensation insurance is protection any normal worker would be allowed.

The National Association of Insurance Commissioner (NAIC) and National Council of Insurance Legislators (NCOIL) have put together a taskforce on the subject. The white paper they have come up with, is still an ongoing discussion. The insurance industry does not have federal oversight, NAIC is the insurance industry's national entity and each state regulates its own insurance industry within state and state insurance laws. The industry does not report MRBs. A claim is paid as long as it does not violate federal or state law.

If MRBs are able to get insurance it is through non-admitted carrier insurances companies, which deal in high risk industries. Arkansas has a few companies that provide insurance to those entities. The premium is paid by the entity and from that, a premium tax is collected by AID. That money in turn, is sent to DFA for its distribution. The dilemma for AID is the same as the banking industry, clarity is needed so the insurance industry is not in federal violation.

An entity can solve risk problems by forming a captive insurance company (captive). The captive is formed by an entity which is the only customer of the captive, and invests its money and puts reserves in the captive. They are set up under a specific charter (general liability or workers comp or theft) and hire a captive manager, which is a third party administrator or actuary. The captive manager and AID determine risk evaluation and set reserves accordingly. Captives are licensed by the AID and given a certificate of operation within thirty days.

Senator Rapert noted an oath is taken to serve in state government, and that oath states: "We uphold the U.S. Constitution, the Arkansas Constitution and the laws of the State of Arkansas and the United States of America." It is offensive and embarrassing that the federal government has put the states in this position.

Good people have been made criminals out of this so called gray area. Marijuana is still federally illegal in all respects.

OTHER BUSINESS

With no further business, the meeting adjourned at 3:07 p.m.