From: Clerk of the Board Office
To: COBSupport@mendocinocounty.org
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Subject: Fwd: Public Comment -- Response to Cara Martinson, Executive Directo, CCA

>>> John Sakowicz <sako4@comcast.net> 08/06/19 13:11 >>>

August 6, 2019

Dear Mendocino County Board of Supervisors:

In its charter, the California Cannabis Authority states it has two primary goals, which are to:

1. Provide actionable, real-time information to local governments for efficient and cost effective regulation, and

2. Link willing financial institutions with cannabis businesses by providing banks with comprehensive, ongoing licensing and regulatory data on cannabis businesses.

Regarding the second primary goal, the interests of Mendocino County's small cannabis farmers can be better served by a cannabis-friendly county-owned-and-operated public bank.

Public banking is the future. Big money-center banks that are owned and operated by Wall Street for their benefit alone are not the future. They are the past. And they all collapsed in during the global financial crisis of 2008.

A local bank here in Mendocino County, created by the people, and owned and operated for their benefit, is what is safe and equitable, not profiteering by Wall Street's robber barons.

In today's report, the California Cannabis Authority states the following:

The alleged benefit to license holders to be able to open up banking options is only a true benefit if there are guarantees that banks that have access to the system will provide a substantially reduced fee structure to the licensees they offer bank accounts to.

Currently only financial institutions that follow incredibly detailed reporting requirements may service cannabis clients. As a result, the cost of those accounts are very expensive. If any banks are being offered the chance to use this program to automatically provide the data needed to provide those reports under the banking guidelines, then they should be required to provide a substantial guaranteed discount to those license holders that are using them.

Essentially, this program would save the bank from having to collect and input the data themselves to meet banking regulations. The cost savings must be guaranteed to the customer (licensee) in order for it to be worth it.

But there can be another option.

Public banking is that option -- a county bank.

Last year, the California State Treasurer’s Office studied the possibility of a state bank and issued a report: “A State-backed Financial Institution (Public Bank) for the State of California Servicing the Cannabis Industry Feasibility Study 2018.” (hereinafter “Feasibility Study”).

The key promise and potential of public banking lay in “addressing commercial banking market failures.” Clearly, private-sector banks’ refusal to provide banking services to California’s regulated cannabis industry constitutes a market failure.

The cannabis farmer community applauded the California State Treasurer’s Office for grappling with the difficult and urgent issue of banking access for California’s cannabis industry, and for recognizing that public banking can provide solutions to failures in the private-sector banking industry. At the time of the release of the Feasibility Study, we deeply appreciated the State Treasurer's leadership role in uplifting public banking as a policy option.

But the Feasibility Study was flawed.

The analyses of the three public banking alternatives examined in the Feasibility Study all proceed under assumptions and factors as if a state cannabis bank were simply a conventional bank that happened to be owned by the state. This misunderstands the purpose of public banking.

The Feasibility Study failed to account for the costs to the public of failing to provide banking access to California’s cannabis industry. Because cannabis-related businesses are locked out of banking services, these businesses and their employees are forced to rely disproportionately on cash transactions, making them attractive targets for robbery and creating a significant risk to public safety. Essentially, the continued cannabis banking crisis externalizes the costs of a cash-based industry, including increased crime, to the general public.

The cannabis industry’s over-reliance on cash also complicates state and local governments’ ability to collect fees and tax revenue. Businesses must dedicate resources and possibly contract with armored car services just to pay taxes, and likewise, state and local agencies must dedicate resources to managing large cash payments. Moreover, paying taxes and fees in cash makes it easier for unscrupulous actors to avoid paying their full tax liability; making these payments by conventional business means (wire, check, credit card) would likely increase revenue collection by both the state and localities.

The failure to thoroughly normalize the cannabis industry by integrating it into the “transparent, regulated, tax-paying part of the California economy,” as the Feasibility Study put it, sets back the state’s ongoing efforts to regulate the cannabis industry – another cost to the public. Cannabis-industry operators are forced to seek clandestine banking services, which may be terminated by the bank without notice at any time, or use large amounts of cash to pay employees, vendors, and bills. These unconventional business practices contribute to the continued stigmatization of the cannabis industry, a vicious cycle which encourages the continued viability of the illicit cannabis market.

These costs, while not necessarily easily quantifiable, must be accounted for in any analysis of potential public policy solutions to the cannabis banking crisis. While private-sector banks may not consider the effects of their business choices on public safety or government revenue collection, it is decidedly in the interest of the State of California to take them into account. The need for the State of California to act becomes more acute with the threat of future adverse policy changes by the Trump Administration.

In conceiving of and analyzing the three public banking alternatives, the Feasibility Study placed unwarranted focus on retail banking models, to the detriment of its analysis of correspondent-banking models, such as that used by the Bank of North Dakota.

A public correspondent bank could also be the locus of data-sharing among regulators and respondent banks to serve Know-Your-Customer and Customer Due Diligence needs, one of the recommendations of the Cannabis Banking Working Group, convened by your office.

A public correspondent bank could also provide reporting and monitoring services in compliance with the 2014 guidance issued by the Financial Crimes Enforcement Network (“FinCEN”) for banking with cannabis-related businesses.

While existing financial institutions balk at the prospect of following this guidance due, in part, to the high cost of compliance, the public benefit from resolving the cannabis-banking crisis should more than account for the compliance costs.

The Feasibility Study's legal analysis was also flawed.

The Feasibility Study only glancingly mentions the partial “safe harbor” provided by the Federal government through its 2014 FinCEN guidance for banking cannabis-related businesses. There is no mention of the fact that Congress has adopted an appropriations rider expressly forbidding the Department of Justice (“DOJ”) from spending funds to prevent states’ implementation of their own medical cannabis laws.

A federal Court of Appeals has held that this appropriations language – which has been renewed in every continuing resolution funding the Federal government since its initial adoption in 2014 – means that the DOJ may not prosecute defendants who are fully compliant with state medical marijuana laws.

As I mentioned this morning during public comment, United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) provides protections. Contrary to the Feasibility Study’s assertion that bank employees could be federally prosecuted for aiding and abetting the sale of cannabis under the federal Controlled Substances Act, such prosecutions would be limited to adult-use cannabis only, which in practice, have not been brought under the current Trump Administration.

All this said, the Feasibility Study seems to doom a California State Cannabis Bank.

So why can't Mendocino County show the way with a county bank?

If Mendocino County took steps towards establishing a public bank to serve the cannabis industry, state and federal regulators and elected officials would be forced to acknowledge the urgency of the cannabis banking crisis.

County employees would enjoy immunity from federal prosecution under the First Amendment for petitioning the Government for a redress of grievances. Thus, there should be no criminal liability for the county or any county employee for preparing for review a bank business plan and presenting it to the state and federal government for review. There is no legal risk associated with taking steps to start a public bank that serves the county’s cannabis industry.

I urge you to seek a formal written opinion from the Department of Business Oversight as to whether a public bank could be established under the existing Commercial Bank Charter. The State Treasurer’s Office could then help Mendocino County begin to develop a business plan to submit to the Federal Reserve in order to receive a master account.

Ultimately, what we want is for the Federal Reserve to issue a master account to our county bank that plans to serve cannabis-related businesses as the core part of its customer base.

We can do this. It's a daunting task, but we can do this. Working with the state, the county could capitalized the county bank out of its own general fund reserves, or, better yet, the county's pension system could diversify its portfolio by capitalizing a county bank.

Former 5th District Supervisor Dan Hamburg thought this was a good idea, and so do I. Our county's farmers are already burdened by the requirements and expenses of the Cannabis Permitting Program. We can ill afford a sprawling state bureaucracy. We can ill afford further profiteering by Wall Street banks.

Respectfully submitted,

John Sakowicz

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