

# Legal Update and Regulator Panel

## Shield Client Connect 2024

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**Presented By:**

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## Cannabis Legality Overview

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### Federal

- Marijuana illegal under Controlled Substances Act
  - Schedule I: No accepted medical use, high potential for abuse (heroin, LSD, cannabis)
- Rohrabacher-Farr Amendment prohibits federal prosecution of those complying with state medical marijuana laws
- Cole Memo evolution / FinCEN guidance
- 2018 Farm Bill removed hemp from CSA marijuana definition

## Cannabis Legality Overview (cont.)

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### States

Marijuana permissible under state law:

- 38 medical
- 24 recreational
- 7 decriminalized

## Potential Legality Changes

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### Legislation

- SAFER Banking Act
- States Reform Act of 2023 / STATES 2.0 Act
- MORE Act
- Others

## Potential Legality Changes (cont.)

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### Rescheduling

- DOJ/DEA proposed rule (May 2024)
  - Schedule III: moderate-to-low dependence potential  
(Tylenol w/codeine, ketamine, anabolic steroids, testosterone)
  - 43,000 comments
  - ALJ hearing (December 2024), ALJ report, additional rulemaking
  - Impacts accessibility, some criminal penalties, business deductions

## Practical Issues

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- New products and services  
(direct vs. indirect, engagement level)
- Third-party risks
- Stakeholder engagement
- D&O insurance

## Practical Issues (cont.)

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- Risk-based pricing
- Agreement verbiage
- Seizure and forfeiture risk
- Civil RICO
- Exit strategy

## Loan Agreement Terms

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- Appropriate pricing
- Security interests
- Pledge agreements
- Collateral inspection
- Guarantees



## Loan Agreement Terms (cont.)

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- Choice of law and venue
- Repossessing collateral and using agents
- Severability clauses
- Reference to federal cannabis laws
- Waiver of illegality defenses

## Internal Revenue Code

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- IRC Section 280E business deductions prohibition
- Applies to trade/business that consists of trafficking in controlled substances (Schedule I and II) prohibited by federal/state law
- Rescheduling to Schedule III could allow MRBs to deduct business expenses on federal tax filings
- Other collateral legal consequences continue to attach to unauthorized marijuana-related activities

## Bankruptcy

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- Bankruptcy plans must be “proposed in good faith and not by any means forbidden by law”. 11 U.S.C. § 1129
- The U.S. Bankruptcy Trustee consistently seeks to enforce that provision regarding MRBs
- Presence of income from MRB may prevent bankruptcy court from confirming bankruptcy plan
- In states where marijuana legalized (e.g., California and Colorado), bankruptcy courts have confirmed MRB bankruptcy plans of reorganization

## Enforcement Actions

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- Management
- BSA staff
- Training
- Written BSA compliance program
- Due diligence program
- Suspicious activity monitoring and reporting

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## Questions?

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## John M. Geiringer



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As the Regulatory Section Leader of BFKN's Financial Institutions Group, John advises a wide variety of financial institutions around the country about the full spectrum of legal, regulatory, and supervisory issues that they face. He is a frequent speaker and author in the financial institutions area on issues surrounding banking regulations, examinations, and enforcement actions, as well as on cybersecurity.

John devotes significant time to anti-money laundering, counter-terrorist financing, and related national security issues. In this regard, he lectures and advises institutions around the country, engages with relevant organizations, and has published on the subject.

Prior to joining BFKN in 1999, John worked as a bank regulator and also as a compliance consultant. He served as legal counsel for the Illinois bank regulatory agency, now the Illinois Department of Financial and Professional Regulation. John also obtained practical experience with respect to bank operations and compliance issues as a regulatory consultant with a regional accounting firm, performing compliance reviews and training for a variety of financial institutions.