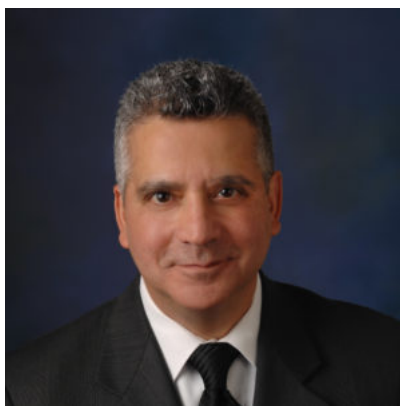





Shares

Cannabis Business Executive - Cannabis and Marijuana industry news



Cannabis Industry Continues to Mature, But Getting Title Insurance Still Problematic

October 18, 2018 by [Leo Aubel](https://www.cannabisbusinessexecutive.com/author/leoaubel/) (<https://www.cannabisbusinessexecutive.com/author/leoaubel/>)

By: Leo G. Aubel, Partner, Howard & Howard

As conflicting state and federal laws regarding cannabis production, distribution, sales and marketing continue on their collision course, two major hurdles for the U.S. cannabis industry have come into focus: banking and title insurance. The purchase, sale, lease, and use of real estate by the cannabis industry in particular is a source of much uncertainty for the title insurance industry.

Prior to April, 2017, many title insurance companies, particularly those operating in states where marijuana is legal recreationally, were willing to issue title insurance subject to some protections. Relevant exclusions from coverage (such as exclusions for civil or criminal forfeiture) and/or limitations on handling escrows were starting to become the norm – if the title company even inquired into what the use of the insured property would be at all.

There were other variations in these procedures and, of course, it varied from state to state. But, title insurance companies handle large amounts of cash. And, unfortunately, the banking industry's continued fear of handling cannabis-related money quickly pushed title companies into refusing to handle the escrow portion of a transaction.

A number of law firms jumped into the void, especially in Oregon and Washington, arranging to handle the escrow portion of a transaction on behalf of their client as long as the title company would insure it.

Trouble with Title Insurance

In April 2017, Fidelity National Financial (the world's largest title insurer) issued underwriting bulletins to its affiliated title underwriters (Fidelity National Title, Chicago Title, Ticor Title, Commonwealth Land Title, etc.) essentially prohibiting the handling of escrow or issuing title insurance if the underlying land was planned for use in growing, producing, distributing or dispensing marijuana or marijuana products.

Many other title companies, if they'd not already declined to handle escrow for and/or insure cannabis transactions, have since followed Fidelity's lead. There has been some speculation in the media that Fidelity may have caved to pressure from federal law enforcement authorities.

Or, perhaps there was no such pressure, except in the form of the writing-on-the-wall clearly indicating that Attorney General Sessions and others in the Trump Administration made no secret of their hostility to marijuana and its distribution — whether medical or recreational, and whether legal within a state or not.

Thus, the one-two punch: First, handling escrows meant dealing with the banking industry's refusal to handle transactions for cannabis business. Second, the administration's anti-

cannabis threats and repeal of the Cole Memo meant title companies would no longer insure titles for cannabis businesses, either.

Now, when a title commitment issues, Fidelity requires that a seller and buyer of real estate sign an affidavit attesting that the property was not used for any purpose related to cannabis activities. Part of this is fair notice that the title company does not want to wait until closing to discover it cannot insure a transaction.

From a practical standpoint, if it wasn't already hard enough, it's now even more difficult to finance such transactions through traditional sources. Banks require title insurance, at least for themselves.

This obviously does not apply to cash transactions, but proceeding without title insurance on the part of a buyer seems perilous. The title insurance system in the U.S. has been in place for well over 100 years. Convincing buyers to go without that coverage is going to be a tough sell. Shares

There is no real fallback. The various other methods of guaranteeing title that previously existed, such as the Torrens title system, fell out of use decades ago.

Nevertheless, there are reasons for real estate attorneys to be optimistic. Clearly, the cannabis industry is not going away. Indeed, sales of recreational marijuana continue to increase. Total marijuana sales in Colorado have increased from \$683,000 in 2014 to \$4.494 Billion in 2017.

Also, Americans (and their lawyers) are endlessly creative and resourceful, and so some palatable work-arounds are being developed by entrepreneurs within and outside the title insurance system.

In addition, helpful legislation is starting to come online. For example, Michigan's Medical Marihuana Facility Licensing Act (MMFLA) provides that a person who owns or leases property where a medical marijuana facility is located, and who has no knowledge that the licensee has violated the MMFLA, cannot be prosecuted and the underlying property may not be seized.

Proposal 1, which will be voted on by Michigan residents on November 6 (and is widely expected to be approved) would legalize recreational marijuana for adult use. It is assumed that the seizure exemption would also apply to recreational marijuana facilities.

Increasing Legalization/Regulation Moves Bode Well for Future of Cannabis Industry

Despite the industry's well-publicized difficulties, the march towards federal legalization continues, including the following recent developments:

- The 2018 federal Farm Bill legalizes hemp as an agricultural commodity. Hemp had been outlawed since 1937.
- On July 31, 2018, Sen. Cory Booker (D-NJ) introduced the Marijuana Justice Act in the U.S. Senate. The law would remove cannabis from the Drug Enforcement Administration's (DEA) Schedule I, the same regulatory class as heroin and cocaine.
- In August 2018, 13 state bank regulators formally requested that Congress develop legislation that creates safe harbors for financial institutions servicing the cannabis industry, joining numerous governors and state attorneys general who had previously requested such legislation.
- In September of this year, the FDA approved the first drug to utilize the marijuana plant-derived ingredient cannabidiol (CBD) – but it can't be sold in the U.S. until the DEA removes cannabis from Schedule I.

So far, federal enforcement of cannabis laws has focused exclusively on the black market. For example, hundreds of federal and local law enforcement officers raided 74 houses in Sacramento and its suburbs earlier this year, for the purpose of breaking up a syndicate of illegal cannabis grow houses financed by money from China.

Elimination of the black market is necessary for the legal, regulated, taxpaying market to function.

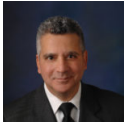
The insurance market is also coming on board. A handful of large carriers, notably

Germany's Hannover Re, are offering policies targeting the cannabis industry.

In late March, the Financial Crimes Enforcement Network (FinCEN) announced that a total of 411 banks and credit unions now provide services to marijuana-related businesses. That's up from 365 a year prior.

Whether the major players in the title insurance industry follow suit remains to be seen, but smaller entrepreneurial companies are already entering the void. If your business includes cannabis products, choose your real estate attorney carefully.

About The Author:



Leo Aubel

Leo Aubel focuses his practice on the real estate industry, with decades of experience in the acquisition, leasing and disposition of real estate. His commercial leasing work includes medical offices, bars and restaurants and retail spaces, as well as the licensing of these facilities. Aubel can be reached at laubel@howardandhoward.com and 312-456-3663.

0 Comments Cannabis Business Executive

Login

Recommend Tweet Share

Sort by Newest Shares

Start the discussion...

LOG IN WITH

OR SIGN UP WITH DISQUS

Name

Be the first to comment.

ALSO ON CANNABIS BUSINESS EXECUTIVE

Buzz Kill: (Marijuana) Vape Companies Feel the Burn of Trump Tariffs

3 comments • 2 months ago

Ohio Land Man — Its not like the Chinese haven't stolen everything from us yet... but if we keep thinking that THEY make better and cheaper products so.... lets just buy from ...

Cannabis Education and Training – Can Certification Help You?

6 comments • 2 months ago

Susan Gunelius — Thank you for sharing your experience, Nic. It's great for readers to learn about more ASA-related programs in addition to the Cannabis Training Institute's ...

You Can't Keep a Good Man Down: ebbu's Jon Cooper

1 comment • a month ago

Mark McNeely — Great article Rob, best of luck to you Jon. Mark McNeely

Some Graphic Design Tips for Non-Designers in the Cannabis Industry

1 comment • 3 months ago

Eduard Literate — I see your videos and articles and am always amazed at the lack of self-awareness. Your articles may be incredibly well written and insightful, but they are ...

Subscribe Add Disqus to your site Add Disqus Add Disqus' Privacy Policy Privacy Policy Privacy

JPS DESIGNS + BUILD contact: MICHAEL TAIBI c(562)897-2811 o(949)650-9992 ext. 8103 michael@jpsdesignsbuild.com jpsdesignsbuild.com

DISPENSARIES · INDOOR/OUTDOOR GROWS LAB TESTING FACILITIES MANUFACTURING/EXTRACTION FACILITIES DESIGN BUILD · GENERAL CONTRACTING ARCHITECTURAL SERVICES CANNABIS LICENSING SERVICES

Leafwire https://www.leafwire.com Leafwire is like LinkedIn, but 100% for the cannabis industry. Come join, connect with investors, meet other cannabis professionals, share news or find your next cannabis job. Learn More

NEXUS GREENHOUSE SYSTEMS LEADERS IN GREENHOUSE SYSTEMS INTEGRATION Hi-Tech Greenhouse Systems For Stronger Crop Yields View our Free Webinar Series NexusCann.co

Home (https://www.cannabisbusinessexecutive.com/)

About Us (https://www.cannabisbusinessexecutive.com/about-cbe/)

Contribute

(https://www.cannabisbusinessexecutive.com/contribute/)



(https://www.facebook.com/cbepress)



(https://twitter.com/CBEPress)



Contributors

(https://www.cannabisbusinessexecutive.com/contributors/)

(https://plus.google.com/u/0/b/105031266327991496993/105031266327991496993/about)