

Spring 2019

FINANCIAL newsletter

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By **Wade Wacholz**
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WHAT TO DO WHEN YOUR CUSTOMER DIES

Imagine you have a good customer who is the majority owner of an operating business. She owns 70 percent and her partner owns 30 percent. Your customer is the founder and president and is married with three adult children, none of whom are involved in the business. Her partner is some 20 years younger. The business operates in a building owned by the customer and her husband through a separate LLC.

You have two loans outstanding: one for operating capital to the service business, and a separate loan to the LLC which owns the building. Both loans are personally guaranteed by your customer. You have blanket security interests on all of the operating company

assets and mortgages on the real estate, as well as mortgages on the customer's home.

The customer passes away unexpectedly. Now what do you do?

No matter how you learned about the customer's death whether from the husband, family, the business partner or some other source, you need to confirm it. Obtain a copy of the Death Certificate which may be



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WHAT TO DO WHEN YOUR CUSTOMER DIES

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available for a few weeks after you find out about your customer's passing.

In the meantime, review your loan file and your documents. Is there any history of default? When is the last time you obtained current financial statements and reviewed the status of the collateral?

In your document review, you need to confirm that the death of the customer is an "event of default." Ordinarily, a well-crafted loan agreement or promissory note will have a provision that states that if the borrower or any guarantor dies it constitutes an event of default. You then have the option to review the circumstances and declare a default or request a replacement guarantee or other accommodations to keep the loan in place. Similarly, the personal guaranty signed by your customer should provide that death of the guarantor: 1) does not revoke the guaranty and 2) upon death, the lender has the right to immediately declare a default and accelerate the debt.

Once you have documentation confirming the death and have reviewed your loan agreement, you will need to assess the circumstances and essentially re-underwrite the credit. First determine who acts for the deceased. If the deceased's assets were held personally (not in trust), a probate proceeding will be necessary and you will need to determine who has been appointed the personal representative of the estate. Ask for Letters Testamentary issued by the probate court to confirm this.

It may be that the deceased held her assets inside a trust. Then you will need a copy of the Trust Agreement and a Certificate of Trust indicating who is the successor trustee and has authority to deal with the assets held in the trust.

When a business owner dies you will also want to determine who acts for the company that was owned or controlled by the decedent. Has the corporation or LLC taken appropriate action to appoint new officers or managers to replace the customer?

You should review the corporate and LLC documents and agreements to determine who has authority and whether the authority has been properly transferred to a new officer or manager.

Besides evaluating questions of authority to act, you will want to assess the longer-term ability of the company to successfully manage the business and ultimately pay the loan. If family members were not involved in the business, who is going to now run it? If the minority business partner is inexperienced, lacks capabilities and adequate capital resources, will he or she be able to succeed and see that the loan is paid? Will the "new" owners of the business have to sell it in order to pay the debt, or pay unrelated obligations of the estate, such as taxes? What assistance will they need to accomplish a sale or liquidation without disrupting the business?

If the customer, without telling you, had placed all of her ownership interest in the company in a trust what are your options? First, you need to get a copy of the Trust Agreement and the transfer documentation and determine whether the transfer violated your loan agreements. You can then assess whether the trustee of the trust should re-sign personal guarantees and other credit documents to reflect their status as the successor to the customer. If your loan documentation had "due on sale" terms, the transfer to a trust may have violated those terms and given you the right to declare a default.

The death of a bank customer can give rise to numerous issues. Careful review of documentation and assessment of the lender's rights and options is important. Seek advice of counsel familiar with both lending and estate matters when the issues appear complex or there are significant questions about how the bank can protect its right to repayment. ■



BANKING MINNESOTA'S NEWEST CASH CROP



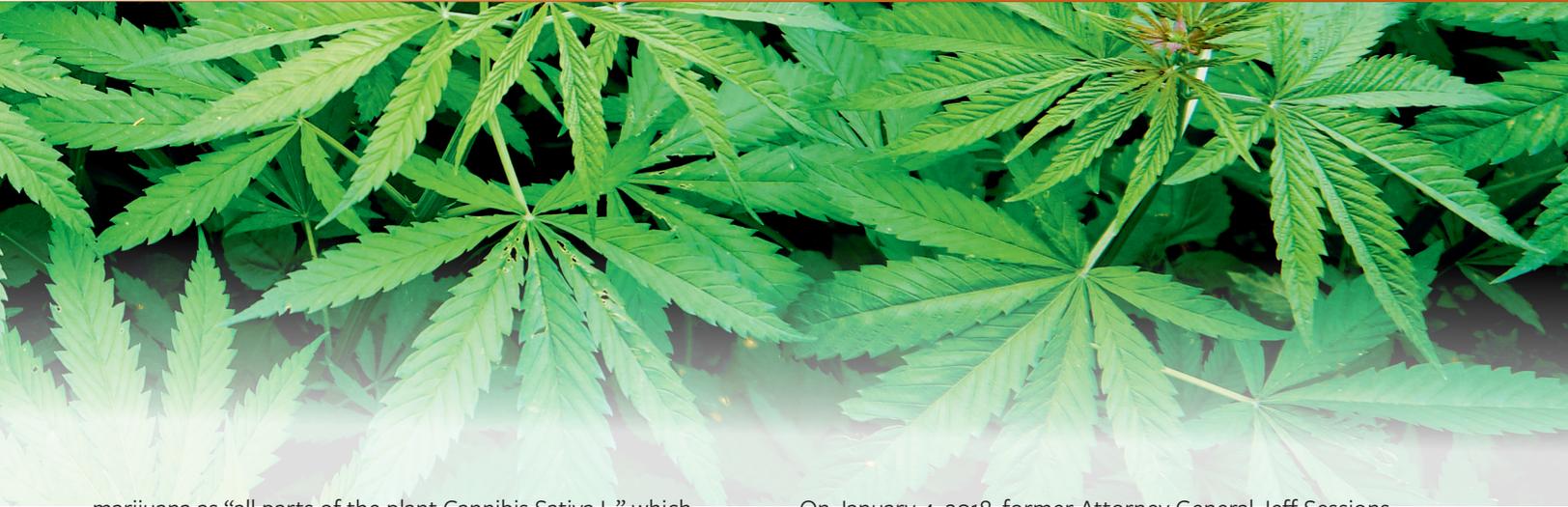
By Rhett Schwichtenberg
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On December 20, 2018, President Trump signed into law the Agricultural Improvement Act of 2018, more commonly known as the 2018 Farm Bill. With the 2018 Farm Bill came the legalization of industrial hemp. Although many states—including Minnesota—had already legalized industrial hemp production, federal banks and FDIC-insured institutions remain subject to federal law and could not legally offer banking services to hemp businesses. Now that hemp is federally recognized as an agricultural commodity, banking industries are free to engage in banking hemp businesses—with some strings attached.

What is Hemp?

Today, the terms hemp and marijuana are used interchangeably to refer to the psychoactive drug. Although the two plants come from the same family of cannabis, *Cannabis sativa L.*, marijuana and hemp share an important difference. Marijuana is high in a psychoactive chemical called delta-9 tetrahydrocannabinol (“THC”). Hemp, on the other hand, is high in a non-psychoactive chemical called cannabidiol, or “CBD.”

Before the 2018 Farm Bill was passed, hemp was listed as a Schedule 1 controlled substance along with marijuana, under the Controlled Substances Act. The Controlled Substances Act defined



marijuana as “all parts of the plant *Cannabis Sativa L.*,” which includes hemp. The passage of the 2018 Farm Bill reclassified hemp as an “agricultural commodity,” removing it from Schedule 1 classification and the Controlled Substances Act entirely.

Under the 2018 Farm Bill, hemp is now defined as any *Cannabis sativa L.* plant with a THC content of 0.3 percent or less.

Banking Hemp Pre-2018 Farm Bill

Prior to the 2018 Farm Bill, providing banking services to hemp producers was a violation of federal law; yet, national and FDIC-insured banks felt safeguarded from the potential of prosecution. In 2013, Attorney General Cole issued what is known today as the “Cole Memo” in light of states passing marijuana legalization laws. The Cole Memo instructed federal prosecutors to focus marijuana prosecution only on particularly heinous cases and allow the states to police all other cases under their own laws. While essentially deferring to state law in most marijuana cases, the Cole Memo stated that it does not in any way limit the federal government’s ability to enforce any federal marijuana law.

Post-Cole Memo guidance provided by FinCEN (the United States Treasury Financial Crimes Enforcement Network) noted that the decision to open, close, or refuse any particular account or relationship is up to the individual financial institution. The FinCEN guidance discusses the procedure for financial institutions serving marijuana-related businesses. The guidance requires those banks to file Suspicious Activity Reports (“SARs”) with FinCEN. There are three categories of SARs: (1) Marijuana Limited (filed when business is complying with state laws); (2) Marijuana Priority (filed when business is not complying with state laws); and (3) Marijuana Termination (filed when business violates one of the criteria in the Cole Memo, necessitating state involvement). Despite the FinCEN guidance, transacting with a business that engages in “marijuana-related businesses” is a violation of federal drug and money-laundering laws, specifically the Bank Secrecy Act of 1970, and could always be prosecuted by the federal government.

On January 4, 2018, former Attorney General Jeff Sessions issued a memorandum rescinding previous guidance on federal marijuana enforcement, including the Cole Memo. Although this memorandum further opened the door to potential prosecution, current Attorney General William Barr has reaffirmed the Cole Memorandum, writing “I do not intend to go after parties who have complied with state law in reliance on the Cole Memorandum.”

Banking Hemp in 2019

Under the 2018 Farm Bill, hemp (including hemp-derived CBD) is no longer a controlled substance under the Controlled Substances Act. Instead, it is now federally recognized as an agricultural commodity. In other words, there are no criminal implications of industrialized hemp production so long as the hemp producer has the requisite licensure and does not willfully violate any state or federal hemp laws. As such, banks no longer need to file SARs when providing banking services to industrial hemp producers as long as the producer is licensed and the bank has no knowledge—or reason to believe—that the producer is willfully violating any laws.

Licensing Process

The 2018 Farm Bill enables individual states to submit a plan to the USDA Secretary that, upon approval, allows that state to be the primary regulator of hemp in that state. If a state does not submit a plan, or the plan is denied, hemp producers in that state will need to obtain a federal license issued by the USDA Secretary via a licensing procedure that is still forthcoming.

Given these new licensing laws, the Minnesota Department of Agriculture stated that individuals and businesses in Minnesota must be licensed under the Minnesota Pilot Program to grow and process hemp in 2019. There are two different licenses available under the Minnesota Pilot Program; a license to grow hemp, and a license to process it. Producers wishing to both grow and process

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BANKING MINNESOTA'S NEWEST CASH CROP

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hemp must hold both licenses. Minnesota's Pilot Program will continue until the USDA approves Minnesota's hemp plan. After Minnesota submits its plan, the USDA has 60 days to approve or reject it.

Minnesota Statutes Section 18K.04 discusses licensing, stating, "[a] person must obtain a license from the [Minnesota Commissioner of Agriculture] before growing industrial hemp for commercial purposes." The application "must include the name and address of the applicant and a legal description of the land area or areas where industrial hemp will be grown by the applicant." The Minnesota Department of Agriculture has further specified that "[a]nyone who wishes to grow or process industrial hemp in Minnesota must obtain a hemp pilot license. Anyone who sells hemp seed for planting, process[es] hemp materials, conduct[s] laboratory testing, or handle[s] raw, viable hemp must also obtain a license."

CBD Products

Although the 2018 Farm Bill legalizes the growth and processing of industrial hemp, it does not authorize the sale of CBD products, explicitly preserving the FDA's power to do so.

Guidance involving the sale and marketing of hemp-derived CBD products is hazy as the FDA has not issued new regulations since the 2018 Farm Bill passed. The FDA Commissioner issued a press release on December 20, 2018 (the day President Trump signed the 2018 Farm Bill). The Commissioner explained that under the Federal Food, Drug, and Cosmetic Act and Section 351 of the Public Health Service Act, it is illegal to introduce CBD into the food supply, market CBD products as dietary supplements, or market CBD products with a claim of therapeutic benefit or any other disease claim before going through the FDA approval

process. He highlighted that the 2018 Farm Bill has no impact on these regulations but did state that the FDA is working on new regulations in light of the new laws. The Commissioner is expected to address CBD regulations at a public meeting in April 2019.

In the meantime, financial institutions should review the business and marketing materials of businesses selling CBD products to consumers before providing banking services to them.

Medicinal and Recreational Marijuana

The 2018 Farm Bill did not address the use of marijuana for medicinal or recreational purposes. Any *Cannabis sativa L.* plant with a THC content greater than 0.3 percent still remains a Schedule 1 drug under the Controlled Substance Act. Although legal in Minnesota, any financial institution providing services to medical marijuana businesses should continue filing SARs with FinCEN until federal law decriminalizes marijuana.

On February 13, 2019, the Subcommittee on Consumer Protection and Financial Institutions, a new congressional subcommittee, held their first hearing on challenges and possible solutions to providing banking services to cannabis-related business. Although most subcommittee members agreed that change is needed to protect cannabis-related businesses, many stated that such change needs to start with the Controlled Substances Act, decriminalizing and rescheduling marijuana, not banking legislation. On March 7, 2019, U.S. Representative Ed Perlmutter introduced House Bill H.R. 1595 titled the Secure and Fair Enforcement Banking Act of 2019 (the "SAFE Act"). If passed, the SAFE Act will provide a safe harbor to financial institutions providing banking services to cannabis-related businesses.

Conclusion

Although the federal government has legalized hemp, it is important for financial institutions to perform due diligence on potential hemp clients to ensure they have the requisite licensure under state and federal law and maintain compliance with those laws. Financial institutions should be cautious when entering into a business relationship with after-market CBD businesses prior to additional guidance from the FDA. Lastly, the 2018 Farm Bill does not affect the legality of marijuana for medicinal or recreational purposes. Marijuana is still a Schedule 1 drug under the Controlled Substances Act and financial institutions that wish to provide banking services to marijuana businesses should follow FinCEN guidance, but risk federal prosecution despite the Cole Memorandum and assurances by Attorney General Barr. ■



Gislason & Hunter LLP

Complimentary Webinar



Wednesday May 22
11:00 a.m. - Noon

Vulnerable Client Protection

Elderly clients and vulnerable adults often need additional assistance from their financial professionals. This seminar will review a variety of protocols and procedures to assist bankers in working with these clients and identifying situations where the client may be taken advantage of by a family member, friend or acquaintance.

Topics covered in this webinar will include:

- **Steps to identify a vulnerable adult in a challenging situation**
- **Reporting process to the correct authorities**
- **State and Federal Law development in protecting financial institutions in these reporting situations**
- **Banking protocols to put in place**

This is a complimentary webinar but all participants must register by emailing:
jdonner@gislason.com

A confirmation with login information will be provided

Presenters for this webinar include Gislason & Hunter LLP Attorneys Kaitlin Pals and Abby Pettit.



WELCOME TO THE FUTURE: ELECTRONIC AND REMOTE NOTARIZATION IN THE DIGITAL AGE



By Dean Zimmerli
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Almost every area of finance and business has dramatically changed as a result of the digital revolution. Notarization has not been among them. If a document needed a notarized signature, it required an in-person meeting with a notary public present where the notary watches the person sign the document and then stamps the document with a rubber stamp. This is not much different than the process followed half a century ago. But thanks to the adoption of the Revised Uniform Law on Notarial Acts (“Revised Act”) adopted in Minnesota during the 2018 Legislative session, this process will finally enter the digital age in earnest. For the first time in Minnesota, the Revised Act will allow for remote online notarization beginning January 1, 2019.

For notarizations performed in-person, the Revised Act makes only minor changes. Notaries performing notarial acts in person will still identify the person signing by a driver’s license or other form of identification, witness the signature, and sign, date, and stamp the document as in the past. However, notaries performing a remote notarization—performing a notarial act when the notary and the

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WELCOME TO THE FUTURE: ELECTRONIC AND REMOTE NOTARIZATION IN THE DIGITAL AGE

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person signing are not in the same physical location—must follow special rules set out in the Revised Act. This article will detail the process of performing remote online notarization, which is set forth at Minnesota Statutes §§ 358.645–358.646.

Qualifications

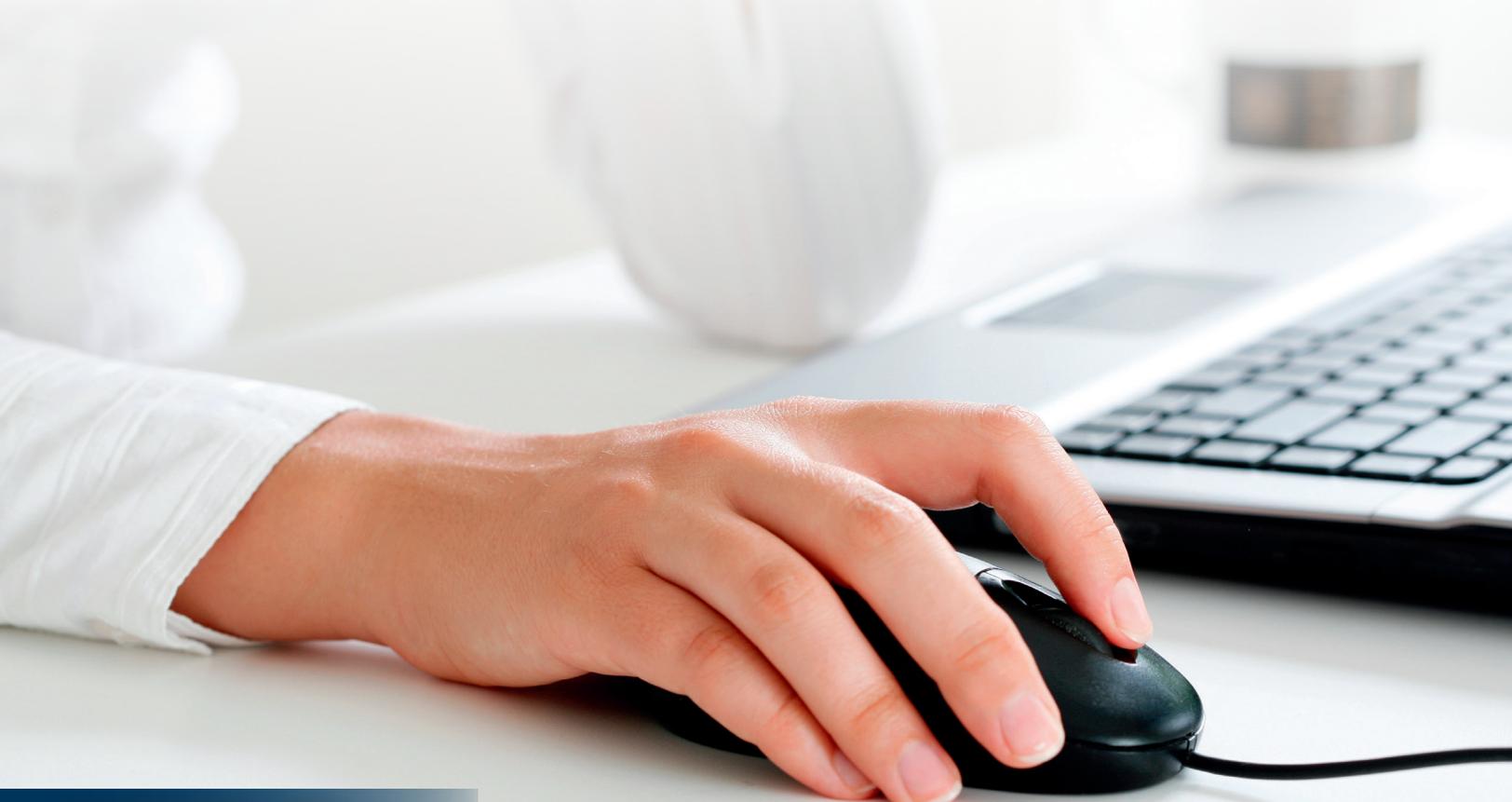
In order to perform remote notarizations, a notary public must be properly qualified. Naturally, the person must actually be appointed and commissioned as a notary public. The notary must then apply to the Minnesota Secretary of State's office for remote online notarization registration and certify that the notary intends to use "communication technology" to perform notarial acts. The registration to perform remote notarization will remain in place so long as the notary commission remains valid, unless terminated sooner. A registration to perform remote online notarization may be revoked or terminated if the notary fails to comply with the provisions governing remote notarization.

Procedure

In some respects, the procedure for performing a remote online notarization follows the traditional process. The notary must verify

the identity of the individual signing the document, witness the signature, and then apply their notary stamp to the document (electronically). The Revised Act contemplates that remote online notarization will deal primarily with electronic signatures, rather than wet ink signatures. This facilitates the ability of the signer and the notary to both work from the same document even though located in different places.

As with traditional notarization, the location of the notary governs. A notary physically present in Minnesota may notarize documents remotely even when the signer is located in another state (or another county in limited circumstances). The reverse is not true; a Minnesota notary may not notarize documents pursuant to their Minnesota commission if the notary is located in another state, even if the remote signer is located in Minnesota. ■





Gislason & Hunter LLP **Employment Law Conference**

Tuesday, April 23, 2019

Courtyard Marriott • 907 Raintree Road • Mankato, MN 56001

11:30 – Buffet Lunch

Noon – Employment Policies and Handbooks – Cory Genelin

What is new and essential in 2019 policies and procedures

1:00 – Case Law Update for Employers – Brittany King Asamoia

1:45 – Break

2:00 – Hot Topics in Employment Law including:

Wage and Hour Law

New FLSA Guidance

Employment Use of Social Media

Discrimination, harassment & retaliation

Marijuana in the Workplace

3:00 – Question & Answer and Open Discussion led by Cory Genelin

3:30 – Conclude

Registration

Name _____

Company _____

Address _____

Email _____

\$50.00 includes, lunch, break, seminar and access to materials

RSVP: jdonner@gislason.com

____ Check enclosed

____ Please call me for credit card information - Phone _____

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Banking Services

Gislason & Hunter represents numerous financial institutions and has a thorough familiarity with financial economic conditions, as well as an ever-evolving regulatory environment. We have extensive experience in the following banking areas:

- Management & shareholder issues
- Transfer of bank assets
- Bank litigation
- Business planning
- Real estate
- Property foreclosures and repossessions
- Loan and workout agreements
- Collateralizing and securing all forms of loans
- Loan and credit agreements
- Subordination and participation agreements

This publication is not intended to be responsive to any individual situation or concerns as the contents of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.

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