

On March 28, 2019, the House Financial Services Committee took the first significant step in reducing the substantial hurdles that stand between US cannabis companies and traditional banking products and services. By a vote of 45-15, the committee passed the bipartisan Secure and Fair Enforcement Banking Act of 2019 (SAFE Banking Act) and approved three amendments.¹

While the legislation would not decriminalize cannabis under federal law, it would provide necessary assurance and protection for the financial services industry to provide banking and financial services to cannabis-related legitimate businesses² (cannabis businesses) and their service providers.³

Background

Under the federal Controlled Substances Act (CSA), marijuana and its derivatives are illegal. Federal anti-money laundering (AML) laws make it a crime for financial institutions to accept the proceeds of an illegal activity, including proceeds from marijuana-related violations of the CSA.⁴ Additionally, financial institutions⁵ that conduct transactions with cannabis businesses could face criminal liability under the Bank Secrecy Act (BSA) for, among other things, failing to identify or report financial transactions that involve the proceeds of cannabis businesses.⁶ Due to the treatment of marijuana and its derivatives as a Schedule I drug and the BSA/AML laws, banks and financial services providers are reticent to provide products and services to cannabis businesses.

Broad Protections Under Federal Law

The SAFE Banking Act would provide broad protections for those conducting transactions with cannabis businesses.

Notably, for purposes of any federal law, including the federal criminal code regarding money laundering, the SAFE Banking Act would specify that proceeds from a transaction conducted by a cannabis business or service provider would not be considered proceeds from an unlawful activity. This would ensure that banks, as well as others providing goods and services to the industry, could engage with cannabis businesses and be assured that payments from such companies would not be illicit funds under federal law.

Protections for Depository Institutions and Insurers

The Act would legitimize the provision of “financial services” by depository institutions and insurers to cannabis businesses in states or Indian countries where such cannabis business is legal. “Financial services” is defined broadly to include typical banking services, lending, processing payments and providing insurance.

A depository institution or insurer, as well as its officers, directors and employees, would not be held liable pursuant to any federal law or regulation solely for providing that financial service to a cannabis business or service provider or for further investing any income derived from such financial service. The bill would provide similar protections to Federal Reserve banks. Additionally, a federal banking agency could not prohibit, penalize or otherwise discourage a depository institution from providing financial services to cannabis businesses and their service providers.

Importantly, collateral for loans provided by a depository institution to a cannabis business or service provider would no longer be subject to criminal, civil or administrative forfeiture pursuant to any federal law for providing such loan.

The legislation would not require an institution to provide financial services to a cannabis business, but it would provide some important protections if it chose to do so.

1 Authored by Reps. Perlmutter (D-CO) and Denny Heck (D-WA) and joined to introduce the legislation by Reps. Warren Davidson (R-OH) and Steve Stivers (R-OH).

2 “Cannabis-related legitimate business” means a manufacturer, producer or any person or company that participates in any business or organized activity that involves handling cannabis or cannabis products, including cultivating, producing, manufacturing, selling, transporting, displaying, dispensing, distributing or purchasing cannabis or cannabis products pursuant to a law established by a state or a political subdivision of a state.

3 “Service provider” means a business, organization or other person that sells goods or services to a cannabis-related legitimate business or provides any business services, including the sale or lease of real or any other property, legal, or other licensed services, or any other ancillary service, relating to cannabis.

4 18 U.S.C. §§ 1956 and 1957; see also 18 U.S.C. § 1960 (transactions by or through a money transmitting business involving funds “derived from” marijuana-related conduct can also serve as a predicate for prosecution); 31 U.S.C. § 5340(2) (definition of “money laundering and related financial crime”).

5 For purposes of the BSA/AML laws, financial institutions are defined broadly to include banks, credit unions, insurance companies, broker-dealers, investment bankers or companies, operators of credit card systems, loan or finance companies, and money transmitters.

6 See, e.g., 31 U.S.C. § 5318(g).

Updating AML Guidance

The SAFE Banking Act directs the Financial Crimes Enforcement Network (FinCEN), a division of the US Department of the Treasury that oversees BSA/AML laws, to issue guidance on the filing of suspicious activity reports (SARs), consistent with the legislation. Essentially, this requires FinCEN to update its 2014 guidance⁷ for the filing of SARs, which was based on the now-rescinded Cole Memo, issued by the US Department of Justice.⁸ That 2014 FinCEN guidance emphasized that, due to the status of marijuana under the CSA, a financial institution is required to file a SAR on any activity above a certain dollar threshold involving a “marijuana-related business.”

Next Steps for the SAFE Banking Act and Other Legislation

As of March 28, the legislation is co-sponsored by 144 Democrats and 16 Republicans, with additional co-sponsors expected. With advancement out of committee, the next step is consideration and a vote in the House. House Rules Committee Chairman James McGovern (D-MA) said he expects the House to consider and vote on the bill within a matter of weeks.

The bill is likely to pass the Democratic-controlled House, but it could face a more difficult challenge in the US Senate. Republican Senators have expressed hesitation in providing legal protections for the financial service industries that serve an industry the federal government still considers illegal. However, in the 115th Congress, Sens. Merkley (D-OR) and Murkowski (R-AK) introduced the SAFE Banking Act and garnered support from 20 co-sponsors.

The prospects for passage in both chambers and a signature by the President remain uncertain. However, continued bipartisan support would increase the likelihood.

Every year since 1981, legislation has been introduced in Congress related to rescheduling marijuana. Members on both sides of the aisle recognize the need for federal government certainty related to state-legal cannabis operations. As the 116th Congress moves forward, expect additional cannabis-related legislation to gain attention, including the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act) which would provide broad protections to U.S. cannabis companies operating in compliance with state law.

About Us

We provide legal advice and counsel on federal and state legal issues to cultivators, processors, laboratories, researchers, dispensaries and suppliers in the dynamic cannabis industry. Our team includes lawyers in multiple practice areas who focus on the rapidly evolving medical marijuana, cannabis and hemp sectors. We can represent clients’ interests on public policy matters and advise them on all of the areas that big businesses face every day – finance, corporate transactions, intellectual property, branding, tax strategy, labor and employment, real estate, environmental, disputes and compliance.

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⁷ FIN-2014-G001: “[BSA Expectations Regarding Marijuana-Related Businesses](#),” FinCEN (February 14, 2014).

⁸ US Department of Justice, “[Guidance Regarding Marijuana Enforcement](#)” (August 29, 2013); US Department of Justice, “[Guidance Regarding Marijuana Related Financial Crimes](#)” (February 24, 2014).