

Publications

SAFE Banking Act Reintroduced in Congress as Cannabis Banking Reform Gains Bi-Partisan Momentum

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With the White House and Congress now under Democratic control, the political shift has fueled renewed optimism in the cannabis industry regarding the prospects for wide-scale legalization or, as a consolation prize, cannabis banking reform. Last month, Congress took critical bipartisan action that significantly increases the likelihood that a long-awaited cannabis banking bill, which would provide legal cannabis businesses with access to crucial financial services, will finally become law.

On March 23, the Secure and Fair Enforcement (SAFE) Banking Act of 2021, sponsored by Senators Jeff Merkley (D-OR) and Steve Daines (R-MT), was reintroduced in the Senate. This reintroduction comes days after a companion bill was reintroduced by Representative Ed Perlmutter (D-CO) in the House on March 18. While the SAFE Banking Act has previously passed three times in the House—once as a standalone bill in 2019 and twice as part of COVID-19 relief bills in 2020—before ultimately dying in the Senate, there are encouraging signs that the prospects for passage now appear strong in 2021.

Refresher: The Current State of Cannabis Banking

For decades, marijuana has been illegal at the federal level under the Controlled Substances Act (CSA). Enacted in 1970, the CSA places strict legal controls on the manufacture, distribution, dispensing and possession of any controlled substance listed on one of five schedules established by the CSA. Currently, 47 states, four U.S. territories and the District of Columbia have legalized some form of marijuana for either medicinal or recreational purposes. Despite this widespread legalization at the state level, marijuana remains an illegal Schedule I controlled substance under federal law.

In light of expanding legalization initiatives at the state level, coupled with U.S. Department of Justice (DOJ) guidance concerning federal enforcement priorities,¹ the Financial Crimes Enforcement Network

(FinCEN) issued guidance in February 2014 (the 2014 Guidance)² clarifying its expectations for financial institutions seeking to provide services to “marijuana-related businesses” under the Bank Secrecy Act (BSA). Under the 2014 Guidance, FinCEN specified that “because federal law prohibits distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity.”³ As a result, the 2014 Guidance established three categories of suspicious activity reports (SARs)—Marijuana Limited SARs, Marijuana Priority SARs and Marijuana Termination SARs—that financial institutions were generally required to file when handling transactions for marijuana-related businesses. In addition, financial institutions were expected to comply with other expensive and burdensome due diligence obligations and submit currency transaction reports.

In 2018, the Agriculture Improvement Act of 2018 (the 2018 Farm Bill)⁴ removed hemp from the definition of “marijuana” under the CSA. The 2018 Farm Bill defines “hemp” as, in essence, the cannabis plant (including any part of the plant and all derivatives), the same plant that produces marijuana, with one significant difference: hemp cannot contain more than 0.3 percent of THC, the main psychoactive compound found in the cannabis plant. Therefore, following the enactment of the 2018 Farm Bill, hemp and hemp-derived products, including the popular cannabidiol (CBD), are no longer considered “controlled substances” under the CSA, while marijuana, which contains more than 0.3 percent of THC, remains illegal as controlled substance under the CSA. FinCEN has since issued additional guidance clarifying expectations for financial institutions serving hemp-related businesses, summarized in a previous alert.

Therefore, while financial institutions can lawfully service hemp-related businesses, financial institutions who service marijuana-related businesses, regardless of whether marijuana has been legalized under state law, can potentially be subject to various federal civil and criminal issues and face increased risks of federal regulatory scrutiny, enforcement actions, prosecution, asset forfeiture and reputational harm.

Overview of the SAFE Banking Act

Given these risks, many banks and other financial institutions do not service marijuana-related businesses. As a result, marijuana-related businesses, legal and licensed under state law, are often denied access to the banking system, unable to utilize all of the banking, checking, payroll, and accounting functions on which other businesses rely. As a result, the multi-billion dollar cannabis industry operates largely on a cash-only basis. This has created significant public safety, tax and regulatory issues. In this environment, businesses, employees and customers are more susceptible to theft and other cash-motivated crimes, tax collection and the audit process are inefficient, and the industry is much more difficult to regulate.

The SAFE Banking Act aims to address these concerns and increase transparency in the industry by creating a safe harbor from criminal prosecution, liability and asset forfeiture for financial institutions, and their directors, officers and employees, who choose to provide financial services to legitimate, state-sanctioned cannabis businesses. Under the bill, federal regulators would be prevented from taking any of the following actions:

- Prohibiting, penalizing or discouraging a financial institution from providing financial services to a legitimate state-sanctioned cannabis businesses, or an associated business (i.e. a law firm who provides legal services to a legitimate cannabis business);

- Terminating or limiting a financial institution's deposit or share insurance solely because the financial institution is providing services to a cannabis business or associated business;
- Recommending, incentivizing or encouraging a financial institution to halt or downgrade providing any kind of banking services to these cannabis businesses; or
- Taking any adverse or corrective action on a loan made to an owner or operator of a cannabis-related business (or who owns real estate or equipment leased to a cannabis-related business).

The SAFE Banking Act also provides protections for hemp and hemp-derived CBD related businesses, who continue to struggle obtaining financial services despite being federally legalized. Additionally, it directs the Secretary of the Treasury to ensure that FinCEN guidance is consistent with the purpose and intent of the SAFE Banking Act. Importantly, the SAFE Banking Act was reintroduced to coincide with the Clarifying Law Around Insurance of Marijuana (CLAIM) Act, a bill that provides similar safe harbors for insurance providers offering services to cannabis businesses. Together, these bills would be a significant boost and provide much-needed clarity for the cannabis, financial services and insurance industries.

Conclusions

Both versions of the SAFE Banking Act reintroduced last month have received broad, bi-partisan support, with over 100 members of the House and 30 members of the Senate signing on as co-sponsors. The bills have also received the support of various critical stakeholders, including the American Bankers Association, the Independent Community Bankers of America and the Credit Union National Association, among others. The Ohio Banker's League (OBL), Ohio's largest financial institutions trade association, supports the SAFE Banking Act and has indicated that passing the bill is one of the OBL's highest priorities. In addition, arguably the bill's largest hurdle in past years, the Republican-controlled Senate and, more specifically, the Senate Banking Committee led by then-Chairman Mike Crapo (R-ID), have shifted to the Democrats.

However, while momentum for the SAFE Banking Act continues to build, there has been some pushback from certain key lawmakers who have indicated their preference for comprehensive marijuana legalization and social equity reform, rather than standalone cannabis banking reform. Current Senate Banking Committee Chairman Sherrod Brown (D-OH) has indicated that while he is willing to move forward with debate on a cannabis banking bill, he will only do so as part of a broader cannabis reform effort, including sentencing reform, which must be done in conjunction with the Senate Judiciary Committee, which has jurisdiction over sentencing reform provisions. Additionally, Senate Majority Leader Chuck Schumer (D-NY), who has criticized cannabis banking reform as too friendly to financial industry interests, is currently drafting a comprehensive marijuana legalization bill with Senator Cory Booker (D-NJ) and Senate Finance Committee Chairman Ron Wyden (D-OR).

However, in light of these developments, cannabis businesses, and the financial institutions and insurers who service these businesses, have reason to be optimistic. With the reintroduction of the SAFE Banking Act, and the increasing support for the cannabis industry in Congress, the prospects for some sort of cannabis reform in 2021 appear strong.

¹ The widely discussed “Cole Memo”—issued in August 2013 by then-Deputy Attorney General James Cole—established the then-DOJ policy on marijuana enforcement under the CSA, indicating that the federal government would not interfere with the legal use of marijuana or prosecute marijuana-related businesses that operated legally under state law. On January 4, 2018, then-Attorney General Jeff Sessions issued a memorandum effectively rescinding the Cole Memo, leaving federal prosecutors free to determine to what extent they will enforce the CSA against state-legalized marijuana businesses. Since it is uncertain to what extent the Biden/Harris administration will prioritize strict enforcement of the CSA, the likelihood of prosecution will vary from jurisdiction to jurisdiction, impairing the ability of marijuana-related businesses to operate effectively and banks to provide financial services to marijuana-related businesses.

² FinCEN Guidance, BSA Expectations Regarding Marijuana-Related Businesses (February 14, 2014), <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf>.

³ FinCEN Guidance (February 14, 2014).

⁴ Agriculture Improvement Act of 2018, § 297A, Pub. L. No. 115-334, H.R. Doc. No. 2 (Dec. 20, 2018).