

SAFE Banking Act of 2021 to Provide Cannabis Industry Access to Financial Services, but Obstacles Remain

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Last week, the House of Representatives passed the Secure and Fair Enforcement (SAFE) Banking Act of 2021 with overwhelming bipartisan support. Over 100 Republicans joined Democrats in sending the bill to the Senate for consideration. The bill would create a safe harbor for depository institutions that provide financial services to cannabis-related legitimate businesses (CLBs) or their service providers. Cannabis remains an illegal drug under federal law, yet 47 states and the District of Columbia, which account for 97.7% of the U.S. population, have legalized cannabis for limited access (low THC) medical purposes or recreational use. The House notably considered and passed the bill on the floor on April 19, reserving April 20 for the potential future passage of legalizing marijuana on a federal level. Financial institutions have been in the difficult position of attempting to serve community businesses in the cannabis industry without violating federal law, notwithstanding existing guidance from FinCEN. The bill would provide welcomed relief.

FinCEN [published guidance](#) in this area in 2014, which aimed to clarify “how financial institutions can provide services to marijuana-related businesses [MRBs] consistent with their BSA [Bank Secrecy Act] obligations.” However, as the American Bankers Association (ABA) has observed, this guidance “does not create a safe harbor” and instead it “merely creates a system for reporting activity that is illegal under federal law but otherwise legal under state law.”

As noted by the ABA and others, the nation’s largest financial institutions have not been willing to take the risks associated with providing services to CLBs under this framework. While a number of community banks do provide services to CLBs, they are subject to uncertain federal regulation despite compliance with FinCEN guidance and federal safety and soundness supervision.

Important Provisions

The bill provides that the proceeds from a transaction involving the activities of a CLB or its service provider will not be considered proceeds from an unlawful activity solely because the transaction involves proceeds from a CLB or service provider or proceeds from certain other cannabis-related activity. Additionally, the bill provides that federal banking regulators may not take punitive action regarding most CLB business activities.

Industry and State Support

The ABA and 51 state bankers associations backed the bill. In its letter to the House, the ABA highlighted

concerns related to banks' current inability to serve the cannabis industry, which results in unserved businesses operating exclusively with cash. Specifically, it mentioned the problems of cash-motivated crimes, tax collection efficiency, and general financial transparency in the industry. The ABA also argued that the discrepancy between state and federal law affects a large swath of economic activity — including real estate and investments that derive revenue from cannabis — not just marijuana growers and dispensaries. It said, “Without greater clarity, that entire portion of economic activity in legal cannabis states will continue to be marginalized from the banking system.”

State legislatures also continue to pass a variety of cannabis reform laws. New York, New Mexico, Virginia, and New Jersey all have passed laws legalizing cannabis. Other states, such as Alabama and Kansas, also have moved bills to consider legalizing medical marijuana. Last fall, Arizona, Montana, New Jersey, and South Dakota all approved recreational use through ballot initiatives.

Outlook

This is the fourth time the SAFE Banking Act has passed the House in a variety of forms, but the first time with a Democratic Senate and president in its path. Democratic control, however, does not mean automatic support and a smooth passage of the bill into law. While bipartisan support has grown over the years, some Senate Republicans remain adamantly opposed to any action on cannabis, and other Democrats want further concessions.

No action is expected to occur before Majority Leader Chuck Schumer (D-NY), Sen. Cory Booker (D-NJ), and Sen. Ron Wyden (D-OR) unveil the details of their effort to fully legalize cannabis. Although this effort does not have a chance at passage, it will take precedent in Democratic messaging before the Senate turns its sights to finding a path forward with the SAFE Banking Act. Their proposal will include aspects of the SAFE Banking Act, as well as the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act, a bill House Judiciary Chair Jerrold Nadler (D-NY) also is expected to reintroduce. Several Democratic Senators remain opposed to full legalization of cannabis, as do most Senate Republicans. Democrats know they will not have the votes to pass a legalization bill but will want to demonstrate their commitment to the issue.

Senate Banking Committee Chairman Sherrod Brown (D-OH) has stated that any passage of a bill that ensures banking access for cannabis businesses [also must be coupled with drug sentencing reforms](#). This means a broader bill, and it would force the Senate Judiciary Committee to consider it also before reaching the floor. While President Biden has not taken a firm footing on a position on legalizing cannabis, he has stated that it should not be considered criminal to use it. While it's unclear what bipartisan support Brown may gain for his efforts with sentencing reform, it is clear the Democrats likely have the votes and path to pass the SAFE Banking Act. This could happen as a standalone bill, but the more likely scenario may be attaching it to a must-pass piece of legislation like a year-end appropriations bill to fund the government. This effort to push it across the finish line, however, could slide to 2022.

Our Cannabis Practice provides advice on issues related to applicable state law. Cannabis remains an illegal controlled substance under federal law.

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