

SAFER Act: Marijuana May Soon Become a Bigger Deal

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Proponents of marijuana reform have had cause for celebration in 2023. Despite challenges facing the industry, the [political](#) and [social](#) momentum surrounding cannabis is ticking upward. Most recently, the marijuana industry touted the passage of the Secure and Fair Enforcement Regulation Banking Act ([SAFER Banking Act](#)) by the Senate Banking Committee, by a notable bipartisan majority of 14-9, on September 27. The bill, SB. 2860, was placed on the Senate legislative calendar under general orders the following day. A Senate floor vote is now pending.

Despite the SAFE Banking Act passing in the U.S. House of Representatives on seven previous occasions since its first passage in 2019, the SAFER Banking Act's advancement through the Senate has caused quite a stir among not only cannabis and cannabis-related businesses, but also among banks, credit unions, insurers, lenders, and more – especially those which have, until now, elected not to serve the cannabis industry due to the risk that they could be [prosecuted](#) given federal restrictions on cannabis. While some banks, credit unions, and other financial services providers do serve the cannabis industry, the majority of state-legal medicinal or recreational cannabis businesses do not participate in traditional and secure banking systems and financial services for this very reason.

The advancement of the SAFER Banking Act by the Senate Banking Committee may be a signal that significant changes are on the horizon, making marijuana a bigger, more accessible deal throughout the country – and allowing cannabis industry participants to make bigger deals – in the near future.

Marijuana Gains Momentum at Federal and State Levels

Several weeks ago, at the federal level, marijuana made national news after a [report](#) from the Congressional Research Service indicated the Drug Enforcement Administration (DEA) is likely to follow the Department of Health and Human Services (HHS) and Food and Drug Administration's (FDA) recommendation to move marijuana from Schedule I to Schedule III under the Controlled Substances Act (CSA). However, as we [reported](#) previously, “[i]t is unclear if the change from Schedule I to Schedule III will impact the marijuana industry's ability to access financial services. Although many risks may be reduced, they are not fully eliminated. Time will tell if and how this change in marijuana re-scheduling will change the risk appetite of banks, credit unions, and other financial service providers.”

The passage of the SAFER Banking Act, conversely, would have substantial impacts on banks, credit unions, and other financial service providers.

Zooming in, 38 states and Washington D.C. now allow for the medical use of marijuana. Voters or legislators in 23 states and Washington D.C. have passed laws regulating the non-medical (so-called, “recreational”) use of cannabis. In the past year, Maryland’s recreational marijuana market opened on July 1; Maryland cannabis retailers sold more than \$85 million worth of products during the first 30 days of July, the state’s first month of legal sales. Minnesota’s law – the most recent to be implemented – went into effect on August 1, 2023. Recreational marijuana will be on the ballot in Ohio this upcoming November, and possibly in [Florida](#), as well.

Key Provisions of the SAFER Banking Act

In sum, the key provisions of the SAFER Banking Act include the “safe harbor” – or protections – from certain criminal, civil, and administrative penalties which may otherwise result due to the status of marijuana under federal law on the basis of the institution’s provision of financial services to a “State-sanctioned marijuana business or service provider.”

While marijuana will remain illegal under the SAFER Banking Act, the law would resolve the tension between federal and state law with respect to banking, lending to, and insuring a state-legal cannabis business. While the authors of this article are not aware of any enforcement action taken against a bank or credit union solely on the basis of their providing services to a state-legal marijuana business, a pattern of non-enforcement operates as no shield against future enforcement. The fear of such enforcement operated as a substantial barrier in recent years.

Under the SAFER Banking Act, certain applicable guidelines and restrictions will remain in place – primarily surrounding due diligence and ongoing monitoring for suspicious activities, all to which activities banking and financial institutions are accustomed in the context of other highly regulated industries.

The Scope of the SAFER Banking Act

Payments: The SAFER Banking Act includes the following payments-related activities under the definition of “financial service(s)” which are protected under the Act’s safe harbor provisions: a) whether performed directly or in directly, the authorizing, processing, clearing, settling, billing, transferring for deposit, transmitting, delivering, instructing to be delivered, reconciling, collecting, or otherwise effectuating or facilitating the payment of funds that are made or transferred by any means, including by the use of credit cards, debit cards, other payment cards, or other access devices, accounts, original or substitute checks, or electronic funds transfers; and b) acting as a money transmitting business that directly or indirectly makes use of a depository institution in connection with effectuating or facilitating a payment for a state-sanctioned marijuana business or service provider.

Insurers: The text of the bill also provides protections for insurers engaging in the business of insurance with a state-sanctioned marijuana business or service provider, of the relevant legal jurisdiction against being held liable pursuant to any federal law or regulation solely for providing a financial service, or for further investing any income derived from such a financial service. The language of the SAFER Banking Act also expands these protections to insurers that “otherwise engages with a person in a transaction permissible pursuant to a law (including regulations),” language which does not appear in the House’s SAFE Banking Act.

Mortgage Loans: Under the SAFER Banking Act, income derived from a legally operating state-sanctioned marijuana business “shall be considered in the same manner as any other legal income for purposes of determining eligibility for a covered mortgage loan for a 1- to 4-unit property that is the principal residence of the mortgagor.” Sec. 9(b)(1). Further, a mortgager or servicer may not be held liable pursuant to any Federal law or regulation solely for providing, guaranteeing, purchasing, or securitizing a mortgage to an otherwise qualified borrower, or for accepting such income as payment on the covered mortgage loan. Sec. 9(b)(2)(A)-(B). Nor may a relevant legal interest be forfeited solely based on an entity’s providing, insuring, guaranteeing, purchasing, or securitizing a mortgage to an otherwise qualified borrower, or accepting marijuana-related income as payment on a covered mortgage loan.

The SAFER Act provides 180 days after its enactment for affected agencies, departments, corporations, and more to provide notice of the implementation of the law previously described by notice, mortgagee letter, circular or handbook, bulletins, seller/servicer guides and guidelines as directed thereby.

Forfeiture: A critical consideration in any discussion of the relevant risks faced by all parties providing goods or services to the cannabis industry is the risk of forfeiture, among the topics discussed by McGlinchey team members at the fourth annual Cannabis Banking and Payments Conference in Washington D.C. last month.

Addressing these issues, the SAFER Banking Act provides express protections against “criminal, civil, or administrative forfeiture” of relevant “legal interest[s]” solely for providing a financial service to a state-sanctioned marijuana business or service provider, or for further investing any income derived from such a financial service. The beneficiaries of these protections include depository institutions, community development financial institutions, federal reserve banks, federal home loan banks, federal national mortgage associations, federal home loan mortgage corporations, federal agencies making, insuring, or guaranteeing mortgage loans or securities. These protections also extend to other parties to mortgage loans (such as nondepository lenders that make a covered mortgage loan, as further defined, and any person who otherwise has a legal interest in such a loan or in the collateral of the loan, including individual units of condominiums and cooperatives, provided that the collateral is a property designed principally for the occupancy of 1 to 4 families and underwritten, in whole or in part, based on income from a state-sanctioned marijuana business or service provider). Section 5(d).

Hemp: The SAFER Act also addresses challenges faced by “hemp-related legitimate businesses.” Sec. 8. Acknowledging that “despite the legalization of hemp, some hemp businesses (including producers, manufacturers, and retailers) continue to have difficulty gaining access to banking products and services” – including that “businesses involved in the sale of hemp-derived CBD products are particularly affected, due to confusion about the legal status of such products” – SAFER requires each federal banking regulator to update guidance related to providing financial services to “hemp-related legitimate business and hemp-related service providers.” Sec 8(c).

Specifically, regulators will have 180 days to provide guidance concerning compliance with obligations of financial institutions, as well as best practices for providing financial services – expressly including processing payments – to such businesses and service providers.

Will Financial Institutions Be Required to Serve the Marijuana Industry?

Under the newly revised legislation, the Treasury Secretary is required to publish updated guidance titled “BSA Expectations Regarding Marijuana-Related Businesses” (FIN–2014–G001), or otherwise issue new guidance to “ensure[] that a financial institution, and any director, officer, employee, or agent of a financial institution continues to report suspicious transactions” within one year of the enactment of the SAFER Banking Act. Sec 6(2). Notably, the previous version of SAFER initially introduced in the Senate provided the Treasury Secretary only half this amount of time (180 days) to issue amended or new guidance.¹

So what are banks, credit unions, insurers, lenders and others to do in the meantime? Will institutions and entities be forced to do business with marijuana-related business and services providers?

If the SAFER Banking Act does become law, all relevant entities will be expected by Congress – despite no updated guidance in place at the time – to “take a risk-based approach in assessing individual customer relationships rather than decline to provide banking services to categories of customers without regard to the risks presented by an individual customer or the ability of the depository institution to manage the risk.” Sec 10(a)(5).

But no, institutions will not be required to serve marijuana businesses; the Act states as much:

Nothing in this Act shall require a depository institution, an entity performing a financial service for or in association with a depository institution, a community development financial institution, or an insurer to provide financial services to a State-sanctioned marijuana business, service provider, or any other business.

Sec. 16(a).

But its passage does mean there is likely to be a significant (voluntary) influx in market entry for financial services providers, as well as increased competition among new and existing financial, insurance, and related service participants in the cannabis industry. And with that influx will come an increased need for these institutions and entities to engage in a wide range of state- and marijuana-specific business activities such as customer identification, risk-based customer diligence, and complying with suspicious activity monitoring and reporting obligations consistent with the business plan, risk profile, and management capabilities of the entity or institution.

A Risk-Based Approach: How to Prepare to Work with a Marijuana Business

The current FinCEN guidance ([FIN-2014-G001](#), issued 2/14/14) clarifying Bank Secrecy Act (BSA) expectations for financial institutions seeking to provide services to marijuana-related businesses is based on what are known as the “[Cole Memos](#).” This guidance requires financial institutions in practice to develop a sophisticated expertise in the marijuana laws and marijuana business environment particular to each marijuana-related business customer.

This FinCEN guidance remains the current authority on BSA expectations for financial institutions who offer marijuana banking services and financial institutions generally, if any suspected marijuana-related activity taking

place in the financial institution requires a report to be filed pursuant to the guidance. Briefly, the guidance restates the standards set out in Cole Memo I, including the eight enforcement priorities.

The FinCEN guidance then details the following requirements for financial institutions:

- Initial and Ongoing Customer Due Diligence. As part of the financial institution's determination whether to open, close, or refuse an account.
- Suspicious Activity Reports (SARs). Regardless of any state law legalizing marijuana, financial transactions involving a marijuana-related business involve funds derived from presently federally illegal activity. Therefore, financial institutions therefore must file SARs on marijuana-related business activity even if the marijuana-related businesses are legal under state law. There are three types of SARs for marijuana-businesses, and financial institutions must determine which is appropriate for a transaction.
- Currency Transaction Reports. The marijuana industry is still overwhelmingly cash-based, and financial institutions must still comply with currency transaction reporting (CTR) requirements for marijuana-related transactions.

If the SAFER Banking Act passes, this guidance will be required to be updated within one year of its date of enactment.

Big Deal(s) Ahead

Despite the existing disconnect between federal and state law with respect to the treatment of marijuana, as well as the oft-conflicting federal guidance, some financial institutions have chosen to serve marijuana-related businesses in recent years. However, the SAFER Banking Act could change that landscape completely and usher in a new era of expanded banking, financing, and insurance of the cannabis industry throughout the United States.

For additional information about how to ready your financial institution to serve customers in the cannabis industry – as well as for further, detailed explanations and examples of due diligence, SARS, and currency transaction reports, and more – visit the Banking and Finance section of McGlinchey's [Green Leaf Brief](#) blog.

[1] Uniform guidance and examination procedures are also required to be developed by the Federal Financial Institutions Examination Council, in consultation with the Department of the Treasury, within one year of the enactment of the SAFER Banking Act. Sec. 7(a).

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