

The Banking Law Journal

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February 2024

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Implications of the SAFER Banking Act for the Cannabis Industry

*By Ryan L. O'Neill and David M. Stewart**

The Secure And Fair Enforcement Regulation Banking Act, if enacted, will allow American banks to serve the cannabis industry. The authors of this article discuss the implications.

American banks may finally be allowed to serve the cannabis industry without fear of federal repercussions,¹ thanks to the “Secure And Fair Enforcement Regulation Banking Act,”² or “SAFER” Banking Act, for short. Earlier versions of the bill, such as the “SAFE” Act, have been introduced since 2013 but died on the Hill despite bipartisan support. But with Senate Majority Leader Chuck Schumer (D-NY) backing the SAFER Banking Act,³ there may be light at the end of the tunnel. The bill has several implications for banks and the cannabis industry.

THE IMPLICATIONS

First, the bill would let banks provide financial services to cannabis-related businesses (CRB). Under current law, banks might risk prosecution⁴ for, among other things, money laundering, should they accept deposits from a CRB. And although the Financial Crimes Enforcement Network (FinCEN) has issued guidelines to help banks do business with CRBs, most banks remain hesitant to shake hands with the cannabis industry until there is a change in the law. Without a place to bank, many CRBs—operating in full compliance with state law—are forced to operate only in cash and get “creative”⁵ in finding ways to safely secure profits.

The SAFER Banking Act recognizes this problem. If passed, no longer could federal regulators “penalize a depository institution” for providing financial services to a state-sanctioned marijuana business “solely because the business .

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¹ <https://www.cato.org/commentary/unlock-cannabis-industry-financial-institutions>.

² S. 1323/H.R. 2891, <https://www.congress.gov/bill/118th-congress/senate-bill/2860/text?s=1&cr=1#toc-HFCF5E94E84F946E2A6234A5C77810233>.

³ <https://www.marijuanamoment.net/schumer-commits-to-bring-newly-revised-marijuana-banking-bill-to-the-floor-with-cannabis-expungements-and-gun-rights-amendments/>.

⁴ <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

⁵ <https://money.cnn.com/2013/04/29/smallbusiness/marijuana-cash/index.html>.

. . . is a State-sanctioned marijuana business.”⁶ And for purposes of the United States Criminal Code, “the proceeds from marijuana-related activities of a State-sanctioned marijuana business” are no longer considered “proceeds from an unlawful activity” just because they stem from a CRB.⁷ The Act also ensures that financial institutions remain eligible for Federal Deposit Insurance Corporation protections should they work with the cannabis industry.⁸ So, if the SAFER Banking Act becomes law, no longer will banks and industry be left looking at each other through the glass—the industry can happily bank with a financial institution eager to accept its business.

Second, by bringing CRBs into the regulated-banking system, the SAFER Banking Act would promote transparency and accountability. Although the American legal cannabis industry is relatively young, the banking industry is not. Welcoming the cannabis sector into the world of mainstream banking means subjecting it (and its books) to the same scrutiny as everyday businesses. In exchange for the security of a checking account, the cannabis industry sheds the secrecy of cash.

Third, although the SAFER Banking Act would let banks take deposits from the cannabis sector, it does not legalize cannabis at the federal level. While the Biden administration has teased⁹ the idea of taking cannabis off the Schedule 1 drug list, under current law,¹⁰ cannabis has “no currently accepted medical use and a high potential for abuse.” As long as cannabis is a Schedule 1 drug, banks serving CRBs may face increased regulatory scrutiny, such as enhanced reporting requirements and compliance obligations. We saw a similar trend with the advent of legal sports wagering. Ultimately, the financial sector must decide if the juice is worth the squeeze.

CONCLUSION

Overall, the SAFER Banking Act presents an opportunity for banks to enter a growing industry without fear of federal blowback. But banks also need to navigate the potential challenges of doing so.

Importantly, the Senate Banking Committee now has approved the Act, with amendments, by a bipartisan 14-9 vote. Since then, groups such as Bank of

⁶ S. 2860, 118th Cong. § 3. (a)(5) (2023).

⁷ S. 2860 § 4.

⁸ S. 2860 § 3.

⁹ <https://www.politico.com/news/2023/08/30/marijuana-review-move-to-schedule-iii-00113493>.

¹⁰ <https://www.dea.gov/drug-information/drug-scheduling#:~:text=Schedule%20I%20drugs%2C%20substances%2C%20or,%2C%20methaqualone%2C%20and%20peyote.>

America and Mastercard have disclosed lobbying expenditures¹¹ related to the bill, which will now head to the Senate floor.

¹¹ <https://www.forbes.com/sites/dariosabaghi/2023/10/23/bank-of-america-nra-and-mastercard-are-lobbying-on-marijuana-banking/?sh=31d315fab22f>.