

CANNABIS BANKING: THE SAFE BANKING ACT 2.0 PASSES THE HOUSE OF REPRESENTATIVES

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On 19 April 2021, the House of Representatives passed the “Secure and Fair Enforcement (SAFE) Banking Act of 2021”¹ by a vote of 321-101. The bill was approved on a significantly bipartisan basis as 106 Republicans (approximately 50 percent of the caucus) joined 215 Democrats in favor. In 2019, a similar version of the legislation passed the House of Representatives by a vote of 321-103, including 91 Republicans in favor (only 46 percent of the caucus).

The significant increase in Republican support coincides with the growing trend of legalization of medicinal and adult-use cannabis products at the state level over the last two years. Since the bill was first passed, seven states have legalized adult-use cannabis.² To-date, 18 states and the District of Columbia have legalized adult-use cannabis products and an additional 19 states have approved medicinal cannabis.

The bill now moves to the Senate, where it has significant support. The path forward for the “SAFE Banking Act” shows both promise and challenges. This alert discusses the substance of the bill, how it has changed and the political road ahead. For additional discussion of the contents of the bill, see our previous alert [here](#).

KEY PROVISIONS

The core of the legislation is the same as the prior bill passed by the House. For instance, the proceeds of transactions with cannabis-related legitimate businesses (CLBs) and their service providers would no longer be considered proceeds from an unlawful transaction and thus, not money laundering, and would not be subject to forfeiture. Moreover, the bill would prohibit “federal banking regulators” from, among other things:

- Terminating or limiting deposit or share insurance, or taking any adverse action against a “depository institution,” solely because the institution provides, or has provided, “financial services” to CLBs or service providers of a CLB;
- Prohibiting, penalizing, or discouraging a depository institution from providing financial services to a CLB or service provider;
- Recommending, incentivizing, or encouraging a depository institution not to offer financial services to an account holder because of the account holder’s connection to a CLB; or
- Taking any adverse or corrective supervisory action on a loan made to a CLB or service provider (or their employees, owners, and operators), or to the owner or operator of real estate leased to a CLB or service provider.

Additionally, the bill would protect businesses that perform a financial service for or in association with a depository institution. Such institutions could facilitate payments and act as a money transmitter that uses a depository institution to facilitate a payment for a CLB or service provider. Insurance companies also would be authorized to write insurance for CLBs and their service providers.

Among other things, the Financial Crimes Enforcement Network would be obligated to update its guidance regarding mandatory suspicious activity reports, and the Federal Financial Institutions Examination Council would be required to issue guidance and examination procedures for such depository institutions.

KEY MODIFICATIONS

Both the House and Senate bills contain important modifications from the original legislation in the prior Congress, including changes to the protections related to the definition of “financial services” and hemp businesses:

Financial Services by Depository Institutions

The 2019 version defined financial services to include the services and products listed in Section 1002 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (among other services not directly relevant to depository institutions). The 2021 version defines financial services to include the services and products listed in Section 1002 of the Dodd-Frank Wall Street Reform and Consumer Protection Act as well as (i) any financial services or product that a federal credit union can provide pursuant to the Federal Credit Union Act; and (ii) any financial service or product a national bank or its financial subsidiary can offer pursuant to 12 U.S.C. § 24 (Seventh) and 12 U.S.C. § 24a, respectively (among other services not directly relevant to depository institutions). The definition does not make reference to any services provided by a national bank pursuant to 12 U.S.C. § 92a.

Hemp-related Business Protections

The 2019 version directed the federal banking regulators to issue guidance “confirming the legality of hemp, hemp-derived CBD products, and other hemp-derived cannabinoid products, and the legality of engaging in financial services with businesses selling hemp, hemp-derived CBD products, and other hemp-derived cannabinoid products.” It also applied the various protections to “hemp (including hemp-derived cannabidiol and other hemp-derived cannabinoid products) in the same manner as such provisions apply to cannabis. The 2021 version directs the federal banking regulators to update their existing hemp banking guidance (rather than comment on the legality of hemp-derived CBD or other hemp-derived cannabinoid products) to advise depository institutions on their Bank Secrecy Act and other federal obligations. It also applies the various protections to covered financial services providers who provide covered financial services to “hemp-related legitimate businesses” and service providers of such businesses.

SENATE PROSPECTS

In 2019, Senators Jeff Merkley (D-OR) and Cory Gardner (R-CO) introduced the Senate companion version of the “SAFE Banking Act” with 33 co-sponsors, including four Republicans. Despite significant support, then-Senate Banking Committee Chairman Mike Crapo (R-ID) did not allow a committee vote on the bill.

Senator Merkley reintroduced the legislation earlier this year along with a new Republican co-sponsor: Steve Daines of Montana. Currently, the bill has 31 co-sponsors. These co-sponsors include several prominent Democrats, including Senators Robert Menendez (D-NJ), Patrick Leahy (D-VT), Dick Durbin (D-IL), Elizabeth

Warren (D-MA), and Bernie Sanders (I-VT). Several key moderate Democrats also support the bill, such as Senators Kyrsten Sinema (D-AZ), Jon Tester (D-MT), and Angus King (I-ME). Notably, six Republicans have signed on as co-sponsors, meaning a total of seven Republicans are sponsors. Even Senator Pat Toomey (R-PA), the Ranking Member of the Banking Committee, has signaled an openness to working on the bill.

The addition of two Republican senators is important because any Democratic-sponsored bill that has 10 Republican co-sponsors could overcome a filibuster (assuming uniform Democratic support). Thus, the “SAFE Banking Act” is, in theory, three Republicans away from a bipartisan, filibuster-proof path to enactment.

However, the ability of the “SAFE Banking Act” to move forward is complicated. Originally, emphasis has been placed on incremental reform on the theory that descheduling cannabis was too fraught with political opposition. Now there is building momentum to enact comprehensive cannabis reform. Senate Majority Leader Chuck Schumer (D-NY) is working with Senators Ron Wyden (D-OR) and Cory Booker (D-NJ) to develop a comprehensive cannabis reform bill. They plan to move forward with their legislation whether or not the Biden administration supports the framework. Moreover, Banking Committee Chairman Sherrod Brown (D-OH) has said that the “SAFE Banking Act” should “come [with] sentencing reform” for cannabis offenses if it is to move forward.³

These differences raise barriers to the bill proceeding through normal order, despite the success in the House and the strong bipartisan support in the Senate. Nothing is definitive, however, and the proposed reform legislation could facilitate inclusion of banking provisions. If these differences are resolved, there is a risk of a threat of a filibuster as there are Senators in both parties opposed to any normalization of cannabis. If three additional Republicans will not vote in favor, the bill would be unable to overcome a veto (or a threat of a veto).

Beyond the specifics of cannabis policy, there may not be enough time to consider the legislation given other issues such as voting rights, confirmation of appointees, and infrastructure. It remains to be seen whether comprehensive cannabis reform can be considered with these other issues.

CONCLUSION

The passage of the “SAFE Banking Act” as a standalone bill by the House of Representatives by a bigger and more bipartisan margin than in 2019 is an important development. The path forward for the “SAFE Banking Act” shows both promise and challenges. Given that 37 states and D.C. have taken action to legalize cannabis in a variety of ways, it is clear that the federal cannabis regulatory paradigm has shifted.

FOOTNOTES

¹H.R. 1996, 117th Cong. (2021).

²New York, Virginia, New Mexico, New Jersey, South Dakota, Arizona, and Montana.

³[Senate banking chair Sherrod Brown would like to couple bank access for cannabis businesses with drug sentencing reforms](#), *cleveland.com*, 5 February 2021

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