

IN THE WEEDS: HOUSE MOVES TOWARD OPENING BANKS TO CANNABIS-RELATED LEGITIMATE BUSINESSES

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On Wednesday, September 25th, the House of Representatives approved the “Secure and Fair Enforcement (SAFE) Banking Act of 2019” (H.R. 1595) by a vote of 321 to 103. The bipartisan bill is the first stand-alone cannabis legislation to be voted on and approved by the full House of Representatives. It would enable legal cannabis businesses, an industry projected to grow to \$80 billion in annual revenue by 2030, to access core banking services, such as operating accounts, from banks and credit unions. Currently, many CLBs operate as all-cash businesses because most banks and credit unions are unwilling to service them in light of the federal prohibition on cannabis, and their anti-money laundering obligations under the Bank Secrecy Act. Recognizing these barriers, the bill's stated purpose is “to increase public safety by ensuring access to financial services to cannabis-related legitimate businesses [“CLBs”] and service providers and reducing the amount of cash at such businesses.”

KEY ELEMENTS

To achieve these goals, the bill would prohibit “federal banking regulators”^[1] from, among other things:

1. Terminating or limiting deposit or share insurance, or taking any adverse action against a “depository institution,”^[2] solely because the institution provides, or has provided, “financial services” to CLBs or service providers of a CLB;
2. Prohibiting, penalizing, or discouraging a depository institution from providing financial services to a CLB or service provider;
3. 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
4. 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;

provided that these services are offered pursuant to State law and are provided within a “State, political subdivision of a State, or Indian country that” has legalized some type of cannabis commerce or use.

Accordingly, if enacted, the SAFE Banking Act would allow depository institutions (and applicants for depository charters) to provide “financial products or services,” as defined by the Dodd-Frank Act (12 U.S.C. § 5481), to CLBs within certain States. Such products and services include:

- extending, acquiring, purchasing, selling, brokering, and servicing loans;
- taking deposits;
- transmitting funds;
- acting as a custodian; and
- providing check cashing and payment services, among others.

The bill also 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.

The proceeds of transactions with 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.

Notably, the SAFE Banking Act does not apply to investment companies and other entities regulated by the Securities and Exchange Commission (SEC), so the bill would not authorize capital formation through SEC-registered entities.

WHAT HAPPENS NEXT?

Whether the SAFE Banking Act will be enacted into law remains to be seen. In late July, Senator Crapo held a hearing entitled the “Challenges for Cannabis and Banking: Outside Perspectives” to hear testimony about cannabis banking issues generally, and the Senate version of the SAFE Banking Act (S. 1200) in particular. However, no other Republican committee members participated in the hearing. The Senate bill has thirty-three co-sponsors, five of whom are Republicans. Of the Republican co-sponsors, only Senator Kevin Cramer (R-ND) sits on the Senate Banking Committee, the committee of primary jurisdiction.

Earlier this month, however, Senator Crapo stated publicly that he hopes to act on cannabis banking legislation before the end of the year. Although Senator Crapo's home state has not enacted any legislation legalizing or decriminalizing cannabis, he has stated that “the impact on the ability of small and large businesses to operate justified [the Senate's] attention.” To date, no additional hearings or mark-ups have been scheduled regarding the SAFE Banking Act or similar legislation, although some Republican committee members may now be more receptive to a vote.

Notes

[1] Defined to include the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Financial Crimes Enforcement Network, the Office of Foreign Asset Control, the Department of Treasury, and “any federal agency or department that regulates banking or financial services as determined by the Secretary of Treasury”.

[2] Defined as insured banks as defined in section 3(h) of the Federal Deposit Insurance Act, and federally- or state-chartered credit unions.

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