

Financial Services

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Government Matters

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Cannabis Banking Bill Clears U.S. House of Representatives

Broad, Bipartisan Support Bodes Well for Senate Passage

On September 25, 2019, the U.S. House of Representatives approved historic legislation to provide legalized marijuana businesses access to banking services. H.R. 1595, the Secure and Fair Enforcement Banking Act of 2019 or the SAFE Banking Act of 2019 (the "SAFE Act"), passed by a 321-103 vote, including 91 Republicans who sided with the Majority.

Specifically, if it were to be enacted into law, the SAFE Act would do the following:

- Allow cannabis-related legitimate businesses, along with their service providers, to access banking services and products, as well as insurance;
- Seek to harmonize federal and state law by prohibiting federal banking regulators from engaging in certain actions against financial institutions, such as discouraging, prohibiting, or penalizing depository institutions that serve cannabis-related legitimate businesses;
- Exempt from federal prosecution or investigation any depository institution, or an employee of the institution, solely for providing banking services to a cannabis-related legitimate business;
- Provide a safe harbor for financial institutions to offer their products and services to cannabis-related legitimate businesses and add protections for ancillary businesses, as well as specify how businesses on tribal land could qualify for the safe harbor provision;
- Require the Federal Financial Institutions Examination Council ("FFIEC") to develop uniform guidance and exam procedures to help financial institutions lawfully serve cannabis-related legitimate businesses.

The goal of the SAFE Act is to remedy the public safety risk for employees, businesses, and communities in jurisdictions across the



United States that have passed laws and adopted policies allowing for some cultivation, sale, distribution, and possession of cannabis for adult recreational or medical purposes, all of which are illegal under federal law. Because of this conflict of law, financial institutions that provide banking services to legitimate cannabis businesses licensed under state law are still subject to federal criminal prosecution and civil and regulatory action. As a result, today, these businesses operate on a cash-only basis, storing large sums of cash on-site and transporting substantial quantities of cash whenever they need to pay vendors or make deposits with the few credit unions that will allow them to open business accounts. These practices not only consume substantial resources, but the business owners and their employees also are more susceptible to robberies and other violent crime. Oftentimes, the businesses pay taxes with large amounts of cash, which creates practical hurdles for those businesses operating legally and results in potential tax evasion for those who cannot overcome the practical challenges of paying government entities with cash.

SENATE CONSIDERATION

With its passage by the House, H.R. 1595 has been sent to the Senate where its prospects are mixed. A companion bill, S. 1200, was introduced by Jeff Merkley (D-Oregon) in April of this year. It has 33 co-sponsors, including five Republicans. To date there has been no action on the bill. With the passage of the House bill, however, Senator Mike Crapo (R-Idaho), the chairman of the Senate Banking Committee, has signaled support for advancing H.R. 1595 by the end of the year.

Advocates of the legislation have refined their message to gain Senate Republican support, arguing that the issue is not about the legalization of marijuana but rather providing protection for bankers, realtors, and insurance companies, as well as improving tax administration, particularly at the state level. In addition, one provision was added to provide similar protections for the hemp industry to appeal to Senate Majority Leader Mitch McConnell (R-Kentucky), and another provision was added at the urging of Senator Crapo, to stop the revival of an Obama-era bank regulatory program known as "Operation Choke Point," that involved investigating banks for doing business with payday lenders and firearms dealers.

We expect Leader McConnell will take his lead, as he often does, from the President. While President Trump has never gone on the record favoring legalization of cannabis, he recently stated that he supports the rights of states to legalize cannabis if they choose to do so. That would indicate that he is certainly not an opponent of the industry. It may suggest that he may sign the SAFE Act if it were presented to him.

The subject will continue to gain attention. A number of the Democratic Senators who are seeking their party's presidential nomination support legislation that would legalize cannabis entirely. They will undoubtedly play a role in the Senate's consideration of the SAFE Act.

PROGNOSIS

We are guardedly optimistic that the SAFE Act will become law by the end of Q1 or early Q2 of 2020. While the passage of the SAFE Act would be a highly positive development for the continued growth of cannabis businesses in opening the door to credit card transactions, electronic fund transfers, and established banking procedures, these businesses will still face challenges with satisfying the diligence requirements that the Act and other existing regulations will impose upon financial institutions that work with cannabis businesses. Moreover, the Act focuses solely on the relationships between cannabis businesses and financial institutions, leaving a significant portion of a business's dealings with its vendors, service providers, and other entities at risk of the application of federal anti-money laundering statutes. We will continue to monitor the progress of this issue and will provide updates as developments arise.



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