

Congress Could Still Pass Cannabis Legislation In 2020

By **Thomas Spulak, William Durham and Chad Peterson** (June 25, 2020, 4:31 PM EDT)

Has COVID-19 extinguished any hope of federal cannabis legislation this year? After high expectations that 2019 would see federal legalization of marijuana, some have written off any possibility that Congress will pass pro-marijuana legislation until 2021.

This article examines current legislative efforts to pass the SAFE Banking Act in the 116th Congress, considers the act's chances as part of the latest pandemic relief bill, and briefly analyzes the prospects for steering it through Congress post-election.

Background

After Republican leaders in the U.S. House of Representatives blocked any cannabis bill from reaching a House vote in 2017 and 2018, proponents of cannabis legalization were hopeful that the incoming 116th Congress would be the most pro-cannabis Congress ever.

In October 2018, Rep. Earl Blumenauer, D-Ore., a founding member and co-chairman of the bipartisan Congressional Cannabis Caucus — issued a blueprint for a step-by-step plan to reach full federal legalization of marijuana by the end of 2019.

But 2019 came and went with just one significant achievement: In September 2019, the House passed the Secure and Fair Enforcement, or SAFE, Banking Act with strong bipartisan support. The SAFE Act would give state-legal marijuana businesses access to banking and commercial lending services, making it easier for them to run and expand their operations.

The bill stalled in the U.S. Senate, but it recently took on new life when the House incorporated it into the Health and Economic Recovery Omnibus Emergency Solutions, or HEROES, Act that passed the House on May 15. The Senate is in no rush to pass a new stimulus bill, but current crystal ball predictions suggest a Senate vote could happen in July.

Which raises the question: In a Republican-controlled Senate that has largely been hostile to cannabis legislation, how likely is the SAFE Act to become law as a stand-alone bill or as part of the latest coronavirus relief bill?

Blumenauer's Road Map



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In October 2018, Blumenauer issued an eight-page memorandum to the House Democratic leadership laying out what he called "desperately needed reforms" that would narrow the gap between federal and state marijuana laws and lead to full legalization at the federal level by the end of 2019.

These reforms included full access to banking and financial services; amending the Controlled Substances Act to protect state marijuana laws; equal access to cannabis treatments for veterans through the U.S. Department of Veterans Affairs; tax reform to ensure that marijuana businesses operating in compliance with state law are taxed the same as other businesses; and restorative justice measures.

While several bills implementing Blumenauer's reforms are pending in the House, only the SAFE Act generated the momentum necessary to reach the Senate. In September 2019, it became the first standalone cannabis bill to pass the House by a floor vote, with 91 Republicans joining 229 Democrats and one Independent.

The only other cannabis bill to get any traction in the House in 2019 was the Marijuana Opportunity, Reinvestment and Expungement, or MORE, Act of 2019, which, among other things, would remove marijuana from the federal controlled substances list and allow states to continue to choose how to regulate a commercial marijuana industry.

The MORE Act passed out of the House Judiciary Committee in November 2019 — one of the last things the committee voted on before taking up impeachment — but several additional House committees would have to pass it or waive jurisdiction before it could receive a vote in the full House.

COVID-19 and the election likely have stalled any further progress on Blumenauer's road map in the House until next year. But that still leaves the SAFE Act in the Senate.

The SAFE Act

Because marijuana remains a Schedule I drug under the Controlled Substances Act, banks that offer services to cannabis-related businesses — including contractors and vendors who never touch the plant — can face scrutiny regarding compliance with the Bank Secrecy Act and anti-money laundering rules and regulations.

Violations could lead to revocation of a bank's charter, prosecution of its managers and forfeiture of its assets. Financial institutions therefore are often reluctant to offer banking services even to marijuana businesses that operate in full compliance with state laws and regulations.

As a consequence, many of these businesses lack access to standard banking services such as demand deposit accounts and are compelled to operate on a cash basis, raising a host of public safety concerns and limiting access to credit and investment needed to expand.

The SAFE Act is designed to solve this access problem by prohibiting federal regulators from penalizing financial institutions solely because they provide banking and related services to marijuana businesses.

So long as a "cannabis-related legitimate business or service provider" acts pursuant to and, in compliance with, state, local or tribal law, federal banking regulators may not prohibit or otherwise discourage the bank from providing it with financial services.

Support for the SAFE Act is both broad and bipartisan. The Senate version, introduced in April 2019, was filed by Sens. Jeff Merkley, D-Ore., and Cory Gardner, R-Colo., along with 20 other co-sponsors from both parties.

Around the same time, U.S. Secretary of the Treasury Steve Mnuchin testified to a congressional subcommittee that there was a need for a legislative solution to the conflict between state and federal law on the banking issue. Governors of both parties also signaled support for the SAFE Act, as did the American Bankers Association.

But the initial excitement that the SAFE Act might progress in the Senate has mostly evaporated. Sen. Mike Crapo, R-Idaho, chair of the Senate Banking Committee, has made it clear that he is opposed to efforts to legalize marijuana on the federal level.

Last December, he issued a statement declaring that he opposes the version of the SAFE Act that was passed by the House. He laid out his own ideas about potential amendments, such as a 2% THC potency cap on marijuana products for a business to be eligible for financial services — a limitation that would disqualify most marijuana businesses from banking access under the SAFE Act.

In short, the SAFE Act as passed by the House appeared to be going nowhere in the Senate before COVID-19.

Reasons for Optimism in the Senate

On May 15, the House passed the HEROES Act, a \$3 trillion federal stimulus bill intended to address the economic fallout from the COVID-19 pandemic. Included within the HEROES Act is the SAFE Act.

There are several reasons why it makes sense to link access to banking services for marijuana businesses to pandemic relief. The pandemic has exacerbated the already serious law enforcement concerns arising from the fact that most marijuana businesses are forced to operate solely on a cash basis. Cash transactions also increase the risk of exposure to COVID-19.

And granting access to banking services will allow for more efficient collection of tax revenues from the marijuana industry at a time when most state and local governments are predicting budget shortfalls due to the pandemic.

Moreover, the SAFE Act is a cheap date; it would not compete for scarce federal funds, but would simply eliminate the threat of federal penalties that has prevented most banks from providing marijuana businesses the sorts of banking services they offer to other industries.

These reasons should be especially persuasive given that the marijuana industry and its tens of thousands of employees have been deemed essential during the pandemic in most states where marijuana is legal.

Progress in the Senate depends on Majority Leader Mitch McConnell, R-Ky., who so far has not allowed a vote on any cannabis bill. But this time might be different. For example, while some of his criticisms of the HEROES Act have specifically targeted SAFE Act provisions relating to cannabis research, McConnell has not publicly criticized the main thrust of the proposed legislation. That may be due to the fact that among the five Republican co-sponsors of the Senate version of the bill are Gardner and fellow

Kentuckian Sen. Rand Paul.

Gardner, who has been outspoken in support of the SAFE Act, is up for reelection in November and is trailing his Democratic opponent. The SAFE Act is critical to Colorado's billion-dollar cannabis industry, and being able to claim he was responsible for passing it would substantially boost his election prospects. Given the slim Republican majority in the Senate, it would not be surprising if McConnell concluded that helping Gardner pass the SAFE Act — either as a standalone bill or as part of the HEROES Act — would likewise help McConnell retain his Republican majority.

McConnell is not likely to schedule the SAFE Act for a vote until it passes Crapo's Banking Committee. But while Crapo until now has held up the bill, more recently there have been signs of progress. In particular, shortly before the coronavirus shutdown Gardner reported that he and Merkley, the Democratic co-sponsor of the Senate bill, had been working with Crapo to address the latter's concerns and that they were close to moving forward.

And just as McConnell wants to protect his Republican majority in the Senate, Crapo might want to help a fellow Republican senator take home a major legislative achievement in time for the November elections.

Prospects Post-Election

If the 116th Congress ends without pro-marijuana legislation such as the SAFE Act, prospects in the next Congress will depend on the election. If the Republicans keep the Senate, then any election-related urgency on their part to pass SAFE Act will evaporate. While there still would be bipartisan support for the bill, McConnell likely would not see it or any other pro-marijuana legislation as a priority.

But if the Democrats take the Senate, there is every expectation that they will push the SAFE Act. Not only does the Senate bill currently have 27 Democratic and two Independent co-sponsors, but Sen. Sherrod Brown, D-Ohio, the ranking member of the Senate Banking Committee, has been an advocate of marijuana banking legislation.

Also, there will be serious pressure on Minority Leader Chuck Schumer, D-N.Y., a strong supporter of sweeping federal marijuana reform, not to hold up the SAFE Act while other legalization bills work their way through the House and Senate.

And it is almost certain that the Democrats in the House and Senate will move other parts of Blumenauer's legalization road map. A leading candidate would be the MORE Act. With the Senate Judiciary Committee no longer chaired by Sen. Lindsey Graham, R-S.C. — who has taken no action on the Senate version of the MORE Act — House leaders can be expected to prioritize a vote by the House and send the bill to the Senate.

How the presidential election affects pro-marijuana legislation is a closer call. While President Donald Trump has suggested he supports the right of states to legalize marijuana, his actions indicate that he is not committed to federal legislation to protect the industry.

His first attorney general, Jeff Sessions, was well known to be a strong opponent of marijuana and rescinded U.S. Department of Justice policy memoranda that generally protected state-legal marijuana businesses from federal prosecution. Trump's fiscal year 2021 budget removes a rider provision, renewed every year since 2014, that prevents the Justice Department from using federal funds to

interfere with the implementation of state medical marijuana laws.

And earlier this year a Trump campaign spokesman said that the administration's policy is that cannabis and other illegal drugs should remain illegal. At the same time, whether Trump would veto a pro-marijuana bill might depend on whether it was passed by a Republican Senate or by a Democratic Senate with strong Republican support.

Former Vice President Joe Biden has cautiously taken the position that marijuana should be legalized, although maybe not yet. His cannabis plan would decriminalize cannabis, expunge some marijuana-related criminal records, and essentially let states set their own policies regarding legalization of medical and recreational marijuana.

But Biden also has said he wants more research on health effects of marijuana use before supporting legalization. It is not likely, however, that he would veto a pro-marijuana bill passed by either a Democratic or Republican Senate.

Conclusion

While the odds are admittedly against pro-cannabis legislation moving forward in Congress this year, the latest pandemic relief bill currently pending in the Senate might offer an unexpected opportunity to make progress on that front. The House's incorporation of the SAFE Act into the HEROES Act revives badly needed banking relief for the cannabis industry that otherwise had stalled in the Senate.

Given the strong bipartisan support for the SAFE Act and the complex dynamics of an election year, the Senate Republican leadership may find it politically advantageous to advance the SAFE Act, either as part of the HEROES Act or as a standalone bill.

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