

Insights

Secure and Fair Enforcement (SAFE) Banking Act Passes U.S. House...Again

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On Monday, April 19, 2021, the U.S. House of Representatives passed the Secure and Fair Enforcement Banking Act of 2021 (the "Act"). The legislation was reintroduced in Congress in late March through a bipartisan effort involving members of both the U.S. House of Representatives (House) and the U.S. Senate (Senate). If ultimately passed by the Senate, the Act would create a safe harbor from federal prosecution and regulatory penalties for banks and credit unions that provide financial services to cannabis-related legitimate businesses (CRLBs) and ancillary companies operating in cannabis-legal states. A substantially similar version of the Act passed the House in September of 2019, making it the first standalone cannabis bill to be passed by a House floor vote, followed shortly by the Marijuana Opportunity Reinvestment and Expungement Act of 2020 (MORE Act) **[See prior alert here]**. With broad bipartisan support, the Act is widely expected to pass the Senate and become law in 2021.

Background

Although numerous states have legalized cannabis to some degree (last week, New Mexico became the 17th state to legalize recreational cannabis, and medical cannabis is legal in 36 states), it remains illegal at the federal level under the Controlled Substances Act (CSA), which was signed into law by President Richard Nixon in 1970. The CSA established U.S. federal drug policy and served as the national implementing legislation for the Single Convention on Narcotic Drugs, 1961, an international treaty aimed to combat drug abuse by coordinated international action. Under the CSA, the cultivation, distribution, and possession of cannabis remains federally illegal, regardless of state legalization. In addition, cannabis-related activities can serve as a basis for the prosecution of other crimes, including money laundering and the unlicensed transmission of money under 18 USC 1956 and 1960.

As a result of the inconsistency between federal and state cannabis legality, as well as conflicting policy statements over the years from the U.S. Department of Justice regarding federal prosecution of cannabis related offenses occurring in legal states, financial institutions have generally refused to accept money from CRLBs. In addition to the risk of potential federal prosecution, institutions have been concerned with losing FDIC and NCUA insurance. This lack of banking access has led CRLBs to operate largely on a cash basis (e.g., payroll, overhead expenses, taxes - all generally paid in cash). Obviously, this method of operating makes the CRLBs highly susceptible to theft and presents safety issues for their employees and customers. The first iteration of a cannabis banking bill was introduced in 2013, with subsequent version being introduced every year since. In the last Congressional session, members of the House voted 321 to 103 in favor of the 2019 version of the bill (receiving nearly 30 Republican votes). However, the bill never received a hearing in the Senate Banking Committee, under then Chairman Mike Crapo (R-ID).

The SAFE Banking Act of 2021

On Monday, April 19, 2021, the House approved the 2021 SAFE Banking Act by a vote of 321 to 101. The legislation was introduced on March 18, 2021 by its sponsor, Rep. Ed Perlmutter (D-CO) and had added nearly 170 co-sponsors by the time the full House voted to approve the bill a month later. A nearly identical bill was introduced in the Senate on March 23rd by two Senators (one Democrat and one Republican).

Like its predecessors, the Act provides that financial institutions can deal with CRLBs by providing that proceeds from such transactions are not considered proceeds from an unlawful transaction. Therefore, these transactions do not constitute money laundering and are not subject to forfeiture. In addition, the Act permits insurance companies to write insurance for CRLBs and their service providers. Finally, the legislation prohibits federal banking regulators from:

- Terminating or limiting deposit or share insurance, or taking any adverse action against a depository institution solely because the institution provides financial services to CRLBs or service providers of CRLBs;
- Prohibiting, penalizing, or discouraging an institution from offering financial services to CRLBs or service providers of CRLBs;
- Recommending, incentivizing, or otherwise encouraging an institution not to offer financial services to an account holder solely because the account holder is affiliated with a CRLB; and
- Taking any adverse or corrective action on a loan made to a CRLB or service provider (solely because the person either owns a CRLB or owns real estate or equipment leased to a CRLB).

Obviously, the Act represents a significant change in operations for financial institutions and their regulators. If ultimately passed by the Senate, the law will require revised regulatory guidance, including changes to the Financial Crimes Enforcement Network (FinCEN) rules related to mandatory suspicious activity reports ("SAR"). More specifically, the Act requires FinCEN to update its February 14, 2014 SAR guidance titled 'BSA Expectations Regarding Marijuana-Related Businesses' within 180 days of the Act's passage in a manner that is consistent with the Act's purposes and does not significantly inhibit the provision of financial services to a CRLB. The Act also updates the Federal Financial Institutions Examination Council's (FFIEC) examination procedures for depository institutions.

What's Next?

Now that the Act has passed the House, it will move on for consideration by the Senate. While Sen. Sharrod Brown (D-OH), who now chairs the Senate Banking Committee, has indicated a willingness to advance the legislation, it will face a tougher climb in the upper chamber where Democrats will need all 50 of their members, along with the support of 10 Republicans to overcome the filibuster. Notably, when introduced, the Senate version of the legislation was co-sponsored by 29 senators, including 6 Republicans. This increased support from legislators is not surprising given the overwhelming support from organizations and businesses, including the American Bankers Association, the American Financial Services Association, the Credit Union National Association, the American Council of Life Insurers, the American Property Casualty Insurance Association, and the American Association of Realtors.¹ This steady growth of support over the past few years has led to an expectation that 2021 will be the year cannabis banking reform finally becomes law. Check back for more updates in the weeks and months ahead.

If you have questions about this alert, the 2021 SAFE Banking Act, or any other legal issues related to the production and sale of hemp and legal cannabidiol products, please contact **Kendall A. Schnurpel**, or your regular Krieg DeVault attorney.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have. In addition, marijuana remains a federally illegal Class I drug. All activities related to marijuana are currently illegal under the federal laws of the United States and nothing contained on this alert is intended to assist in any way with violation of applicable law.

[1] see: <https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=5344>