

SAFE BANKING ACT OF 2019, GRANTING PROTECTION FOR SOME FINANCIAL SERVICES TO CANNABIS BUSINESSES, CONTINUES TO GARNER SUPPORT

Hemp & Medical Cannabis Alert
May 2, 2019

Among the more significant problems created by the continued federal ban on cannabis is the inability of state-legal cannabis businesses to access financial services like bank accounts, loans, and insurance. Treasury Secretary Stephen Mnuchin has repeatedly called for a bipartisan legislative fix. That effort continues to take shape with increasing support. In April, the House Financial Services Committee voted 45-15 to approve an amended version of the SAFE Banking Act of 2019 (the “SAFE Act”). The SAFE Act would provide protection to certain depository institutions that service legitimate cannabis businesses. While similar bills have been introduced in the past, support for the current bill grew to 169 cosponsors on May 1, 2019.

In broad strokes, the SAFE Act provides safe harbor to “depository institutions” who provide “financial services” to a “cannabis-related legitimate business or service provider.” The bill prohibits “Federal banking regulators” from taking adverse action against depository institutions for providing financial services to legitimate cannabis businesses, or otherwise discouraging them from providing those services. At the same time, the SAFE Act explicitly does not require depository institutions to service the cannabis industry.

The current bill extends to certain financial services provided to cannabis manufacturers and producers, or other organizations that cultivate, sell, transport, display, dispense, distribute or purchase cannabis or cannabis products. Financial services to entities that provide goods or services to “cannabis-related legitimate businesses” are also covered. The activities of the cannabis-related business or service provider must be legal under state and local law, so protections would not extend to financial services provided for cannabis-related activity that is not legal under state law.

Permitted “financial services” and products include deposit-taking, lending, check cashing, and debt collection, among others. The most recent markup added protection for insurance, money transmitters, and payment processing services as well. These services are critical for small businesses participating in legal cannabis markets, and the increased access would remove a significant barrier to entry.

Attorneys

Ariele Doolittle
Christopher Doyle
Patrick Fitzsimmons
Joseph Goldberg
Patrick Hines
Gary Schober
Daniel Spitzer
Melissa Subject

Practices & Industries

Cannabis & Hemp

SAFE BANKING ACT OF 2019, GRANTING PROTECTION FOR SOME FINANCIAL SERVICES TO CANNABIS BUSINESSES, CONTINUES TO GARNER SUPPORT

However, limitations in the bill leave questions. The safe harbor applies to adverse actions by “Federal banking regulators,” defined as the Federal Reserve, CFPB, FDIC, OCC, NCUA, or “any Federal agency that regulates banking or financial services[.]” Generally it would not protect against action taken by the Department of Justice. However, the bill specifically provides that proceeds from transactions with legitimate cannabis businesses are not to be considered “proceeds from an unlawful activity” under federal money laundering statutes. It also protects against criminal, civil, or administrative forfeiture of legal interests in collateral pledged by cannabis businesses. These protections reduce the likelihood of DOJ action against a financial services provider. Whatever the likelihood of DOJ action, the bill also provides no protection against action by state regulators or attorneys general, and has no language concerning preemption of state law.

Another significant limitation comes from the SAFE Act’s definition of “financial services” provided by “depository institutions.” The current bill adopts the definition of “financial services” provided in the consumer protection provisions of the Dodd-Frank Act. That definition, which was written specifically for the Consumer Financial Protection Bureau, is not well suited to legislation intended for the broader banking and financial services industry. For example, it does not apply to capital markets activities, and it would not shield broker-dealers, underwriters, asset managers, or custodians who service cannabis businesses.

While the current limitations are cause for concern, the bill will allow cannabis businesses to obtain bank accounts, insurance, and other services that are currently difficult to obtain. And there is still time to address other concerns about the SAFE Act’s scope. The next step for the SAFE Act is consideration by the House Judiciary Committee, which has referred it to the Subcommittee on Crime, Terrorism, and Homeland Security.

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html>.