

Credit Research Foundation White Paper Brief



An Overview of the Secure and Fair Enforcement (SAFE) Banking Act of 2019

By: Jeffrey D. Prol, Esq., Bruce N. Nathan, Esq., Andrew Behlmann, Esq.,
and Jeremy Merkin, Esq.

***Abstract:** SAFE Banking Act, if enacted, would provide a safe harbor for financial institutions that provide services to plant-touching businesses and non-plant touching suppliers of goods or services to the cannabis industry. The bill, if enacted, will prohibit Federal regulators from penalizing, discouraging or taking adverse action against these firms.*

Cannabis, with the exception of hemp, remains illegal under federal law, the supreme law of the land under the Supremacy Clause of the United States Constitution. As a result, banks and credit unions continue to largely avoid the cannabis industry even as a growing number of states legalize its distribution and consumption. What many people fail to consider is the growing scope of companies that potentially fall under the umbrella of the cannabis industry. Financial institutions are turning away not only growers, processors, and retailers of cannabis and cannabis products – the “plant-touching” side of the cannabis business – but also ancillary suppliers that provide goods or services to plant-touching businesses and may never come into contact with cannabis at all. Some examples include a manufacturer of specialized heat lamps or of custom wraps used to package cannabinoid-infused edibles. Due to the unavailability of

banking, credit card processing, and other traditional financial services, a multibillion-dollar industry has essentially been reduced to a cash-only business, forcing companies and their suppliers to carry the risk that comes with dealing exclusively in significant amounts of cash.

Though it is a far cry from federal legalization of cannabis, the Secure and Fair Enforcement (SAFE) Banking Act of 2019 is a proposed solution to the current lack of available financial services in the cannabis industry. The bill's stated purpose "is to increase public safety by ensuring access to financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses." If enacted, the SAFE Banking Act would provide a safe harbor for financial institutions that provide financial services to plant-touching businesses operating pursuant to applicable state, local, or Indian tribal laws (defined as a "cannabis-related legitimate business") *and* their non-plant-touching suppliers of goods or services, including real property (defined as a "service provider").

In an effort to bring a wider array of financial services to the booming cannabis industry, the bill would prohibit Federal banking regulators from penalizing, discouraging, or otherwise taking any adverse or corrective supervisory action against a depository institution or associated entity for providing financial services to a cannabis-related legitimate business or service provider in a state or subdivision where cannabis is legal and the business operates according to applicable state, local, or Indian tribal law.

Of particular importance to ancillary suppliers to the cannabis industry, the SAFE Banking Act provides that "the proceeds from a transaction conducted by a cannabis-related legitimate business or service provider shall not be considered as proceeds from an unlawful activity solely because the transaction was conducted by a cannabis-related legitimate business or service provider, as applicable." If the SAFE Banking Act becomes law, ancillary suppliers will no longer have to fear federal prosecution and forfeiture resulting from accepting payments from a plant-touching business.

As further protection, a depository institution and any associated entity, insurer, and Federal Reserve Bank and the officers, directors, and employees thereof, would not be held liable pursuant to any federal law or regulation solely for providing financial services to a cannabis-related legitimate business or service provider or for further investing any income derived from such a financial service. Additionally, a depository institution or Federal Reserve Bank that provides financing or other financial services to an owner, employee, or operator of a cannabis-related legitimate business or service provider or to an owner or operator of real estate or equipment that is leased or sold to a cannabis-related legitimate business or service provider would not be subject to criminal or civil penalties or administrative forfeiture pursuant to any federal law for providing such loan or other financial service.

The SAFE Banking Act would not eliminate the burdensome bureaucratic requirement that financial institutions file Suspicious Activity Reports (SARs) for transactions suspected to be illegal. However, the bill would relax SAR requirements by requiring the Financial Crimes Enforcement Network to issue revised guidance that is consistent with the bill's purpose and

intent and “does not significantly inhibit the provision of financial services to a cannabis-related legitimate business or service provider” in a state or subdivision that has legalized cannabis.

What does this all mean? Mainstream financial institutions may soon have sufficient legal cover to begin offering the same financial services to the cannabis industry – deposit accounts, credit card processing, wire transfer and ACH payments, etc. – that are available to any other business or operation that is not prohibited by federal law. Notwithstanding the safe harbor the SAFE Banking Act would provide, banks will still need to conduct the necessary diligence to make sure the cannabis companies with whom they conduct business are complying with all state, local, and other applicable legal requirements.

On September 25, 2019, the House of Representatives passed the SAFE Banking Act in a promising bipartisan 321-103 vote that included the support of 229 Democrats, 91 Republicans, and 1 Independent. When, or if, the Republican-controlled Senate will vote on the Safe Banking Act remains unknown. The optimist will note that the Senate version of the bill currently has a promising number of co-sponsors, including 26 Democrats, 5 Republicans, and 2 Independents. The pessimist will note that Senate Majority Leader Mitch McConnell is not one of the co-sponsors, and that President Trump has not yet given an indication as to whether he would sign the bill if it passes the Senate. The realist will simply point out that in order for the burgeoning cannabis industry to continue to safely grow and become a stable presence in the marketplace, market participants – plant-touching or not – must have access to ordinary business financial services.

The authors are attorneys in the Bankruptcy and Creditors Rights Department at Lowenstein Sandler LLP, a full service law firm with offices in New York, New Jersey, Washington DC, California, and Utah.