



Solving An Untenable Situation

***The Public Health and Safety Rationale Behind
The Secure and Fair Enforcement Banking Act***

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EXECUTIVE SUMMARY

In May 2019, a bipartisan group of thirty-eight Attorneys General sent a letter to congressional leaders urging support for legislation that would create a safe harbor for depository institutions providing financial services or products to a Marijuana Related Business (“MRB”). On September 25, 2019, the Secure And Fair Enforcement Banking Act (“SAFE Banking Act”) passed the House with strong bipartisan support¹, but the effort stalled in the Senate banking committee. Since then, the lack of access to the national banking system for an industry estimated in the tens of billions, compounded by the global health crisis, has led to an “untenable situation”.²

The prevalence of medical and recreational cannabis is well documented. To date, all but four states permit medical cannabis use in some form. An estimated 3 million Americans use medical cannabis for a variety of conditions. Eleven states plus the District of Columbia have a recreational cannabis program. Industry analysts estimate the U.S. cannabis market will exceed \$22 billion in sales revenue by 2022.³ And the 2018 Farm Bill led to a proliferation of hemp derived CBD products, which contain a low-grade dose of Delta-9-Tetrahydrocannabinol.

Despite changes under state law, current federal law prohibits the national banking system from providing this industry with basic services. As indicated in the May 2019 Letter, the federal-state conflict creates public safety concerns in the form of large cash transactions, fuels a grey market environment for money laundering, and frustrates state and local tax revenue collection. The global pandemic highlights the need for federal legislation in three respects.

First, the lack of national banking is now a public health priority. MRBs are operating as “essential businesses” in twenty-eight states. The bulk of sales transactions are done on a cash basis. Since the beginning of the COVID-19 outbreak, consumers and businesses have expressed a preference against cash transactions due to the potential of virus transmission.

Second, threats to public safety have intensified. Because of social distancing guidelines, MRBs conduct sales through curbside pick-up or delivery. With transactions occurring outside of a restricted access area, these locations have become an increased target for criminal activity. The need for greater financial transparency and prevention of money laundering is also still present.

Finally, MRBs generate significant tax revenue for states and localities, but collection is challenging. Although recent proposed federal legislation may provide some budgetary relief for the states, increasing the efficiency and safety for state and local tax collection may reduce the scale of a federal financial bailout.

¹ 229 Democrats and 91 Republicans voted in favor. <https://www.foxbusiness.com/politics/marijuana-industry-scores-big-win-as-house-passes-safe-banking-act> (last visited May 14, 2020).

² Cannalex Law. (2016, January 13). What the Fourth Corner Credit Union Case Means for Legal Marijuana – It May Go Beyond Banking. Retrieved March 13, 2020, from <https://www.cannalexlaw.com/marijuana-banking-case/> (with regard to the current financial situation for cannabis businesses, the judge in this case stated that “ I regard this situation as untenable and hope that it will soon be addressed and resolved by Congress.”)

³ Gilbert, N. (2020, May 4). 49 Fascinating Cannabis Industry Statistics: 2020 Data Analysis & Market Share. Retrieved May 12, 2020, from <https://financesonline.com/cannabis-industry-statistics/>

On May 12, 2020, members of the House put forward a COVID relief package that includes the SAFE Banking Act.⁴ The Act protects financial institutions through a safe harbor. It neither endorses legalization, nor provides financial relief to MRBs. This white paper explores in detail the legal challenges raised in the May 2019 Letter and addresses how COVID-19 elevates the need for federal legislation.

⁴“Making emergency supplemental appropriations for the fiscal year ending September 30, 2020, and for other purposes.” SAFE Banking Act found at Div. K, Title VI, Sec. § 110606. Full text is [here](#).

ANALYSIS

I. Introduction

Imagine you are a teller at your state's Department of Revenue, and a small business owner has come to your window in order to pay their monthly sales and excise taxes. Instead of a cashier's check, however, you are handed a cardboard box containing twelve thousand dollars in cash.

Now imagine that you are that small business owner. In order to get that box of cash to the Department of Revenue, you personally transported it in your car all the way across town, which you do at least a dozen times per year. You are also forced to either pay all your other bills, including wages to employees, in cash, or to circumvent financial transparency and create a third-party holding company to obtain simple banking products. In states with legal medical and recreational marijuana, these scenarios are all too common.

As of December of 2019, it is estimated that there are around 7,500 cannabis dispensaries in the U.S., with around 120,000 employees.⁵ These figures do not include ancillary businesses which would also constitute a MRB. In 2019, legal cannabis was projected to bring in \$1.6 billion in tax revenue across the nation⁶, and by 2025 some estimate that the value of the worldwide cannabis industry could exceed \$60 billion.⁷

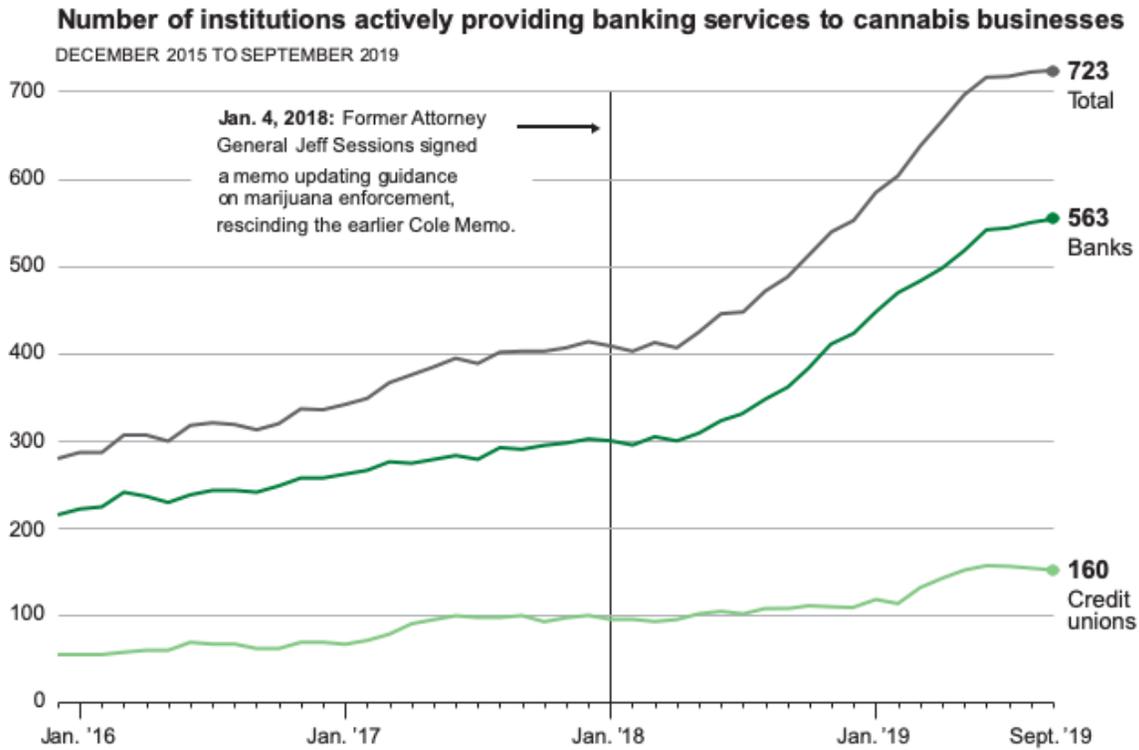
One of the most universally recognized problems with state-legal cannabis markets in the U.S. is the lack of consistent and direct access to financial institutions.⁸ A common perspective among those who are familiar with the issue is that the cannabis industry is completely unbanked, but that is no longer the case. As shown from the figure below, the number of financial institutions who provide services to MRBs has been steadily growing since 2014; as of September of 2019, 723 institutions service MRBs.

⁵ Hobson, K. (2019, December 17). Cannabis Dispensaries Growth Study 2020. Retrieved April 16, 2020, from <https://www.getkisi.com/blog/cannabis-dispensaries-growth-study-2020>

⁶ Davis, C. (2019, August 7). State and Local Cannabis Tax Revenue on Pace for \$1.6 Billion in 2019. Retrieved April 16, 2020, from <https://itep.org/state-and-local-cannabis-tax-revenue-on-pace-for-1-6-billion-in-2019/>

⁷ Hobson, K. (2019, December 17). Cannabis Dispensaries Growth Study 2020. Retrieved April 16, 2020, from <https://www.getkisi.com/blog/cannabis-dispensaries-growth-study-2020>

⁸ Kovaleski, S. F. (2014, January 11). Banks Say No to Marijuana Money, Legal or Not. Retrieved January 15, 2020, from <https://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html>



Despite this positive trend, financial institutions are still generally hesitant to engage with the cannabis industry. Under federal law, financial institutions open themselves up to significant criminal or monetary penalties for servicing cannabis businesses. In addition, banks who undertake the risk of serving the cannabis industry must comply with increased regulatory and due diligence requirements imposed by federal guidance. Many financial institutions find that the benefits to servicing cannabis businesses simply do not outweigh the burdens.¹⁰

The “under-banked” nature of the cannabis industry creates a host of problems not just for the industry but for the public as well. From the financial institution’s perspective, cannabis banking imposes additional regulatory burdens on banks which increases the cost of doing business with these companies. From the retailer’s perspective, it creates a host of cash management problems. MRB owners who do not have access to banking must pay their bills and taxes in cash, secure and transport that cash, and rely on wealthy individuals for small business loans. Finally, from the public perspective, the volume of unsecured cash increases the risks of transmission of COVID-19, serves as a dangerous lure for criminals, and makes it more difficult to accurately tax these businesses.

Section II will unpack the legal constraints on cannabis banking under federal law. Section III will explore in detail the federal guidance handed down to financial institutions and federal prosecutors by the Department of Justice and the Financial Crimes Enforcement Network. Section

⁹ Graph from PoliticoPro Datapoint

¹⁰ Willamette Week. (2017, January 24). MBank is Closing Its Marijuana Bank Accounts. Retrieved January 15, 2020, from <https://www.wweek.com/portland/blog-33062-mbank-is-closing-its-marijuana-bank-accounts.html>

IV will discuss the SAFE Banking Act, which passed the House in 2019 and has been recently re-introduced in the latest COVID-19 stimulus package, and the reasons why the act is worth reconsidering during the COVID-19 pandemic.

II. Federal Law Functionally Prohibits the National Banking System from Serving the Cannabis Industry

In this section, we will discuss the complex web of federal statutes, regulations, and jurisprudence that prohibit MRBs from accessing the national banking system.

The overarching federal legislation which controls the legal status of marijuana is the Controlled Substances Act (“CSA”), 21 U.S.C. § 801 et seq. The CSA lists a litany of different controlled substances and categorizes them into different levels of perceived danger, or “schedules.” As defined by the CSA, a drug meets the schedule 1 criteria if 1) the drug . . . has a high potential for abuse, 2) the drug . . . has no currently accepted medical use or treatment in the United States, and 3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.¹¹

The CSA lists marijuana as a schedule 1 drug,¹² which makes it illegal to manufacture or distribute.¹³ Federal law also makes it illegal to aid or abet the cultivation or distribution of marijuana, or to conspire to manufacture or distribute marijuana.¹⁴ Banks who provide a service or product to MRBs open themselves up to criminal penalties for conspiring to distribute marijuana (by providing loans & bank accounts) or for aiding and abetting in distribution (by facilitating credit card payments). In 2005, the Supreme Court affirmed the federal government’s power to criminalize the cultivation and distribution of marijuana regardless of state law, and even for strictly personal or medical use.¹⁵

It bears mentioning that in the 2018 Farm Bill, Congress carved out hemp and hemp derived products, referred to as CBD products, from the definition of marijuana in the CSA. However, confusion continues to exist over the relationship between hemp, CBD, and cannabis. Botanically, hemp and hemp derived products originate from the same species of cannabis plant as marijuana and marijuana products. The legal distinction is that hemp and CBD products must contain no more than 0.3% of delta-9 tetrahydrocannabinol, or THC, the compound in cannabis that creates the psychoactive effect or “high.”

a. The Money Laundering Control Act and the Bank Secrecy Act

Federal anti-money laundering statutes – the Money Laundering Control Act (“MLCA”) and the Bank Secrecy Act (“BSA”) – create the greatest risk of federal intervention for financial institutions providing services to MRBs. Under the MLCA, a financial institution can be charged

¹¹ 21 U.S.C. 812(b)(1)

¹² 21 U.S.C. 812(c)(c)(10), 802(6)

¹³ 21 U.S.C. 841(a)

¹⁴ 18 U.S.C. 2 & 371

¹⁵ *Gonzales v. Raich*, 545 US 1, 23-33 (2005) (holding that congress has the authority to regulate home-grown marijuana because it has the potential to effect interstate commerce)

with money laundering if it conducts a financial transaction involving the proceeds of a known “specified unlawful activity” while also knowing that the transaction is meant, in whole or in part, to conceal something about the nature of those proceeds, or to avoid a reporting requirement.¹⁶ “Specified unlawful activity” includes the manufacture, importation, sale, or distribution of a controlled substance.¹⁷ A financial institution can also commit money laundering under the MLCA by knowingly engaging or attempting to engage in a transaction in more than \$10,000 of criminally derived property, which includes marijuana.¹⁸

The BSA, on the other hand, requires financial institutions to establish and maintain programs for monitoring and reporting potential illegal or suspicious customer activity to the Financial Crimes Enforcement Network. The goal is to aid federal prosecutors in identifying and prosecuting monetary crimes.¹⁹ To accomplish this goal, FinCEN requires banks and credit unions to file Suspicious Activity Reports, which must be filed for transactions of at least \$5,000 where the institution knows or suspects that the transaction involves funds derived from illegal activities.²⁰

Despite the significant and growing presence of state medical and recreational programs, FinCEN guidance has made clear that marijuana cultivation and distribution constitutes illegal activity.²¹ The BSA also requires that, for *any* transaction of \$10,000 or more, financial institutions must submit Currency Transaction Reports to FinCEN.²² FinCEN’s guidance will be explored in Section III, with a particular emphasis on the requirement to file SARs for each marijuana related transaction.

b. FDIC insurance & Federal Reserve regulation

In addition to the MLCA and BSA, the Federal Deposit Insurance Corporation (“FDIC”) and the Federal Reserve (“Fed”) also impose regulations which make providing financial services to MRBs difficult. Federal and state law requires all banks to have FDIC Federal Deposit and Share insurance,²³ and federally chartered credit unions must have insurance through the National Credit Union Administration (“NCUA”).²⁴ Requirements for maintaining federal insurance include maintaining compliance with the CSA, MLCA and BSA. Penalties for not complying with FDIC requirements can include monetary penalties.²⁵ The FDIC can also institute the banking death penalty - revocation of deposit insurance.²⁶ This effectively closes the banks doors overnight, due to the requirement of FDIC insurance.

The Fed also has significant regulatory authority over member banks. The primary benefit of Fed membership is access to the Federal Payment Systems Administration, which provides four

¹⁶ 18 U.S.C. 1956(a)(1)

¹⁷ 18 U.S.C. 1956(c)(7)(b)(i)

¹⁸ 18 U.S.C. 1957(a), (f)(2)

¹⁹ 31 U.S.C. 5318(h), (g)

²⁰ 31 C.F.R.

²¹ FinCEN Marijuana-Related Business Guidance, note 33 at 3

²² 31 U.S.C. 5313(a), 31 C.F.R. 1010.311

²³ 1933 Banking Act Pub. L. No. 73-66, 48 Stat. 163 (1933)

²⁴ 12 U.S.C. 1781(a)

²⁵ 12 U.S.C. 1818(s)(2)

²⁶ 12 U.S.C. 1818(a)(2)

important payment services to all member banks and credit unions: 1) a centralized check collection system; 2) access to the Automated Clearinghouse network; 2) access to the Fedwire system, and 4) coin and currency services.²⁷ All of these services are essential to the day-to-day operations of any financial institution.

The Fed has broad discretion when issuing a “master account,” which grants access to those payment systems. The Fed may choose not to issue a master account to a business who engages in MRB transactions, as was the case for Fourth Corner Credit Union in Colorado. The judge in that case said that since marijuana is still federally illegal, he could not order the Fed to open an account for the credit union.²⁸ The case of Fourth Corner Credit Union will be discussed further in Section IV.

Once a bank becomes a member of the Fed, it must monitor its customers activity to ensure compliance with federal laws and regulations.²⁹ The Fed has warned that accounts that are used for illegal purposes, as well as collateral “derived from illegal activities,” are exposed to asset seizures.³⁰ Precedent holds that the cultivation and distribution of marijuana constitute illegal activities.

In addition to federal legislation and regulation, the U.S. is also subject to numerous treaty obligations which make it difficult to grant the cannabis industry access the federal banking system. For the purposes of this paper, we will focus specifically on the federal scheme and will not address these international treaty obligations.

All these requirements open the door to significant criminal and financial penalties for financial institutions who attempt to engage in transactions with MRBs. Financial institutions who decide to undertake the risk of providing services to MRBs must follow strict federal guidance.

III. DOJ and FinCEN Guidance to Financial Institutions Require Substantial Resource Commitments and Offer No Legal Protections

In this section we will discuss how, although federal law prohibits banking MRBs, those institutions willing to incur legal risk to provide services to MRBs must comply with strict and burdensome federal guidance.

In response to the state ballot initiatives to legalize recreational cannabis sales, the Department of Justice (“DOJ”) under the Obama Administration issued a series of memos which provided federal guidance to prosecutors with respect to prosecuting marijuana related crimes. In August 2013, then Deputy Attorney General James Cole issued a memorandum outlining the DOJ’s priorities with respect to state efforts to legalize and regulate the commercial sale of marijuana. In

²⁷ Hill, J. (2015). Banks, Marijuana & Federalism. Case Western Reserve Law Review, Volume 65 Issue 3, 627-28. <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1043&context=caselrev>

²⁸ Borchardt, D. (2016, January 8). Cannabis Credit Union Loses Case Against Fed Reserve Bank. Retrieved January 20, 2020, from <https://www.forbes.com/sites/debraborchardt/2016/01/08/cannabis-credit-union-loses-case-against-fed-reserve-bank/#567dfa31170c>

²⁹ 12 U.S.C. 324, 330, 12 C.F.R. 208.3(d), app. D-1 II.A.5 (2019)

³⁰ Div. Of Banking Supervision & Regulation, Bd. Of Governors of the Fed. Reserve Sys., Commercial Bank Examination Manual Section 4128.1, at 12 and 10

2014, Deputy Attorney General Cole issued another memo expanding on this guidance (“2014 Cole Memo”), with a specific focus on financial institutions who attempt to service MRBs.

Concurrent with the 2014 Cole Memo, FinCEN also released guidance for financial institutions who wish to engage in transactions with MRBs. This guidance, along with the 2013 and 2014 Cole Memos, create the framework that institutions follow when banking MRBs.

In 2018, then Attorney General Jeff Sessions wrote a memo to federal prosecutors which effectively rescinded the 2013 and 2014 Cole Memo guidance.³¹ That position, however, was reversed by Attorney General Barr when he indicated that the DOJ will continue to implement the Cole era guidance.³² Neither of these actions had any effect on the status of the 2014 FinCEN guidance document, which has remained in place since its issuance.

a. DOJ guidance sets forth eight enforcement priorities for federal prosecutors

On August 29th of 2013, Deputy Attorney General Cole wrote a memo to federal prosecutors (“2013 Cole Memo”) where he expressed the departments commitment to upholding the CSA while simultaneously utilizing enforcement resources in the most efficient and rational way.³³ In keeping with this goal, the Deputy Attorney General outlined the DOJ’s eight individual enforcement priorities with respect to state-legal marijuana.³⁴ For the purposes of banking the cannabis industry, the most relevant enforcement priority is preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.

One of the key points of the 2013 Cole Memo was that enforcement discretion was contingent on states imposing and maintaining robust regulatory systems:

“Jurisdictions that have implemented systems that provide for regulation of marijuana activity must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.”³⁵

Deputy Attorney General Cole indicated that in states with such a robust regulatory program, marijuana enforcement should be left to state and local authorities.³⁶ However, the memo clarified that the guidance is non-binding on the DOJ and that, even in the absence of one of these enforcement priorities, nothing precludes federal investigation and prosecution of state-legal marijuana related crimes.³⁷ The August 2013 Cole Memo is a hallmark document in the history of cannabis law and policy.

³¹ Memorandum for All United States Attorneys on Marijuana Enforcement January 4th, 2018

³² Marijuana Moment. (2019, January 29). Trump Attorney General Pick Puts Marijuana Enforcement Pledge In Writing. Retrieved January 15, 2020, from <https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#68e3ed005435>

³³ Memorandum from James M Cole, Deputy Atty Gen., to Unites States Attys, Guidance Regarding Marijuana Enforcement (Aug 29, 2013) at 1.

³⁴ *Id.* at 1-2.

³⁵ *Id.* at 3.

³⁶ *Id.* at 2.

³⁷ *Id.* at 4.

The 2014 Cole Memo specifically focused on financial institutions engaging in transactions with MRBs. The Deputy Attorney General noted that the provisions of the MLCA and BSA apply to marijuana-related banking, and clarified that an underlying conviction for a marijuana-related offense is not necessary for prosecution under these acts.³⁸ In order to ensure compliance with state law and the federal enforcement priorities with regard to servicing MRBs, the Deputy Attorney General stated that financial institutions must maintain robust programs of risk-management and customer due diligence.³⁹

The 2014 Cole Memo reiterated the fact that, in all cases, “whether the marijuana-related conduct implicates one or more of the enforcement priorities should be the primary question in considering prosecution under the CSA.”⁴⁰ Deputy Attorney General Cole therefore advised prosecutors to pursue financial institutions who engage in business with MRBs only when one or more of the enforcement priorities are implicated. However, Deputy Attorney General Cole again clarified that this guidance is non-binding, and nothing impedes the federal government from prosecuting marijuana related crimes even without one of the priorities being implicated.⁴¹

b. FinCEN guidance imposes a tiered system of SARs filing for each marijuana related transaction

Concurrent with the 2014 Cole Memo, the Financial Crimes Enforcement Network (“FinCEN”) released guidance in 2014 (“2014 FinCEN Guidance”) which attempted to align the reporting requirements under the BSA with the 2013 Cole Memo’s enforcement priorities and additional 2014 DOJ guidance. The 2014 FinCEN Guidance set forth increased customer due diligence requirements that banks must follow and outlined a tiered system for Suspicious Activity Report (“SARs”) filings.

The guidance stated that the decision to bank an MRB must ultimately be left to the bank, and that banks who service MRBs must make that determination based on a number of institution-specific factors. A primary factor in making this determination is performing customer due diligence, which the guidance specifies to include:

1. Verifying with the appropriate state authorities whether the business is duly licensed and registered,
2. Reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business,
3. Requesting from state licensing and enforcement authorities available information about the business and related parties,

³⁸ Memorandum from James M Cole, Deputy Atty Gen., to United States Attys, Guidance Regarding Marijuana Related Financial Crimes (Feb 14, 2014) at 2.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 3.

4. Developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g. medical v recreational customers),
5. Ongoing monitoring of publicly available sources for adverse information about the business and related parties,
6. Ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance, and
7. Refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.⁴²

These requirements impose significant burdens on banks who wish to serve MRBs, but that is not all that is required. The guidance further states that, once a financial institution decides to do business with a MRB, that institution must file Suspicious Activity Reports (“SARs”) in connection with that business.⁴³ All financial institutions must file SARs with FinCEN if the institution knows, or has reason to know, that the funds involved in a transaction were derived from illegal activities. The guidance makes clear that financial transactions involving MRBs constitute funds derived from illegal activities.⁴⁴

In order to categorize and prioritize SAR filings, FinCEN created three separate categories of SAR filings with regard to MRBs. The first category, and lowest priority, is a “Marijuana Limited” SAR filing. Financial institutions who provide services to MRB’s who, in the institution’s opinion, do not implicate one of the DOJ’s eight enforcement priorities must file a “Marijuana Limited” SAR.⁴⁵ The information in this filing is limited to identifying information about the MRB. The financial institution must also state the fact that they are filing the SAR solely because the customer is a MRB, and the fact that no other suspicious activity has been found.⁴⁶

Separate from any SAR filing, financial institutions must also file Continuing Activity Reports (“CARs”) on MRBs for which they have previously filed Marijuana Limited SARs. These CARs simply restate the identifying information and necessary facts, as well as including information on specific deposit, withdrawal, and transfer amounts for the account.

The second category of SARs, “Marijuana Priority SAR”, is required if the financial institution becomes aware of activity implicating any one of the DOJ’s enforcement priorities. This second category would include identifying information on the MRB, as well as any details regarding the DOJ enforcement priorities that the institution believes has been implicated and any relevant details about the MRBs financial transactions.⁴⁷

The final category, “Marijuana Termination” SAR, is required if a financial institution believes that servicing an MRB is seriously affecting its ability to maintain strong money laundering

⁴² Fin. Crimes Enforcement Network, Dept of the Treasury, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses (2014) at 2-3.

⁴³ *Id.* at 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

compliance measures.⁴⁸ This report must explain the reason for termination of the relationship. The guidance urges financial institutions, if they become aware that a MRB is attempting to move to another financial institution after a termination, to warn that financial institution of any illegal activity if possible.⁴⁹

The guidance points out the obvious fact that financial institutions are not always in the best position to determine whether the activities of a certain MRB implicate federal enforcement priorities. To that end, the guidance includes a non-exhaustive list of circumstances that could constitute “Red Flags” which might indicate the necessity of filing a Marijuana Priority or Marijuana Termination SAR:

1. A MRB is using its state-legal marijuana business as a front for other illegal activity. The guidance also lists several specific facts which could indicate whether or not this is true in a given case.
2. A MRB is unable to present its licensing or operating documentation
3. A MRB is unable to identify the source of significant external investment
4. A customer conceals their involvement with an MRB
5. Individuals associated with a MRB have a criminal history
6. A MRB or associated individuals have a history of state enforcement action against them
7. A MRB is engaged in interstate activity
8. Individuals associated with a MRB live outside the state where the MRB is located
9. A MRB is located on, or its product was grown on, federal property
10. A MRB is too close to a school, lacking compliance with state law
11. A MRB claiming to be a “non-profit” engages in activity inconsistent with that classification.⁵⁰

These red flags correlate directly with the eight enforcement priorities outlined in the August 2013 Cole Memo. Financial institutions can point to these activities as specific evidence that one of the DOJ’s eight enforcement priorities has been implicated by a transaction with a MRB.

Ultimately, the additional burdens of increased customer diligence and SARs reporting requirements are key drivers in a bank’s decision not to service MRBs. The effect of these increased burdens is that banks are essentially serving as an informal regulatory arm of the DOJ and FinCEN. There are no other industries which require banks to engage in this level of scrutiny. Yet this level of scrutiny underscores the need for an increase in financial transparency in this marketplace.

⁴⁸ *Id.* at 4-5.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 5-7.

IV. The SAFE Banking Act Would Provide a “Safe Harbor” for Financial Institutions that Choose to Bank MRBs

This section will discuss the 2019 version of the SAFE Banking Act and the version currently before Congress, its impact on the cannabis industry, and why the COVID-19 pandemic increases the need for access to banking. Congressional action is the optimal solution to addressing the lack of access to the national banking system. As discussed above, states have limited power in this area of law, and only national action would provide the industry with the stability it needs to move forward.

a. The SAFE Banking Act of 2019

The Secure and Fair Enforcement (“SAFE Banking Act” or “the Act”) Banking Act (HR. 1595 2019) was reintroduced in April of 2019 by Rep. Ed Perlmutter (D-CO) and quickly passed through the House.⁵¹ Passage of the bill was mostly bi-partisan, with nearly all Democrats and almost half of Republicans voting for it.⁵² Since then, the bill has been under consideration by the Senate Committee on Banking, Housing, and Urban Affairs, chaired by Sen. Mike Crapo (R-ID).⁵³

The Act creates a safe harbor for financial institutions who provide financial services to MRBs or ancillary businesses. The act prohibits the FDIC from barring financial institutions from working with cannabis companies, as well as prohibiting the application of the “death penalty” - revocation of deposit insurance - solely based on the fact that the bank serves an MRB. The goal of the act is to align incentives so that banks will not face punishment for bankrolling a state-legal cannabis organization. In addition, the bill extends protections to businesses providing other products or services to marijuana businesses.⁵⁴

Besides the obvious backing of MRBs, financial sector advocates have expressed strong support for the bill, including banking lobbyists, major financial institutions, and state banking associations.⁵⁵ Law enforcement officials also seem to support the bill.

But the 2019 bill was not without critics. Chief among them is Sen. Crapo himself, who in December 2019 said that the bill failed to address “the high-level potency of marijuana, marketing tactics to children, lack of research on marijuana’s effects, and the need to prevent bad actors and cartels from using the banks to disguise ill-gotten cash to launder money into the financial

⁵¹ Congress.gov. (2019, September 26). Actions - H.R.1595 - 116th Congress (2019-2020): Secure And Fair Enforcement Banking Act of 2019. Retrieved April 13, 2020, from <https://www.congress.gov/bill/116th-congress/house-bill/1595/actions?KWICView=false>

⁵² Clerk.House.gov. (2019, September 25). Final Vote Results for Roll Call 544. Retrieved April 17, 2020, from <http://clerk.house.gov/evs/2019/roll544.xml>

⁵³ <https://www.congress.gov/bill/116th-congress/house-bill/1595/all-actions-without-amendments>; Krane, K. (2020, February 24). Is The SAFE Banking Act On The Ropes? And Other Federal Updates. Retrieved February 20, 2020, from <https://www.forbes.com/sites/kriskrane/2020/02/24/is-the-safe-banking-act-on-the-ropes-and-other-federal-updates/#4cbd55501e15>

⁵⁴ <https://www.congress.gov/bill/116th-congress/house-bill/1595/text>; Reiff, N. (2020, January 29). What Is the SAFE Banking Act? Retrieved February 20, 2020, from <https://www.investopedia.com/safe-banking-act-4587773>

⁵⁵ Reiff, N. (2020, January 29). What Is the SAFE Banking Act? Retrieved February 20, 2020, from <https://www.investopedia.com/safe-banking-act-4587773>

system.”⁵⁶ Project SAM (Smart Approaches to Marijuana), a Colorado based non-profit focused on protecting children from marijuana, has applauded Sen. Crapo for his reticence.⁵⁷ To address the concerns of high potency, Senator Crapo has considered an amendment which would significantly limit the potency of marijuana products that could be sold in stores.⁵⁸

The imposition of a potency limit through federal legislation may have the indirect effect of highlighting whether there are permissible or impermissible forms of cannabis consumption, a debate that may derail efforts to pass financial regulation and is outside of the scope of this white paper.

In January 2020, the American Bar Association (“ABA”) published an article outlining the need for passage of the SAFE Banking Act. The ABA stated that while concerns over child safety and access are of course legitimate, the marijuana industry’s continued lack of access to banking services creates a series of security, public safety and regulatory problems.⁵⁹

The import of the SAFE Banking Act is its narrow application to only the financial services sector of this industry. While some senators are concerned about as the lack of social equity provisions in the bill, others argue that this incremental approach makes the acts passage much more likely.⁶⁰

The major roadblock to passage is the Republican controlled Senate. Senate Majority Leader Mitch McConnell has been a vocal opponent of marijuana legislation in the past but is a supporter of hemp and hemp derived products.⁶¹ As noted, the 2018 Farm Bill led to a rapid expansion of the hemp and hemp extracted CBD product marketplace. Since then, the hemp and CBD industry have faced financial services challenges due to the legal confusion between CBD and cannabis, which could be alleviated through the SAFE Banking Act and is addressed in the 2020 House version.

⁵⁶ United States Committee on Banking, Housing, and Urban Affairs. (2019, December 18). Chairman Crapo Outlines Concerns with Cannabis Banking Legislation. Retrieved February 20, 2020, from <https://www.banking.senate.gov/newsroom/majority/chairman-crapo-outlines-concerns-with-cannabis-banking-legislation>

⁵⁷ Carlson, D., & Martin/AP, J. (2020, January 28). Mike Crapo wisely puts children before cannabis profits. Retrieved February 13, 2020, from <https://www.washingtonexaminer.com/opinion/op-eds/mike-crapo-wisely-puts-children-before-cannabis-profits>

⁵⁸ Krane, K. (2020, February 24). Is The SAFE Banking Act On The Ropes? And Other Federal Updates. Retrieved February 20, 2020, from <https://www.forbes.com/sites/kriskrane/2020/02/24/is-the-safe-banking-act-on-the-ropes-and-other-federal-updates/#4cbd55501e15>

⁵⁹ Snead, A., & Hill, L. (2020, January 30). Accounts That Go Up in Smoke: To Bank or Not to Bank, the Marijuana Industry. Retrieved February 15, 2020, from https://www.americanbar.org/groups/business_law/publications/committee_newsletters/banking/2020/202001/fa_3/

⁶⁰ Maranz, F. (2019, September 29). Analysts See Senate Joining House on Marijuana Banking Law. Retrieved February 14, 2020, from <https://www.insurancejournal.com/news/national/2019/09/29/541479.htm>

⁶¹ Williams, S. (2018, December 22). Mitch McConnell Blocks Marijuana Banking Reform Amendment. Retrieved February 14, 2020, from <https://www.fool.com/investing/2018/12/22/mitch-mcconnell-blocks-marijuana-banking-reform-am.aspx>

b. The SAFE Banking Act as included in the 2020 House bill

On May 12, 2020, the House released an appropriations bill providing COVID-19 relief which incorporated a version of the SAFE Banking Act. The Act will allow “cannabis-related legitimate businesses” and their service providers (e.g. real-estate providers, legal service providers, accounting services, etc.) to access financial services and products, as well as insurance. A “cannabis-related legitimate business” means a “manufacturer, producers, or person” that “participates in any business or organized activity that involves handling cannabis or cannabis products . . .” pursuant to state law.⁶²

The stated purpose of the Act is to “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.” Under the Act, financial and insurance institutions are provided a safe harbor from federal enforcement on the sole basis of providing financial or insurance services to a “cannabis-related legitimate business.” The Act also requires reports to Congress on access to financial services and barriers to entry for minority and women owned cannabis businesses.

In perhaps a nod to Sen. McConnell, the current bill specifically provides protections to financial institutions servicing hemp and CBD companies. The bill states, “despite the legalization of hemp, some hemp businesses (including produces, manufacturers, and retailers) continue to have difficulty gaining access to banking products and services” particularly those businesses that sell CBD products.⁶³

What the Act does not do is equally important in three respects. First, the Act does not provide any stimulus relief to cannabis-related legitimate businesses. Next, the Act does not require any financial institution to service a cannabis-related legitimate business. Finally, the Act does not make any adjustments to the Controlled Substances Act, and therefore, cannabis would remain as Schedule I narcotic.

c. The SAFE Banking Act, or similar legislation, would preserve public health and safety, increase efficiencies for tax revenue collection, and increase financial transparency

During the COVID-19 pandemic, the arguments in support of the SAFE Banking Act, or similar legislation, are only strengthened. Allowing MRBs to access financial intuitions creates tangible benefits for public health and safety, increases tax collection efficiencies, and improves financial transparency in this burgeoning marketplace.

The most direct effect of the industry’s lack of access to banking is that MRB’s are responsible for storing and transporting large amounts of cash on a daily basis. In many cases, retail locations have become miniature banks, with some owners installing cameras, sensors and security

⁶² SAFE Banking Act found at Div. K, Title VI, Sec. § 110606(n)(4). Full text is [here](#).

⁶³ *Id.* at § 110606(k).

personnel above and beyond what is legally necessary.⁶⁴ In Colorado, this problem led to the creation of Blue Line Protection Group, a security contracting company that specializes in protecting MRBs and their cash.⁶⁵

The original SAFE Banking Act of 2019 had no reference to public health, but its provisions have taken on a new public health focus in light of COVID. While public health authorities have not explicitly directed the avoidance of cash,⁶⁶ the Centers for Disease Control and Prevention guidelines recommend strict protocols when handling cash.⁶⁷ Many businesses and consumers are weary of the use of cash during COVID-19. A study published in March of 2020 shows that the virus can exist on any surface for days after it first arrived there.⁶⁸ The cash-intensive nature of the cannabis industry puts consumers, businesses, and public authorities at an increased risk of contracting the virus.

As alluded to above, large amounts of cash also creates major public safety concern, regardless of the source of the cash. With the rise of COVID-19, this issue becomes especially acute. MRBs are open and doing business in nearly thirty states across the country as “essential businesses.” For example, on April 14th, the Denver Police Department sent a letter to all licensed marijuana businesses in Denver asking them to increase security measures after the city saw an uptick in burglaries of dispensaries and other MRBs.⁶⁹ Denver dispensaries reported 10 burglaries in the first two weeks in April, up from a total of 8 burglaries in all of April 2019.⁷⁰

Finally, in an all cash business, issues with tax collection are inevitable. Cannabis businesses are still required to pay federal, state, and local taxes, and this typically means an employee of the store must drive across town with tens of thousands of dollars in their trunk.⁷¹ During the COVID-19 crisis, these issues become all the more important on the regulators end. Owners are handling large amounts of cash that has potentially been contaminated by the virus and passing that cash along to regulators. The passage of SAFE would not only allow these MRBs to collect funds

⁶⁴ Shepard, S. (2019, January 10). Intense Security Measures at Marijuana Dispensaries Following Incident. Retrieved February 12, 2020, from <https://securitytoday.com/articles/2019/01/10/intense-security-measures-at-marijuana-dispensaries-following-incident.aspx>

⁶⁵ Yakowicz, W. (2015, March 17). The Company to Call When You've Got Lots of Weed and Cash. Retrieved February 12, 2020, from <https://www.inc.com/will-yakowicz/blue-line-protection-secures-cannabis-cash-and-now-bank-accounts.html>

⁶⁶ Jagannathan, M. (2020, March 9). World Health Organization: 'We did NOT say that cash was transmitting coronavirus'. Retrieved May 2, 2020, from <https://www.marketwatch.com/story/who-we-did-not-say-that-cash-was-transmitting-coronavirus-2020-03-06>

⁶⁷Centers for Disease Control and Prevention: What Grocery and Retail Worker’s Need to Know, from <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/grocery-food-retail-workers.html>

⁶⁸ Science Daily. (2020, March 20). Study reveals how long COVID-19 remains infectious on cardboard, metal and plastic. Retrieved April 5, 2020, from <https://www.sciencedaily.com/releases/2020/03/200320192755.htm>

⁶⁹ Mitchell, T. (2020, April 14). Denver Police Report Rise in Dispensary Burglaries. Retrieved May 10, 2020, from <https://www.westword.com/marijuana/denver-police-report-rise-in-marijuana-dispensary-burglaries-11687632>

⁷⁰ Ricciardi, T. (2020, April 15). Denver marijuana dispensaries see increase in burglaries during coronavirus pandemic. Retrieved May 5, 2020, from <https://www.denverpost.com/2020/04/15/denver-marijuana-dispensaries-burglaries-coronavirus/>

⁷¹Kovaleski, S. F. (2014, January 11). Banks Say No to Marijuana Money, Legal or Not. Retrieved January 15, 2020, from <https://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html>

electronically and therefore decrease the risk of transmission, it would also increase the accuracy of tax collection and increase revenue for states currently struggling with budgetary resources.

Ignoring the COVID-19 pandemic for a moment, as difficult as that may be, MRBs lack of access to the financial system creates a host of additional problems for financial institutions attempting to bank MRBs.

As discussed in Section III(b), the major drawback for financial institutions engaging with the marketplace is the lengthy and resource-intensive process of banking an MRB. The case of Fourth Corner Credit Union illustrates the challenges. Fourth Corner Credit Union was founded in Colorado in 2014 with the goal of providing financial services to marijuana businesses within the state. When the Federal Reserve denied Forth Corner's application for a master account, Forth Corner appealed the decision asking the court to require the Fed to issue the master account. The district court judge was sympathetic to the plight of the cannabis industry, but ultimately held that he could not order the Fed to issue a master account in violation of federal law.⁷² Fourth Corner was eventually granted conditional approval for its master account, but only after the credit union abandoned its previous target market, MRBs, in favor of secondary businesses in the cannabis space like non-profits and advocacy groups.⁷³

Other credit unions, like Partner Colorado Credit Union, have blazed a trail that can establish a national model for marijuana banking, but at increased cost. These institutions perform an enormous volume of customer due diligence, going to levels that far exceed the demands placed on typical financial institutions. The cost of services to the MRB and the resource intensive demands on the credit union could be alleviated with a safe harbor.

The lack of financial transparency in this marketplace makes performing customer due diligence even more troublesome and could open the door for money laundering. MRBs sometimes use holding companies or other deceptive tactics to acquire account access. Banks are still liable for the transmission of these funds, even if they do so unwittingly.⁷⁴ Even assuming that store owners are not taking part in deceptive activity to gain financial access, MRBs still use their cash to spend on other necessary expenditures like rent, payroll, and expenses or improvements. Payments from an MRB to its landlord, employees, or to third party service providers are also subject to scrutiny and banks are liable for the transmission of these funds.⁷⁵

⁷² Borchardt, D. (2016, January 8). Cannabis Credit Union Loses Case Against Fed Reserve Bank. Retrieved January 20, 2020, from <https://www.forbes.com/sites/debraborchardt/2016/01/08/cannabis-credit-union-loses-case-against-fed-reserve-bank/#567dfa31170c>

⁷³ Sacirbey, O. (2018, July 16). Fourth Corner Credit Union gets conditional approval from Federal Reserve for marijuana-related banking. Retrieved March 15, 2020, from <https://mjbizdaily.com/marijuana-focused-credit-union-gets-conditional-approval-federal-reserve/>

⁷⁴ Childears, D. (2018, June 12). Pot banking comes with little guidance, lots of liability. Retrieved March 17, 2020, from <https://www.americanbanker.com/opinion/pot-banking-comes-with-little-guidance-lots-of-liability>

⁷⁵ *Id.*

CONCLUSION

During the COVID-19 pandemic, the passage of the SAFE Banking Act becomes all the more important. First, reducing the industry-wide reliance on cash will help to slow the transmission of the virus, as cannabis dispensaries in the majority of states continue to operate as “essential businesses.” Next, reducing the industry’s reliance on cash also reduces their allure to criminal activity, as such activity has increased since the initial spread of the virus. Finally, the ability to efficiently collect tax revenue from the marijuana industry, estimated to have generated \$1.6 billion in taxes in 2019, will provide critical relief for state and local governments predicting budget shortfalls due to the pandemic. The SAFE Banking act would provide a safe harbor to these institutions, while maintain an agnostic position towards legalization.

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