

U.S. House of Representatives Passes the SAFE Banking Act

September 26, 2019

On September 25, 2019, the U.S. House of Representatives voted 321-103 to pass the Secure and Fair Enforcement Banking Act of 2019 (the “SAFE Banking Act” or the “bill”).¹ The bill’s passage—with substantial bipartisan support—represents a significant win for financial institutions and reform advocates that are seeking changes in the federal law governing marijuana. The bill now moves to the U.S. Senate, where it will be considered by the Banking Committee and where it is expected to face heightened scrutiny and potential resistance. The odds for this bill becoming law in this session of Congress remain long.

Summary of the SAFE Banking Act. The SAFE Banking Act offers depository institutions, insurance companies, other financial institutions and related parties seeking to serve cannabis businesses in states where cannabis² is legal (“cannabis-related legitimate businesses”) a safe harbor from enforcement, adverse supervisory action and other adverse action under federal law. The bill also clarifies that, for purposes of federal money laundering statutes, 18 U.S.C. §§ 1956, 1957, proceeds derived from transactions involving a cannabis-related legitimate business do not constitute proceeds of an unlawful activity solely because of the business’s involvement in the cannabis industry. To implement these changes, the SAFE Banking Act directs the Federal Financial Institutions Examination Council to develop, within six months after the date of enactment, uniform guidelines for examining depository institutions that provide financial services to the cannabis industry.³

¹ The SAFE Banking Act as it was approved by the House of Representatives is available [here](#).

² The SAFE Banking Act defines “cannabis” in the same way as “marihuana” in the federal Controlled Substances Act, *i.e.*, “all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.” The term does not include hemp, as defined in the Agriculture Improvement Act of 2018. We use the term “cannabis” consistent with its definition in the SAFE Banking Act.

³ For additional information on the SAFE Banking Act as it was first considered by the House Financial Services Committee, please see our prior analysis [here](#). To learn more about revisions to the SAFE Banking Act and its passage by the House Financial Services Committee in March 2019, please see our analysis [here](#).

Recent Amendments and Implications for Financial Institutions. A number of key amendments were made to the SAFE Banking Act to help secure its passage through the House of Representatives and to attempt to make the bill more palatable to the U.S. Senate.⁴ By many accounts, amendments were specifically designed to broaden the bill's appeal to Republican congressmen and women.⁵ Other amendments appear to expand the scope of the bill, resulting in additional or more explicit protections for certain stakeholders. The amended bill:

- Includes a new section that specifically enumerates legal protections for insurers.⁶ The added provision, entitled “Protections for Insurers,” states that insurers, as well as their officers, directors and employees, may not be held liable pursuant to any federal law solely for engaging in the business of insurance with a cannabis-related legitimate business or service provider or for further investing any income derived from such business of insurance.
- Clarifies that the protections for ancillary businesses from liability under federal money laundering statutes apply to transactions “involving activities of a” cannabis-related legitimate business or service provider, as opposed to only those transactions conducted by such entities.⁷
- Instructs the federal banking regulators to issue guidance confirming the legality of hemp and hemp-derived cannabidiol (“CBD”) and the legality of engaging in financial services with businesses selling these products.⁸ Acknowledging residual confusion regarding the legal status of these substances following the enactment of the Agriculture Improvement Act of 2018 (commonly referred to as the “2018 Farm Bill”), the bill directs regulators to recommend best practices for financial institutions engaging with hemp and CBD-related businesses.
- Confirms that the bill's protections apply to hemp and hemp-derived CBD in the same manner as cannabis, thereby shielding financial institutions that provide financial services to cannabis-related legitimate businesses, including hemp and hemp-derived CBD businesses, and their service providers from liability under federal law.⁹

⁴ A redline showing changes to the regulatory text is available [here](#).

⁵ Natalie Fertig, *et al.*, *Cannabis banking vote a go in the House*, POLITICO PRO (Sept. 20, 2019), available [here](#).

⁶ See SAFE Banking Act, sec. 4(c).

⁷ See SAFE Banking Act, sec. 3.

⁸ See SAFE Banking Act, sec. 11.

⁹ See SAFE Banking Act, sec. 12.

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- Prohibits federal banking regulators from requesting that depository institutions terminate customer accounts or discouraging banking relationships with certain customers unless (1) they have a valid reason for the request and (2) such reason is not solely based on “reputation risk to the depository institution.”¹⁰ This provision, supported by Republican members since the SAFE Banking Act was initially considered by the House Financial Services Committee, is designed to prevent the recurrence of programs such as the Obama Administration’s “Operation Choke Point,” which discouraged banks from doing business with firearms dealers and payday lenders, among others.¹¹ Notably, there is a carve-out for requests regarding customers that pose a threat to national security—such requests are explicitly permitted.
 - Reserves authority for federal banking regulators, clarifying that the SAFE Banking Act may not be construed as limiting or otherwise restricting the regulators’ general examination, supervisory and enforcement authority, “provided that the basis for any supervisory or enforcement action is not the provision of financial services to a cannabis-related legitimate business or service provider.”¹²
 - Extends legal protections for Federal Reserve Banks to Federal Home Loan Banks.¹³

Senate Consideration. Although the SAFE Banking Act enjoys support among actors in the financial services industry and others who view the bill as a solution to the compliance challenges created by the differing treatment of cannabis in certain states and at the federal level, challenges lie ahead. On the left, senators such as Cory Booker (D-NJ) have said that criminal justice issues should be addressed simultaneously with any banking legislation. On the right, key legislators remain opposed to a bill that moves toward broad-based marijuana legalization.

The SAFE Banking Act, however, is not without support in the Senate. The Senate Banking Committee held a hearing on cannabis banking issues on July 23, 2019, subsequent to which Chairman Mike Crapo (R-ID) indicated his support for a vote on legislation enabling banks to serve cannabis-related businesses. Moreover, 33 senators, including 5 Republicans, now co-sponsor the Senate version of the SAFE Banking Act, and the amendments made to the House bill may convince other senators to lend support to the legislation. In particular, the provisions focusing on hemp and hemp-

¹⁰ See SAFE Banking Act, sec. 13.

¹¹ See *Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses*, Hearing before the H. Subcomm. on Consumer Protection and Financial Institutions, 116th Cong. (2019) (statement of Rep. Blaine Luetkemeyer) available [here](#).

¹² See SAFE Banking Act, sec. 5(b).

¹³ See SAFE Banking Act, sec. 4(b), (d)(2).

derived CBD that were added to the latest version of the bill may garner support from Senate Majority Leader Mitch McConnell (R-KY), a major proponent of hemp legalization as a benefit to Kentucky-based farmers.¹⁴ Senator McConnell's support will be critical in ensuring that the SAFE Banking Act comes up for consideration on the Senate floor for a vote by the full Senate.

Despite glimmers of optimism, forthcoming debate in the Senate could lead to revisions that either endanger the likelihood of enactment or make the bill less attractive to its current proponents. Senate Banking Committee Chairman Crapo has not committed to any particular bill, noting: "We may craft our own bill or we may work with [Senate sponsors of the SAFE Banking Act] to craft any amended legislation."¹⁵ Many observers remain skeptical of enactment of a bill in this Congress, but the SAFE Banking Act may serve as a model for future legislation that, many believe, may have better odds in the next Congress, which will follow the November 2020 elections.

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We will continue to monitor developments in this fast-paced area and analyze them as they occur. Please do not hesitate to contact us with any questions.

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¹⁴ Senator McConnell recently proposed a legislative solution to the Food and Drug Administration's ban on food and dietary supplements containing hemp-derived CBD.

¹⁵ Zachary Warmbrodt, *Crapo plans landmark cannabis banking vote*, POLITICO (Sept. 13, 2019), available [here](#).