

Senate Again Rejects SAFE Banking Act, Extending Financial Institutions' Compliance Quandary

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Marijuana banking reform has once again stalled: on December 7, 2021, the Senate rejected efforts to include the Secure and Fair Enforcement (“SAFE”) Banking Act in the National Defense Authorization Act (“NDAA”) for fiscal year 2022. As more U.S. states legalize marijuana use while federal law continues to treat it as a controlled substance, the challenges for financial institutions seeking to do business relating to the marijuana industry are becoming increasingly pronounced. In this client update, we summarize key issues over the last year for financial institutions navigating these challenges. We first outline legislative and regulatory developments and then describe evolving conceptions of risk in this area.

Legislative and Regulatory State of Play. Medicinal use of marijuana is legal in 36 states and the District of Columbia, with recreational use now legal in 18 of these states and the District of Columbia.¹ However, at the federal level, marijuana remains classified under Schedule I of the Controlled Substances Act, a category reserved for substances with no currently accepted medical use in treatment in the United States, a lack of accepted safety for use under medical supervision and a high potential for abuse.² The resulting potential for civil and criminal liability has prevented most large financial institutions from serving this now-burgeoning market. Despite guidance by certain regulators seeking to bridge this state-federal divide (for example, the Financial Crimes Enforcement Network (“FinCEN”) and National Credit Union Administration), the Department of Justice has not reinstated any formal guidance that could provide more concrete comfort.³

¹ *State Medical Cannabis Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 29, 2021), available [here](#).
21 U.S.C. § 812(b)(1).

² See FinCEN, *BSA Expectations Regarding Marijuana Related Businesses* (Feb. 14, 2014), available [here](#); David Baumann, *CUs Won't Be Sanctioned for Providing Marijuana Banking*: NCUA Chairman Hood, CREDIT UNION TIMES (Aug. 5, 2019), available [here](#). Although the Department of Justice under the Obama administration issued a formal policy of enforcement forbearance with respect to providing financial services to marijuana-related businesses that did not impinge certain state and federal law enforcement interests, Attorney General Jeff Sessions subsequently rescinded it. See James M. Cole, *Guidance Regarding Marijuana Related Financial Crimes* (Feb. 14, 2014), available [here](#); Jefferson B. Sessions, III, *Marijuana Enforcement* (Jan. 4, 2018), available [here](#).

The SAFE Banking Act is one reform that would allow financial institutions to work with marijuana-related businesses operating in compliance with state law.⁴ As noted, although the SAFE Banking Act was included in the fiscal year 2022 NDAA as passed by the House of Representatives (in its fifth tour through the chamber), it once again failed to garner sufficient support in the Senate. The bill has bipartisan support, but some Senators have opposed it for a variety of reasons, including some who insist that any marijuana-related reform comprehensively address restorative justice and other issues at play.

To this end, Senators Schumer, Wyden and Booker introduced earlier this year the Cannabis Administration and Opportunity Act (“CAOA”), which would de-schedule marijuana from the Controlled Substances Act.⁵ However, this bill, too, faces significant opposition in the Senate, where many continue to oppose full federal legalization.

Even assuming comprehensive legislation could pass in Congress, President Biden has signaled his opposition⁶—despite including the decriminalization of the use of cannabis and the expungement of prior cannabis use convictions in his campaign’s criminal justice platform.⁷ That being said, Treasury Secretary Janet Yellen recently signaled her support for allowing marijuana businesses access to U.S. banks in order to facilitate tax collection, so the administration may support more modest reform efforts.⁸

Evolving Views of U.S. Marijuana Industry Risks. Based on these recent legislative developments, businesses of all kinds have adjusted to the reality that federal legislation is not likely to be forthcoming any time soon. This problem, which has persisted at least since Colorado and Washington first legalized recreational marijuana in 2012, has left many institutions wondering whether and how to engage with an increasingly large part of the U.S. economy. Over 90% of Americans favor either medical or recreational legalization of marijuana.⁹ Institutions contemplating marijuana-related business dealings therefore wonder whether the Department of Justice would crack down on such widespread and broadly supported activity given its other priorities.

Banking organizations, for their part, largely have continued to stay on the sidelines. Cognizant of their regulators’ watchful eyes, the potential for liability and the significant compliance costs of designing a program tailored to FinCEN anti-money

⁴ See our prior analysis of the SAFE Banking Act [here](#).

⁵ For more information about the CAO, see our prior analysis [here](#).

⁶ See Maeve Sheehey, *Psaki: Biden unmoved on marijuana legalization—despite Schumer legislation*, POLITICO (July 14, 2021), available [here](#).

⁷ See *The Biden Platform for Strengthening America’s Commitment to Justice*, available [here](#).

⁸ See *Yellen: Bank Access for Cannabis Firms Would Aid U.A. Tax Collections*, REUTERS (Dec. 1, 2021), available [here](#).

⁹ See Ted Van Green, *Americans overwhelmingly say marijuana should be legal for recreational or medical use*, PEW RESEARCH (April 16, 2021), available [here](#).

laundering guidance and other financial crime and reputational risk concerns, larger banks have decided to hold off on engaging directly with entities that “touch the plant.”¹⁰ Given the scope of the U.S. marijuana industry, though, banks have found it increasingly difficult to avoid connections to it entirely. Many institutions have sought to implement compliance controls supporting indirect ties; this includes, for example, onboarding certain service providers to the marijuana industry or the employees of “plant-touching” entities.

Securities firms also have had to wrestle with how to engage with businesses tied to the marijuana industry in capital markets. Transactions like the merger of Weedmaps’ parent company with a special purpose acquisition company, Silver Spike Acquisition Corp., in June have tested the limits of securities exchange rules, which require listed companies to comply with applicable law. In addition, market participants have had to consider the implications of secondary market trading in marijuana-related issuers, particularly those that “touch the plant” in the United States. Although prohibited on the New York Stock Exchange, Nasdaq Stock Market and Toronto Stock Exchange, the securities of issuers involved in such activity may trade on the Canadian Securities Exchange or in over-the-counter markets. A number of securities firms have gone to great lengths to prohibit these types of trades.¹¹ Some do allow trading in such securities, however, and some deal-focused firms have advised on primary market transactions and mergers and acquisitions with respect to plant-touching issuers.

Other businesses have contemplated serving the U.S. marijuana industry directly. For example, insurance companies are considering whether they can cover U.S. marijuana industry risks—in some cases, at the urging of state regulators.¹² Some asset managers are eyeing potentially attractive returns for offering credit to the U.S. marijuana industry, among other activities, and finding ways to do what banks believe they cannot.¹³ Nonfinancial publicly listed companies are also considering how they can take advantage of what many view as significant growth opportunities in the industry while competition is limited.

¹⁰ For example, FinCEN’s latest marijuana banking update shows that interest by banks in serving marijuana-related businesses has plateaued in recent years. FinCEN, *Marijuana Banking Update* (September 30, 2021), available [here](#).

¹¹ See, e.g., Shariq Khan and Matt Scuffham, *JPMorgan to restrict trading of some U.S. cannabis stocks – letter*, REUTERS (Nov. 2, 2021), available [here](#). Some have speculated that such de-risking initiatives may have arisen from the collapse of Archegos Capital Management. See Shariq Khan and Matt Scuffham, *Credit Suisse stops custodian service for some U.S. cannabis stocks-sources*, REUTERS (May 5, 2021), available [here](#).

¹² See, e.g., California Department of Insurance, *Cannabis and Insurance Initiative* (“Our goal is to make sure that insurance products are available, especially to businesses that will need insurance to secure a license from the California cannabis licensing agencies.”), available [here](#).

¹³ See, e.g., Silver Spike Investment Corp., Form N-2 (Dec. 3, 2021), available [here](#).

A category of drugs known as psychedelics provides an interesting contrast to marijuana. Cities like Denver and Washington, D.C. have decriminalized certain of these substances, and they are becoming an increasingly popular target of research for therapeutic use. Some psychedelics are classified, like marijuana, under Schedule I of the Controlled Substances Act; others have been approved as drugs by the Food and Drug Administration and therefore may be used legally under medical supervision. This distinction has allowed some psychedelic companies to participate in the broader U.S. economy to an extent marijuana-related businesses cannot. For example, a number of psychedelic research companies have gone public and are listed on U.S. exchanges, while U.S. marijuana businesses have generally been unable to do so.¹⁴ The Biden administration has voiced its support for streamlining rules for researching Schedule I substances, which would facilitate further growth for both sectors.¹⁵ This area will be another for regulated institutions to watch and consider carefully.

As long as state and federal law diverge with respect to the status of controlled substances, institutions will face compliance challenges when engaging in business relating to these substances. Companies must make individualized decisions regarding whether and how to become involved in the marijuana industry, which remains challenging in the absence of regulation that bridges the state-federal divide.

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

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¹⁴ See Will Yakowicz, *Psychedelic Therapeutics Startup Cybin to List on NYSE's Small Cap Market*, FORBES (July 22, 2021), available [here](#); Marina Temkin, *Psychedelic IPOs Build Momentum as Atai Life Sciences Goes Public*, PITCHBOOK (June 18, 2021), available [here](#).

¹⁵ See Press Release, *Biden-Harris Administration Provides Recommendations to Congress on Reducing Illicit Fentanyl-Related Substances*, THE WHITE HOUSE (Sept. 2, 2021), available [here](#).

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