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## *Can Cannabis Banking Work? Growing Interest in a Federal Safe Harbor*

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With over half of states legalizing cannabis for medical or recreational use,<sup>1</sup> the legal cannabis industry in the United States grew to over \$10.4 billion last year.<sup>2</sup> However, because cannabis remains classified as a Schedule I controlled substance under federal law, the cannabis industry is severely underbanked and, in many instances, must operate only in cash, which creates a host of issues from security for customers and legal dispensaries, to the challenges paying vendors including the tax authorities.

On a bi-partisan basis, Congress has taken notice of the challenges facing both the legal cannabis industry and those that might otherwise bank them.

- Proponents of a federal solution are encouraged by the introduction in the House of Representatives of H.R. 1595, the Safe and Fair Enforcement Act of 2019, also known as the SAFE Act.<sup>3</sup> The bill, drafted by Representatives Perlmutter [D-CO], Heck [D-WA], Stivers [R-OH] and Davidson [R-OH], proposes to harmonize federal and state law by preventing federal banking regulators from engaging in certain enforcement actions against financial institutions that service the industry in cannabis-legal states. There are similar developments in the U.S. Senate with the Strengthening the Tenth Amendment Through Entrusting States Act, also known as the STATES Act, drafted by Senators Warren [D-MA] and Gardner [R-CO] aimed at updating federal cannabis laws.<sup>4</sup> However, Senate Banking Committee Chairman Mike Crapo recently made statements that he would not commit to taking up the legislation, indicating he would prefer the Department of Justice to resolve the issue.<sup>5</sup>
- On February 13, the House Financial Services Committee hosted a hearing entitled “Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses,” the first of its kind dedicated to discussing the reason so many financial institutions find themselves opting out of servicing the cannabis industry.<sup>6</sup>
- More recently, on April 13, 2019, Pennsylvania Department of Banking and Securities Secretary Robin Wiessmann and the heads of twenty-four other state banking departments penned a letter to congressional leadership, recommending the establishment of a federal “safe harbor” for banks serving cannabis-related businesses where it is legal (the “State Bank Supervisors Letter”).<sup>7</sup>



Such actions demonstrate that there is growing bipartisan interest in providing banks and other financial institutions with a safe-harbor to provide services to the cannabis-related businesses that are complying with state law, despite concerns raised by law enforcement.

## **The Session Memo: A Renewed Era of Uncertainty**

On January 4, 2018, in a one-page memo citing the Controlled Substances Act, Attorney General Jeff Sessions directed all U.S. Attorneys to enforce the laws enacted by Congress and to follow “well-established principles” when pursuing prosecutions related to marijuana activities, stating: “*Given the Department’s well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately*” (the “Sessions Memo”).<sup>8</sup> In so doing, the Sessions Memo rolled back the then-existing directive from the Department of Justice (the “Cole Memo”), which had indicated that federal prosecutors and law enforcement should focus only on what where viewed as high-risk operates in cannabis-legal jurisdictions.<sup>9</sup>

Notwithstanding the Sessions Memo, there remains guidance from Financial Crimes Enforcement Network (“FinCEN”) that outlines how financial institutions can provide services to the cannabis industry in accordance with the Bank Secrecy Act, which, in part, is implemented to thwart the banking industry being used for illegal drug financing activities. The FinCEN guidance even implemented a new form of Suspicious Activity Report.<sup>10</sup> Nevertheless, fewer than 500 depository institutions in the U.S. are providing banking services to the industry.<sup>11</sup>

## **The Call for Clarity**

Like their state counterparts, federal banking regulators have weighed in, calling on Congress to provide much-needed clarity for banks and other financial service providers:

- Treasury Secretary Steven Mnuchin is on the record that marijuana businesses should be permitted to store proceeds from their businesses in banks, stating: “I assure you that we don’t want bags of cash. We do want to find a solution to make sure that businesses that have large access to cash have a way to get them into a depository institution for it to be safe.”<sup>12</sup> He also said resolving this issue is at the “top of the list” of his concerns.<sup>13</sup>
- Federal Reserve Chairman Jerome Powell said the conflict of state and federal law on cannabis “puts federally chartered banks in a very difficult situation...it would be great if that could be clarified.”<sup>14</sup>
- Comptroller of the Currency Joseph Otting urged Congress to “act at the national level to legalize marijuana if they want those entities involved in that business to utilize the U.S. banking system.”<sup>15</sup>

The State Bank Supervisors Letter discusses how guidance would enable banks to serve entities and help reduce the risk associated with large cash and carry operations and bring the safeguards, activities and sales associated with this industry into the regulatory reporting compliance framework.

Interestingly, the State Bank Supervisors Letter is not limited to those states banking departments like the New York Department of Financial Services that have been vocal in their support for cannabis banking.<sup>16</sup>

Among its signatories is Commissioner Leary of the Utah Department of Financial Institutions (“UDFI”), which has up to this point taken a very hard line stance against cannabis banking in the



current environment. Commissioner Leary has stated that any evidence of cannabis-banking related activities in Utah would be considered a violation of federal law by UDFI.<sup>17</sup> As a result, state-chartered banks and licensed payment processors in Utah have been directed to forego providing services to cannabis-related businesses unless the status of cannabis is changed under federal law and federal regulators implement rules that will ensure appropriate due diligence.

## Conclusion

The various developments related to cannabis banking at both the federal and state levels are indicative that change is in the air. The growing consensus for a federal safe harbor would enable both the cannabis and banking industries to flourish.

Paul Hastings is working with clients to navigate this changing landscape.



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<sup>1</sup> See generally, State Medical Marijuana Laws, National Conference of State Legislatures (Jan. 23, 2019), available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>; Marijuana Overview, National Conference of State Legislatures (Dec. 14, 2018), available at <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> (Currently thirty-three states and three U.S. territories permit the medical use of cannabis and ten states as well as the District of Columbia legalized cannabis for recreational use. Twenty-two states have decriminalized cannabis in small amounts or re-designated its use as a low-level misdemeanor).

<sup>2</sup> Legal Marijuana Industry Had Banner Year in 2018 (Dec. 27, 2018), available at <https://www.cnn.com/2018/12/27/legal-marijuana-industry-had-banner-year-in-2018.html>.

<sup>3</sup> H.R. 1595, SAFE Banking Act of 2019, available at <https://www.congress.gov/bill/116th-congress/house-bill/1595?q=%7B%22search%22%3A%5B%22SAFE+Banking+Act%22%5D%7D&s=1&r=>.

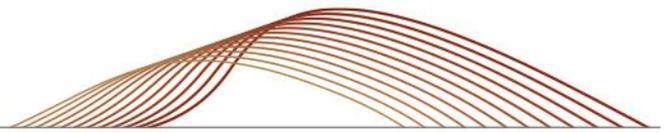
<sup>4</sup> Strengthening the Tenth Amendment Through Entrusting States Act, available at <https://www.warren.senate.gov/imo/media/doc/STATES%20Act%20116th%20Congress%20bill%20text.pdf>.

<sup>5</sup> See Victoria Guida, Crapo Says He Can't Commit to Moving Marijuana Banking Legislation, Politico (Apr. 30, 2019), available at <http://go.politicoemail.com/?qs=0f84c72aff51fc70a663fbd4b5697a29aeb502aed13ee7a00725b3d54d80b89714be131941f3d41251ef302527ac49c8>.

<sup>6</sup> FSC Majority Staff Memorandum: Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses (Feb. 12, 2019), available at [https://financialservices.house.gov/uploadedfiles/hhrq-116-ba15-20190213-sd002\\_-\\_memo.pdf](https://financialservices.house.gov/uploadedfiles/hhrq-116-ba15-20190213-sd002_-_memo.pdf).

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- <sup>7</sup> State Bank Supervisors Marijuana Letter (April 15, 2019), available at <https://www.mass.gov/files/documents/2019/04/16/marijuana%20banking%202019%20letter.pdf>.
- <sup>8</sup> Jefferson B. Sessions, Atty Gen. Memorandum for United States Attorneys: Marijuana Enforcement (January 4, 2018), available at <https://www.justice.gov/opa/press-release/file/1022196/download>.
- <sup>9</sup> James M. Cole, Deputy Atty Gen. Memorandum for United States Attorneys: Guidance Regarding Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; James M. Cole, Deputy Atty Gen. Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (August 29, 2013), available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; James M. Cole, Deputy Atty Gen. Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), available at <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>.
- <sup>10</sup> BSA Expectations Regarding Marijuana-Related Business, U.S. Department of the Treasury, Financial Crimes Enforcement Network, FIN-2014-G001 (February 14, 2014), available at <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.
- <sup>11</sup> *Id.*
- <sup>12</sup> See Treasury Fiscal Year 2019 Budget Hearing Before the House Comm. of Ways and Means, 116<sup>th</sup> Cong. (Mar. 14, 2019).
- <sup>13</sup> See *id.*
- <sup>14</sup> Tom Angell, More Banks Working with Marijuana Businesses, Despite Federal Moves, *Forbes* (Jun. 14, 2018), available at <https://www.forbes.com/sites/tomangell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#7a4b381c1b1b>.
- <sup>15</sup> OCC's Otting Wants Marijuana Banking Resolved by 2020, NAFCU (January 18, 2019), available at <https://www.nafcu.org/newsroom/occs-otting-wants-marijuana-banking-resolved-2020>.
- <sup>16</sup> New York DFS, Guidance on Provision of Financial Services to Medical Marijuana and Industrial Hemp-Related Businesses in New York State (July 2018), available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/New\\_York\\_Online\\_Lending\\_Survey\\_Report.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/New_York_Online_Lending_Survey_Report.pdf) (New York Department of Financial Services ("NYDFS") published guidance for state chartered banks to clarify that banking services may be provided to cannabis-related businesses, so long as they are in compliance with New York laws and regulations. In doing so, NYDFS has gone one step further than other state banking departments to provide a framework for banks to engage with cannabis-related businesses.).
- <sup>17</sup> Meeting of the Board of Bank Advisors at 5 (Aug. 22, 2018) available at <https://www.utah.gov/pmn/files/446663.pdf>.