



Statement of

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Introduction

Chairman Meeks, Ranking Member Luetkemeyer, and Members of the Subcommittee, my name is David Carpenter, and I am a legislative attorney at the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS on access to banking services for marijuana-related businesses.

My testimony provides a brief overview of how marijuana is currently regulated under the federal Controlled Substances Act. It then discusses the legal obligations of financial institutions under the Bank Secrecy Act and federal anti-money laundering laws, and the potential legal risks associated with providing financial services to entities that manufacture, produce, cultivate, sell, transport, or purchase marijuana (“marijuana-related businesses”). It then provides an overview of the discussion draft of the Secure And Fair Enforcement Banking Act of 2019 (SAFE Banking Act), dated February 6, 2019 (10:58 a.m.) and notes some potential uncertainties regarding how the SAFE Banking Act might apply to financial institutions with regard to serving marijuana businesses operating in compliance with state marijuana laws.

In serving the U.S. Congress on a non-partisan and objective basis, CRS takes no position on the efficacy of the SAFE Banking Act.

Brief Summary of the Regulation of Marijuana Under the Controlled Substances Act¹

The federal Controlled Substances Act (CSA)² establishes the legal regime through which the federal government: (1) regulates and facilitates the lawful production, possession, and distribution of controlled substances; (2) prevents diversion³ of these substances from legitimate purposes; and (3) penalizes unauthorized activities involving controlled substances.⁴ The CSA places various plants, drugs, and chemicals into one of five schedules based on the substance’s medical use, potential for abuse, and safety or dependence liability.⁵ The five schedules are progressively ordered with the substances generally considered the most dangerous and addictive classified as Schedule I substances and those generally regarded as the least dangerous and addictive classified as Schedule V substances.⁶ By law, Schedule I substances have “a high potential for abuse” with “no currently accepted medical use in treatment in the

¹ See CRS Report R44782, *The Marijuana Policy Gap and the Path Forward*, coordinated by Lisa N. Sacco (providing a detailed discussion and analysis of federal marijuana law and policy).

² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§ 801–904) (enacting the CSA).

³ The Drug Enforcement Administration (DEA) of the Department of Justice (DOJ) has explained that the term “diversion,” used in the context of the CSA, refers to “the redirection of controlled substances which may have lawful uses into illicit channels.” Controlled Substances Quotas, 83 Fed. Reg. 32,784, 32,784 (July 16, 2018) (codified at 21 C.F.R. pt. 1303).

⁴ See CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh (listing CSA’s criminal provisions regarding unauthorized trafficking, possession, or other prohibited activities involving controlled substances).

⁵ 21 U.S.C. § 812(b).

⁶ When Congress enacted the CSA in 1970, it established “initial schedules” of controlled substances, *id.* § 812(c), but specified that the schedules “shall be updated” periodically, *id.* § 812(a). The current list of controlled substances within their designated schedules may be found in 21 C.F.R. §§ 1308.11–15.

United States” and cannot safely be dispensed under a prescription.⁷ Schedule I substances may be lawfully used only for bona fide, federal government-approved research studies.⁸

Marijuana is currently classified as a Schedule I controlled substance and is, therefore, subject to the most severe restrictions and penalties under the CSA.⁹ As a result, it is a federal crime to grow, sell, or merely possess the drug.¹⁰ In addition to facing the prospect of federal criminal prosecution, imprisonment, and criminal fines, those who violate the CSA may suffer a number of additional adverse consequences under federal law.¹¹ For example, federal authorities may confiscate, through civil or criminal forfeiture proceedings, any property used to grow marijuana or facilitate its sale or use, as well as all proceeds derived from the sale of marijuana.¹²

In spite of these federal prohibitions, a number of states and localities have established laws and policies that permit certain marijuana-related activities.¹³ While the Department of Justice (DOJ) and the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) have previously issued guidance on the interplay of federal marijuana laws and conflicting state legalization efforts,¹⁴ Congress has not passed comprehensive legislation to address state and local marijuana legalization laws. Thus, regardless of state and local laws purporting to authorize marijuana use, federal law prohibits cultivation, distribution, and possession of marijuana, except by those who engage in federally approved research.¹⁵

Financial Services for Marijuana Businesses

Bank Secrecy Act¹⁶ and Federal Anti-Money Laundering Laws

When financial institutions provide financial services to business customers, they generally are not directly involved in the sale, possession, or distribution of their customers’ products. However, financial

⁷ 21 U.S.C. § 812(b).

⁸ *Id.* § 823(f).

⁹ *Id.* § 812(c)(a)(c)(10); 21 C.F.R. § 1308.11(d)(23).

¹⁰ 21 U.S.C. §§ 841–90.

¹¹ *Id.* See also CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh (providing a detailed description of the CSA’s civil and criminal provisions).

¹² 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1). See also CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle (describing the procedural requirements and potential defenses associated with asset forfeiture).

¹³ *Map of Marijuana Legality by State*, DISA GLOBAL SOLS., <https://disa.com/map-of-marijuana-legality-by-state> (last visited Feb. 12, 2019).

¹⁴ For example, in 2013, former Deputy Attorney General James Cole issued a subsequently rescinded memorandum to U.S. attorneys that reiterated the fact that marijuana cultivation, sale, distribution, and possession remain unlawful under federal law and outlined eight federal enforcement priorities. Memorandum from James M. Cole, Deputy Attorney Gen. to All United States Attorneys Regarding Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) [hereinafter 2013 Cole Memorandum], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>. The 2013 Cole Memorandum and other DOJ marijuana-related guidance was rescinded on January 4, 2018. Memorandum from Jefferson B. Sessions, Attorney Gen. to All United States Attorneys Regarding Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>. FinCEN also “issu[ed] guidance to clarify Bank Secrecy Act (‘BSA’) expectations for financial institutions seeking to provide services to marijuana-related businesses,” which as of the date of this testimony remained in effect. U.S. DEP’T OF THE TREASURY, FIN. CRIMES ENF’T NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESS, FIN-2014-G001 (Feb. 14, 2014) [hereinafter FinCEN Marijuana Guidance 2014], <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>; see *infra* “FinCEN Guidance to Financial Institutions” section of this testimony.

¹⁵ 21 U.S.C. § 812(c); 21 C.F.R. § 1308.11(d)(23).

¹⁶ The “Bank Secrecy Act” is commonly used to refer to Titles I and II of Pub. L. No. 91-508, including its major component, the

institutions commonly acquire the financial proceeds generated from the sale of customer products. To the extent that a bank acquires the proceeds derived from sales of marijuana in violation of federal law, federal authorities could potentially confiscate such funds through civil or criminal asset forfeiture proceedings,¹⁷ even if the marijuana sales are permissible under state law.¹⁸ For example, if a bank lends to a state-authorized medical marijuana dispensary, federal authorities might be able to require the bank to forfeit any proceeds that the bank generated from the loan on the grounds that such proceeds resulted from sales of marijuana in violation of federal law.¹⁹

In addition to the risk of asset forfeiture, federal anti-money laundering laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize certain transactions involving property that is known to be derived from certain unlawful activities,²⁰ including the sale and distribution of marijuana.²¹ Violators of these anti-money laundering laws may be subject to fines and imprisonment,²² and any real or personal property involved in or traceable to prohibited transactions is potentially subject to criminal or civil forfeiture.²³ For example, a bank employee could be subject to a twenty-year prison sentence and criminal money penalties under Section 1956 for knowingly engaging in a financial transaction involving marijuana-related proceeds that is conducted with the intent to promote a further offense, such as withdrawing marijuana-generated funds from a business checking account in order to pay the salaries of medical marijuana dispensary employees.²⁴ Similarly, a bank officer could face a ten-year prison term and criminal money penalties under Section 1957 for knowingly receiving deposits or allowing withdrawals of \$10,000 or more in cash that is derived from distributing and selling marijuana.²⁵

Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, Title II, 84 Stat. 1114, 1118–24 (1970) (as amended and codified at 18 U.S.C. §§ 1829b, 1951–59; 31 U.S.C. §§ 5311–32). The Bank Secrecy Act requires reports and records of transactions involving cash, negotiable instruments, or foreign currency and authorizes the Secretary of the Treasury to prescribe regulations to insure that adequate records are maintained of transactions that have a “high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.” Title II, 84 Stat. at 1118.

¹⁷ 18 U.S.C. § 981(a)(1) (“The following property is subject to forfeiture to the United States . . . (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title) [i.e., the list of predicate offenses for money laundering (18 U.S.C. § 1956)], or a conspiracy to commit such offense.”).

¹⁸ *United States v. McIntosh*, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016).

¹⁹ 18 U.S.C. § 981(a).

²⁰ 18 U.S.C. §§ 1956(c)(7), 1957(f)(3). See “Specified Unlawful Activities” in CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle (providing a full list of predicate offenses).

²¹ 18 U.S.C. §§ 1956, 1957. See CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle (providing a detailed analysis of federal anti-money laundering laws).

²² Section 1956 violations are punishable by imprisonment for not more than twenty years and fines of up to \$500,000 or twice the value of the property involved, whichever is greater. 18 U.S.C. § 1956(a)(1). Section 1957 violations are punishable by imprisonment for not more than ten years and fines of up to \$250,000 (or \$500,000 for organizations) or twice the value of the property involved in the transaction, whichever is greater. *Id.* §§ 1957(b), 3571, 3559. Conspiracy to violate either section carries the same maximum penalties, as does aiding and abetting the commission of either offense. *Id.* §§ 2, 1956(h). See, e.g., *United States v. Lyons*, 740 F.3d 702, 715 (1st Cir. 2014). See CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh (providing a detailed description of the penalties for violating these laws).

²³ 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1).

²⁴ *Id.* § 1956(a)(1)(A)(i).

²⁵ *Id.* § 1957(a), (d).

Under federal law, financial institutions²⁶ must aid law enforcement in investigating and prosecuting those who violate federal laws, including the CSA.²⁷ For example, the Secretary of the Treasury has exercised authority to require financial institutions to file suspicious activity reports (SARs)²⁸ with FinCEN regarding financial transactions²⁹ suspected to be derived from illegal activities,³⁰ including sales of marijuana.³¹ Depository institutions³² also must establish and maintain anti-money laundering programs designed to prevent institutions from facilitating money laundering and financing terrorist activity, as well as to ensure that the institutions' officers and employees have sufficient knowledge of their customers and their customers' businesses to identify when filing SARs is appropriate.³³

Additionally, financial institutions, their employees, and certain other affiliated parties³⁴ could be subject to administrative enforcement actions by federal regulators for violating the Bank Secrecy Act or anti-

²⁶ For the purposes of the Bank Secrecy Act and anti-money laundering laws, the term "financial institution" is defined broadly to include banks, savings associations, credit unions, broker dealers, insurance companies, pawnbrokers, automobile dealers, casinos, cash checkers, travel agencies, and precious metal dealers, among others. 31 U.S.C. § 5312(a)(2).

²⁷ 12 U.S.C. §§ 1951–59; 31 U.S.C. §§ 5311–32.

²⁸ 31 U.S.C. § 5318(g). Filing suspicious activity reports (SARs) are mandatory under certain circumstances, but financial institutions may file SARs even when not mandated by law. *See, e.g.*, 12 C.F.R. §§ 1020.320(a) (banks); 31 CFR § 1022.320(a) (money services businesses).

²⁹ "Transaction" is defined as:

means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

Id. § 1010.100(bbb).

³⁰ 18 U.S.C. §§ 1956(c)(7), 1957(f)(3). *See* "Specified Unlawful Activities" in CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle (providing a full list of predicate offenses).

³¹ 21 U.S.C. §§ 841–90; 31 U.S.C. § 5318(g); 31 C.F.R. § 1020.320.

³² There are several different types of depository institutions, including state- and federally-chartered banks, savings associations, and credit unions.

³³ *See generally id.* §§ 5318(h)(1), 1020.200–20. *See also* 12 U.S.C. § 1786(q)(1) (credit unions); *id.* § 1818(s) (banks and savings associations). Even in the absence of suspicion, financial institutions must file currency transaction reports (CTRs) with FinCEN relating to transactions involving \$10,000 or more in cash or other "currency." 31 U.S.C. § 5313; 31 C.F.R. §§ 1020.300–20, 1010.300–70. "Currency" is defined as:

The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

Id. at § 1010.100(m).

The willful failure to file SARs and CTRs is punishable by imprisonment for not more than five years or not more than ten years in cases of a substantial pattern of violations or transactions involving other illegal activity. 31 U.S.C. § 5322. Structuring a transaction to avoid the reporting requirement exposes the offender to the same maximum terms of imprisonment. *Id.* § 5324(d). *See* CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle, (providing a detailed description of penalties for violations of Bank Secrecy Act reporting and monitoring requirements).

³⁴ *See, e.g.*, 12 U.S.C. §§ 1813(u) (defining "institution-affiliated party" to include, among others, "any director, officer, employee, or controlling stockholder . . . of, or agent for an insured depository institution," as well as any independent contractor . . . who knowingly or recklessly participates in any violation of any law or regulation; any breach of fiduciary duty; or any unsafe or unsound practice which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.").

money laundering laws.³⁵ For example, federal banking regulators³⁶ implement comprehensive supervisory regimes that are designed to ensure that depository institutions are managed and operated in a safe and sound fashion to maintain profitability and in compliance with applicable state and federal law. To further this mandate, banking regulators may exercise strong, flexible administrative enforcement powers against depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates that act unlawfully, including by engaging in marijuana-related activities that violate the CSA or the anti-money laundering laws.³⁷ Banking regulators have legal authority, for instance, to issue cease and desist orders, impose civil money penalties, and issue removal and prohibition orders that temporarily or permanently ban individuals from working for any depository institution.³⁸ Banking regulators also have authority, under certain circumstances, to revoke an institution's federal deposit insurance coverage and to take control of and liquidate a depository institution.³⁹ A criminal conviction for violating the Bank Secrecy Act or anti-money laundering laws is an explicit ground for appointing the Federal Deposit Insurance Corporation "as receiver [to] place the insured depository institution in liquidation."⁴⁰

Because of these potential legal risks, many financial institutions have reportedly been unwilling to provide financial services to the marijuana industry.⁴¹ This has often left marijuana businesses without the ability to accept debit or credit card payments, to use electronic payroll services, to maintain checking accounts, or to avail themselves of other common banking services. Consequently, many marijuana businesses are reportedly operating exclusively in cash,⁴² raising concerns about tax collection and public safety, among other things.⁴³

³⁵ See, e.g., 12 U.S.C. §§ 1786, 1818, 1831o.

³⁶ For these purposes, the federal banking regulators are: the Office of the Comptroller of the Currency (OCC) for national banks and federal savings associations; the Board of Governors of the Federal Reserve System for domestic operations of foreign banks and state-chartered banks that are members of the Federal Reserve System; the Federal Deposit Insurance Corporation (FDIC) for state savings associations and state-chartered banks that are not members of the Federal Reserve System; and the National Credit Union Administration (NCUA) for federally insured credit unions. *Id.* §§ 1766, 1813(q). The Bureau of Consumer Financial Protection (CFPB) also has certain consumer compliance regulatory authority over depository institutions. *Id.* §§ 5481–5603.

³⁷ See, e.g., *id.* § 1786 (credit unions); *id.* §§ 1818, 1831o (banks and savings associations). See also Press Release, Off. of the Comptroller of the Currency, OCC Assesses \$2.5 Million Civil Money Penalty Against Gibraltar Private Bank and Trust Company for Bank Secrecy Act Violations (Feb. 25, 2016), <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-20.html> (ordering the payment of a civil money penalty and remedial actions for allegedly "fail[ing] to maintain an effective Bank Secrecy Act/Anti-Money Laundering (BSA/AML) compliance program.").

³⁸ See, e.g., 12 U.S.C. § 1786 (credit unions); *id.* §§ 1818, 1831o (banks and savings associations).

³⁹ See, e.g., *id.* §§ 1786–87 (credit unions); *id.* §§ 1818, 1821, 1831o (banks and savings associations).

⁴⁰ *Id.* § 1821(c)(5)(M), (d)(2)(E).

⁴¹ See, e.g., *Guidance on Provision of Financial Services to Medical Marijuana & Industrial Hemp-Related Businesses in New York State*, N.Y. DEP'T OF FIN. SERVS., 2 (Jul. 3, 2018), <https://www.dfs.ny.gov/legal/industry/il180703.pdf> ("Because marijuana currently is still listed on Schedule I under the Federal Controlled Substances Act, medical marijuana . . . businesses operating in accordance with New York State laws and regulations continue to have difficulty establishing banking relationships at regulated financial institutions. The ability to establish a banking relationship is an urgent issue today for the legal cannabis industry. So long as it remains difficult to open and maintain bank accounts, the industry will largely rely on cash to conduct business and operate.")

⁴² *Id.*

⁴³ See Tom Angell, *Trump Treasury Secretary Wants Marijuana Money in Banks*, FORBES (Feb. 6, 2018), <https://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks/#3c9bc4ed3a53>.

FinCEN Guidance to Financial Institutions

In response to state and local marijuana legalization efforts, FinCEN issued guidance with respect to marijuana-related financial crimes on February 14, 2014.⁴⁴ This guidance appears to provide a roadmap for financial institutions to comply with suspicious activity reporting requirements when providing financial services to marijuana businesses operating in compliance with state or local laws, while also alerting FinCEN to transactions that might trigger federal enforcement priorities.⁴⁵

The guidance notes that:

[b]ecause federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and [FinCEN regulations].⁴⁶

FinCEN advised financial institutions that, in providing services to a marijuana business, they must file one of three types of special SARs:

1. A marijuana limited SAR should be filed when a financial institution determines, after the exercise of due diligence, that a marijuana business is not engaged in any activities that violate state law or implicate the investigation and prosecution priorities outlined in the guidance, including distribution to minors and supporting drug cartels or similar criminal enterprises;⁴⁷
2. A marijuana priority SAR must be filed when a financial institution believes a marijuana business is engaged in activities that implicate prosecution priorities;⁴⁸ and
3. A marijuana termination SAR should be filed when a financial institution finds it necessary to sever its relationship with a marijuana business to maintain an effective anti-money laundering program.⁴⁹

The FinCEN guidance also lists examples of “red flags” that may indicate that a marijuana priority SAR is appropriate.⁵⁰

As of April 30, 2018, FinCEN has reported that it has received more than 50,000 marijuana-related SARs and that over 400 depository institutions reported providing some form of financial services to marijuana-related businesses.⁵¹ However, it is not clear precisely what level of financial services these depository

⁴⁴ FinCEN Marijuana Guidance 2014, *supra* note 14. Although DOJ rescinded several marijuana-related guidance documents, FinCEN’s guidance remains in effect. The Administration could reverse or otherwise make significant changes to its enforcement priorities and policies. *See generally* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

⁴⁵ FinCEN Marijuana Guidance 2014, *supra* note 14.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 3–4.

⁴⁸ *Id.* at 4. These enforcement priorities were originally outlined in the 2013 Cole Memorandum. 2013 Cole Memorandum, *supra* note 14.

⁴⁹ FinCEN Marijuana Guidance 2014, *supra* note 14, at 4–5.

⁵⁰ *Id.* at 5–7. Some examples of “red flags” noted in the guidance are: “[t]he business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law”; and “[a] customer seeks to conceal or disguise involvement in marijuana-related business activity.” *Id.* at 6.

⁵¹ *Marijuana Banking Update*, DEP’T OF TREASURY, FINCEN, https://www.fincen.gov/sites/default/files/shared/277157%20EA%202nd%20Q%20MJ%20Stats_Public.pdf (last visited Feb. 12, 2019).

institutions are providing marijuana businesses.⁵² Moreover, it remains uncertain whether these depository institutions are directly serving businesses that are actually involved in cultivating and selling marijuana, or are only serving entities that are indirectly involved in the marijuana business, such as landlords renting office space to marijuana businesses.⁵³

Overview of the SAFE Banking Act

The discussion draft of the SAFE Banking Act⁵⁴ would not remove marijuana from the CSA schedules or move marijuana from Schedule I to a different schedule. As a result, even if the SAFE Banking Act became law, it would continue to be a federal crime to grow, sell, or merely possess the drug.⁵⁵ Instead, the legislation would appear to attempt:

- to constrain federal banking regulator⁵⁶ authority to penalize depository institutions⁵⁷ for providing financial services to marijuana businesses operating in compliance with state or local laws;⁵⁸ and
- to protect depository institutions and their personnel from some legal liability under the CSA, anti-money laundering laws, and other federal laws when providing financial services to, or investing proceeds derived from serving, marijuana businesses operating in compliance with state or local laws.

More specifically, Section 2 of the draft bill would, among other things, prohibit federal banking regulators from “terminat[ing] or limit[ing] the deposit insurance or share insurance . . . solely because the depository institution provides or has provided financial services to a cannabis-related legitimate business” or “prohibit[ing], penalize[ing], or otherwise discourage[ing] a depository institution from providing financial services to a cannabis-related legitimate business.”⁵⁹ The draft bill would define “cannabis-related legitimate business” generally to mean entities engaged in marijuana-related business activities “pursuant to” state and local laws.⁶⁰

⁵² Robert Rowe, *Compliance and the Cannabis Conundrum*, ABA BANKING J. (Sept. 11, 2018), <https://bankingjournal.aba.com/2018/09/compliance-and-the-cannabis-conundrum/> (“According to FinCEN, by the end of the third quarter 2017, it had received nearly 40,000 SARs reporting activity associated with a marijuana-related business. The great majority of those were marijuana limited SARs, indicating that the industry continues to offer some level of services to the cannabis industry. No one knows, though, how extensive those offerings are or what kinds of banking relationships do exist. Anecdotal reporting suggests it is very limited.”).

⁵³ *Id.*

⁵⁴ Discussion Draft of the Secure And Fair Enforcement Banking Act of 2019, dated February 6, 2019, 10:58 a.m. [hereinafter SAFE Banking Act].

⁵⁵ See 21 U.S.C. §§ 841–90.

⁵⁶ The bill would define “Federal banking regulator” to be the Federal Reserve Board, OCC, FDIC, CFPB, “or any other Federal agency or department that regulates banking or financial services, as determined by the Secretary of the Treasury.” SAFE Banking Act § 8(5).

⁵⁷ The draft bill would define “depository institution” to mean state and federal credit unions and banks, savings associations, and any other “depository institution” as defined by 12 U.S.C. § 1813(c). SAFE Banking Act § 8(4). Although non-depository institutions also offer financial services, my testimony, like the SAFE Banking Act, focuses on depository institutions.

⁵⁸ The draft bill would also apply to marijuana laws and regulations of Indian tribes. For simplicity, references to the term “state” in relation to the SAFE Banking Act in this testimony encompasses an “Indian Tribe” within “Indian Country” as those terms are defined in Section 6 of the SAFE Banking Act.

⁵⁹ SAFE Banking Act § 2.

⁶⁰ *Id.* § 8(3).

Section 3 of the draft bill appears designed to reduce legal liability under federal anti-money laundering laws for financial institutions serving the marijuana industry.⁶¹ Section 3 would clarify that “the proceeds from a transaction conducted by a cannabis-related legitimate business shall not be considered as proceeds from an unlawful activity solely because the transaction was conducted by a cannabis-related legitimate business” for the purposes of federal anti-money laundering laws “and all other provisions of Federal law.”⁶²

Section 4(a) appears designed to protect depository institutions and their “officers, directors, and employees” from liability under federal law or regulation based solely on their providing “financial services to cannabis-related legitimate businesses” “[i]n a State, political subdivision of a State, or Indian country” that “allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to the law or regulation of” that jurisdiction.⁶³

Similarly, Section 4(b) of the draft bill appears designed to encourage depository institutions to provide loans to marijuana businesses by providing some protection from asset forfeiture laws.⁶⁴ Specifically, Section 4(b) would generally protect depository institutions from “criminal, civil, or administrative forfeiture of” “a legal interest in the collateral for a loan or another financial service provided to an owner or operator of a cannabis-related legitimate business” or to entities that rent or sell property to a cannabis-related legitimate business.⁶⁵

The draft bill would not expressly eliminate a financial institution’s responsibility to file SARs associated with marijuana-related transactions. Instead, Section 6 of the draft bill would require FinCEN to issue guidance on marijuana-related suspicious activity reporting requirements that “is consistent with the purpose and intent of the SAFE Banking Act.”⁶⁶ The draft bill would also require banking regulators to “develop uniform guidance and examination procedures for depository institutions that provide financial services to cannabis-related legitimate businesses.”⁶⁷

Impact the SAFE Banking Act Might Have on Depository Institutions Serving Marijuana Businesses

It is unclear how enactment of the SAFE Banking Act would affect the financial services industry. The discussion draft of the SAFE Banking Act, if enacted, might reduce some legal and financial risks that financial institutions face when serving the marijuana industry, but significant risks likely would remain. The remaining risk of providing financial services to marijuana businesses will likely depend on factors that are unknowable at this time.

For example, federal banking regulators have strong and flexible enforcement powers that they may exercise to ensure depository institutions comply with state and federal laws,⁶⁸ and some discretion in

⁶¹ *Id.* § 3.

⁶² *Id.* The draft bill’s liability provisions in Section 3 would appear to extend to marijuana-related transactions generally, regardless of whether a depository institution is involved.

⁶³ See SAFE Banking Act § 4(a).

⁶⁴ *Id.* § 4(b).

⁶⁵ *Id.*

⁶⁶ *Id.* § 6 (amending 31 U.S.C. § 5318(g)).

⁶⁷ *Id.* § 7. Section 5 of the bill would expressly provide that depository institutions would not be required to provide services to marijuana businesses. *Id.* § 5.

⁶⁸ See *supra* notes 34–40 and surrounding text.

how they interpret and enforce the laws within their jurisdictions.⁶⁹ The draft bill also contains a number of potentially ambiguous provisions that might be subject to multiple reasonable interpretations. Consequently, a depository institution's decision on whether to serve the marijuana industry likely will depend on the supervisory and enforcement guidance banking regulators provide for the SAFE Banking Act.⁷⁰ Moreover, there is always the possibility that the SAFE Banking Act could spark litigation between financial institutions that serve marijuana businesses and their regulators, meaning that the Act's effect may ultimately depend on how courts interpret its language.

For instance, Section 2 of the draft bill would generally prohibit banking regulators from "penaliz[ing], or otherwise discourag[ing] a depository institution from providing financial services to a cannabis-related legitimate business."⁷¹ However, the draft bill does not appear to absolve depository institutions entirely from their responsibilities to implement customer due diligence and certain other anti-money laundering program compliance standards when serving marijuana-related businesses. Questions remain regarding how banking regulators would resolve the tension between ensuring that depository institutions are effectively evaluating money laundering and other compliance risks while also abiding by the bill's proscription on penalizing and discouraging institutions from serving the marijuana industry.

It is also unclear how FinCEN would interpret Section 6 in conjunction with Section 3 for the purpose of suspicious activity reporting. As explained above, financial institutions generally must file a SAR regarding financial transactions⁷² suspected to be derived from "illegal activities."⁷³ The SAFE Banking Act does not expressly eliminate a financial institution's suspicious activity reporting requirements associated with marijuana-related transactions. Instead, Section 6 of the draft bill appears to envision that financial institutions would continue to be required to file SARs on marijuana businesses in accordance with "appropriate guidance issued by FinCEN," which must be "consistent with the purpose and intent of the SAFE Banking Act of 2019."⁷⁴ Additionally, Section 3 of the draft bill provides that the proceeds from transactions with "cannabis-related legitimate business" no longer constitute proceeds of "unlawful activity" for purposes of "all . . . provisions of Federal law."⁷⁵ If the proceeds of such covered transactions are no longer unlawful under the SAFE Banking Act, could FinCEN determine that financial institutions would no longer have to file SARs associated with marijuana-related transactions?

It is also unclear how banking regulators would respond to issues that are not explicitly addressed by the draft bill. For instance, in order to process customer debit or credit card payments and to transfer funds electronically, depository institutions generally need access to the Federal Reserve's payment system

⁶⁹ See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey, and CRS Report R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, by Todd Garvey.

⁷⁰ Financial institutions might also desire guidance from DOJ, FinCEN, and state criminal law enforcement agencies.

⁷¹ SAFE Banking Act § 2.

⁷² "Transaction" is defined as:

means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

31 C.F.R. § 1010.100(bbb).

⁷³ See, e.g., 31 C.F.R. § 1020.30 (banks).

⁷⁴ SAFE Banking Act § 6.

⁷⁵ *Id.* § 3.

through a master account at a regional Federal Reserve Bank.⁷⁶ In the past, at least one Federal Reserve Bank had refused to approve an application for a master account for a credit union that openly proposed to serve marijuana businesses in violation of federal law.⁷⁷ The draft bill does not explicitly address access to the Federal Reserve's payment system. Refusing to approve master account applications because a depository institution intends to serve marijuana businesses could arguably qualify as an action "discourag[ing]" depository institutions from providing financial services to marijuana businesses within the meaning of Section 2 of the SAFE Banking Act. However, the precise scope of that provision would be left to the Federal Reserve and the courts to determine.

Even if the SAFE Banking Act became law, financial institutions that provide services to the marijuana industry would likely continue to have a legal obligation to ensure that the businesses they serve comply with a complex and not fully consistent web of relevant state and local marijuana laws.⁷⁸ Furthermore, because the draft bill would not decriminalize marijuana under the CSA, marijuana businesses and their officers, directors, and employees could still face federal criminal prosecution, criminal fines, and asset forfeiture.⁷⁹ Thus, financial institutions would likely continue to face significant financial risks when providing services to marijuana businesses because of the potential legal exposure of such businesses. For example, a marijuana business owner might have trouble repaying a bank loan if he is subject to criminal prosecution, criminal fines, and asset forfeiture proceedings for violating the CSA. Although Section 4(b) of the draft bill might protect against the forfeiture of a depository institution's legal interest in assets securing financial transactions, those protections would not necessarily guarantee that a depository would not, for example, suffer losses on a defaulted secured loan. As a result, compliance costs associated with serving the marijuana industry might be significantly higher than costs associated with more typical business industries.⁸⁰ In light of these legal and financial risks, banking regulators might consider imposing heightened or particularized examination procedures, anti-money laundering due diligence standards, or other regulatory measures on depository institutions serving marijuana businesses. However,

⁷⁶ See generally Fed. Fin. Inst. Examination Council, *Retail Payment System IT Examination Handbook: Payment Instruments, Clearing, and Settlement*, IT HANDBOOK, <https://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement.aspx> (last visited Feb. 11, 2019); Level 4 Ventures, Inc., JADE Compliance Sols., & RLR Mgmt. Consulting Inc., *California State Backed Bank Feasibility Study Report*, CA. TREASURER, 17 (Dec. 24, 2018), <https://www.treasurer.ca.gov/comm-external-urls/cannabis-feasibility-full-report.pdf> ("To be clear, without a master account issued by the Federal Reserve the bank cannot function. It would have no ability to accept and clear customer checks drawn on other banks; no ability to issue checks or otherwise make payments other than in cash; and no ability to transfer funds to other banks."); *Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City*, 154 F. Supp. 3d 1185, 1187 (D. Col. 2016) ("The newly minted credit union promptly applied to open a 'master account' at the Federal Reserve Bank of Kansas City. Despite its name, the Bank is not a federal agency. Rather, it is a private corporation created by an Act of Congress and run by its own board of directors. Depository institutions can only access the Federal Reserve payments system through a master account or through a correspondent bank that has a master account. This access is necessary for the electronic transfer of funds. Simply put, without this access The Fourth Corner Credit Union is out of business."), *vacated and remanded on other grounds*, *Fourth Corner Credit Union v. Fed. Reserve Bd.*, 861 F.3d 1052 (10th Cir. 2017).

⁷⁷ *Fourth Corner Credit Union v. Fed. Reserve Bd.*, 861 F.3d 1052 (10th Cir. 2017).

⁷⁸ See *supra* "FinCEN Guidance to Financial Institutions" section of this testimony. See also COMMONWEALTH OF MASS. SPECIAL COMM. ON MARIJUANA, REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA 75 (Mar. 8, 2016) ("In February, 2014, the Department of the Treasury's Financial Crimes Enforcement Network issued guidance concerning how financial institutions can service marijuana businesses without violating the federal Bank Secrecy Act. Banks must undertake rigorous due diligence and compliance efforts to ensure a marijuana business is in compliance with all state laws, and to identify any suspicious or criminal activity. Notwithstanding this guidance, the large national banks have not participated in the industry to this point, perhaps because dealing with a marijuana business requires a higher level of compliance and effort or because they fear future federal policy changes could leave them and their customers exposed to risk.").

⁷⁹ See SAFE Banking Act § 4(b).

⁸⁰ REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA 75 ("Banks must undertake rigorous due diligence and compliance efforts to ensure a marijuana business is in compliance with all state laws, and to identify any suspicious or criminal activity. . . . The banks must comply with daunting requirements for due diligence and compliance reporting, which can be time consuming and expensive.").

it is unclear to what extent such additional measures would comply with the proscription on “penaliz[ing], or otherwise discourag[ing] a depository institution from providing financial services to a cannabis-related legitimate business” under Section 2 of the draft bill.

Figure I. Photo and Biography

David H. Carpenter, Legislative Attorney, Congressional Research Service

**Biography**

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