

Marijuana Banking: Legal Issues and the SAFE(R) Banking Acts

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A number of states have [adopted](#) laws permitting marijuana sales and other marijuana-related activities, even though those same activities remain unlawful under federal drug and financial laws. Due to the legal risks under federal law, many financial institutions are [unwilling](#) to provide common banking products and services—such as debit or credit card payment services, business loans, electronic payroll services, and checking accounts—to state-authorized marijuana businesses. Some argue that this unwillingness, in turn, has [reportedly](#) stifled growth of state-authorized marijuana businesses and forced them to [operate](#) largely in cash, raising public safety and tax compliance concerns.

Both the House and the Senate have considered legislation designed to reduce some of the legal risks associated with providing financial services to marijuana businesses operating in compliance with state laws. In September 2023, the Senate Banking Committee favorably reported one such bill—S. 2860, the Secure And Fair Enforcement Regulation Banking Act of 2023 (SAFER Banking Act). A similar bill, H.R. 2891, the Secure And Fair Enforcement Banking Act (SAFE Banking Act), has been introduced in the House, and, although it has not done so thus far in the 118th Congress, the full House passed versions of the SAFE Banking Act [seven times](#) in the 116th and 117th Congresses.

This Legal Sidebar analyzes the liability that financial institutions risk by serving marijuana businesses given the discordant state and federal marijuana legal regimes. It finishes with a discussion of the SAFER Banking Act. A more detailed analysis of the information in this Sidebar is available in the “Financial Services for Marijuana Businesses” section of CRS Report R44782, *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*, coordinated by Lisa N. Sacco.

Federal Financial Laws and Marijuana Businesses

A number of federal laws prohibit activities involving the possession and distribution of both marijuana and assets tied to marijuana sales.

Controlled Substances Act. The federal [Controlled Substances Act](#) (CSA) criminalizes the manufacture, sale, possession, and distribution of marijuana. Under the CSA, marijuana is classified as a Schedule I drug. Schedule I drugs are statutorily considered to have “a high potential for abuse” with “no currently accepted medical use in treatment in the United States” and may be lawfully used only for federally

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approved research studies. (As discussed in [a separate CRS report](#), the Department of Health and Human Services in August 2023 reportedly recommended that the Drug Enforcement Administration change marijuana's classification to Schedule III.) CSA violators may be subject to [imprisonment or criminal fines](#), and federal authorities may confiscate property used to facilitate marijuana's growth, sale, or use through civil or criminal [forfeiture](#) proceedings.

Anti-money laundering laws. Depository institutions (e.g., banks, thrifts, and credit unions) and certain other financial institutions that provide banking account, electronic payment, and other financial services to marijuana businesses do not typically possess, distribute, or manufacture marijuana in direct violation of the CSA. At the same time, financial institutions commonly acquire proceeds generated by their customers' product sales. Federal anti-money laundering (AML) laws (i.e., §§ [1956](#) and [1957](#) of the criminal code) criminalize the handling of proceeds derived from various unlawful activities, including marijuana sales in violation of the CSA. Violators of AML laws may be subject to fines and imprisonment. Individuals could be subject to a twenty-year prison sentence and criminal money penalties under § [1956](#) for knowingly engaging in financial transactions involving marijuana-related proceeds with the intent to promote a further offense. For [example](#), a bank could violate § [1956](#) for withdrawing funds generated from marijuana sales from a checking account to pay the salaries of medical marijuana dispensary employees on behalf of the dispensary. [Similarly](#), a bank employee could face a ten-year prison term and criminal money penalties under § [1957](#) for knowingly receiving deposits or allowing withdrawals of \$10,000 or more in cash derived from the distribution or sale of marijuana.

Asset forfeiture. Federal authorities can confiscate, through [civil](#) or [criminal](#) asset [forfeiture](#) proceedings, all proceeds derived from and any real or personal property involved in or traceable to marijuana sales that violate federal law, including AML laws. For example, if a bank provides a loan to a state-authorized marijuana dispensary, federal authorities could require the bank to forfeit the dispensary's loan payments on the grounds that such payments can be traced to federally prohibited marijuana sales.

Bank Secrecy Act. The [Bank Secrecy Act](#) (BSA) requires certain financial institutions to have policies and procedures in place both to ensure that their clients are not engaging in unlawful behavior, such as selling marijuana, and to aid law enforcement by reporting potentially illegal or otherwise suspicious activities. Under the BSA, financial institutions must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding transactions suspected to be derived from illegal activities, including marijuana sales. The BSA also requires depository and certain other financial institutions to establish and maintain AML programs designed to prevent institutions from facilitating money laundering and financing terrorist activity. The programs also help ensure that the institutions' officers and employees have sufficient knowledge of their customers to identify when SARs should be filed. Bank personnel who [willfully fail to file SARs](#) can be subject to imprisonment of up to five years, and institutions that [fail](#) to implement sufficiently rigorous AML programs can suffer stiff civil and criminal money penalties, as well as asset forfeiture.

Administrative enforcement. Additionally, federal regulators can exercise [administrative enforcement actions](#) against financial institutions, their employees, and certain affiliated parties for violating the BSA or AML laws. For example, federal banking regulators (i.e., the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration) implement comprehensive supervisory regimes to ensure that depository institutions operate in a safe and sound manner and comply with applicable laws. To this end, banking regulators have strong, flexible administrative enforcement powers, which they may use against depository institutions and their directors, officers, controlling shareholders, employees, and certain agents and affiliates that act unlawfully. Such unlawful actions [include](#) engaging in marijuana-related activities that violate the BSA or AML laws. Banking regulators may, for instance, [impose remedial measures](#) by issuing [cease-and-desist orders](#), assessing [civil money penalties](#), and issuing [prohibition orders](#) that temporarily or permanently ban individuals from working in the banking industry. In extreme

cases, banking regulators may [revoke an institution's federal deposit insurance](#) and, under certain circumstances—including a criminal conviction under the BSA or AML laws—take control of and liquidate a depository institution.

Financial institutions [expend](#) tens of billions of dollars on BSA/AML compliance each year, and federal banking regulators have [reportedly](#) prioritized BSA and AML compliance to fight financial crime in recent years by increasing both the number of BSA/AML enforcement actions and the size of monetary penalties in these actions.

FinCEN Guidance to Financial Institutions

Although the banking regulators have yet to issue any formal guidance in response to state and local marijuana legalization efforts, FinCEN issued [guidance](#) in February 2014 on financial institutions' SAR reporting requirements when serving marijuana businesses. The guidance identified transactions that might trigger federal enforcement priorities, which include distributing to minors and supporting drug cartels or similar criminal enterprises. The guidance notes the following:

Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. [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].

The [guidance](#) advises financial institutions serving marijuana businesses to file one of the three types of SARs:

1. *A marijuana limited SAR* should be filed when a financial institution determines, after exercising due diligence, that a marijuana business is not engaged in any activities that violate state law or implicate enforcement priorities outlined in the guidance.
2. *A marijuana priority SAR* must be filed when a financial institution believes a marijuana business is engaged in activities that implicate enforcement priorities.
3. *A marijuana termination SAR* should be filed when a financial institution finds that it must sever its relationship with a marijuana business to maintain an effective AML program.

The FinCEN guidance also lists examples of “red flags” that may indicate that a marijuana priority SAR is appropriate, such as if a business fails to sufficiently document state law compliance.

As of June 30, 2023, FinCEN [reported](#) that it has received nearly 350,000 marijuana-related SARs and that about 675 depository institutions were offering financial services to marijuana-related businesses. However, the depth and breadth of financial services that depository institutions are providing to marijuana businesses is unclear. It is also uncertain whether these depository institutions are serving businesses directly involved in cultivating and selling marijuana or are serving only entities indirectly involved in the marijuana business (e.g., landlords renting office space to marijuana businesses).

SAFE(R) Banking Acts

In past Congresses, the House Financial Services Committee [held](#) a markup of a previous version of the SAFE Banking Act, and the full House approved versions of the bill seven times: H.R. 7900 and H.R. 4521 in the 117th Congress, H.R. 3617 in the 117th Congress, H.R. 4350 and H.R. 1996 in the 117th Congress, and H.R. 6800 and H.R. 1595 in the 116th Congress. The first major action on a marijuana banking bill in the Senate occurred in the 118th Congress, when the Senate Banking Committee held a [hearing](#) followed by a [markup](#) and favorable report of S. 2860, the SAFER Banking Act.

The SAFER Banking Act and the very similar 118th Congress version of the SAFE Banking Act (S. 1323 and H.R. 2891) have two primary aims. First, they would constrain federal banking regulatory authority to penalize depository institutions for providing financial services to marijuana businesses complying with state laws. Second, they would protect depository institutions and their personnel from some legal liability under the BSA, AML, and asset forfeiture laws when providing financial services to or investing proceeds derived from serving marijuana businesses complying with state laws. The bills would provide that the proceeds from state-compliant marijuana activities shall not be treated as proceeds from an unlawful source for purposes of federal AML laws. They would further provide that income derived from state-authorized marijuana businesses must be treated like any other lawful source of income for participation in certain federally backed mortgage programs. They would relatedly protect the Federal National Mortgage Association (Fannie Mae); the Federal Home Loan Mortgage Corporation (Freddie Mac); and federal agencies administering federal mortgage loan, guarantee, and insurance programs from asset forfeiture when mortgage payments are derived in part from state-authorized marijuana activities. Additionally, the bills would require FinCEN to issue new guidance on filing marijuana-related SARs consistent with the bill requirements. Finally, the bills would constrain the banking regulators' authority to force or encourage depository institutions to close customer accounts based on reputational risks, including those associated with the customer's ties to state-authorized marijuana activities.

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