

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

February 12, 2019

Memorandum

To: Members, Committee on Financial Services

From: FSC Majority Staff

Subject: February 13, 2019, “Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses”

The Subcommittee on Consumer Protection and Financial Institutions will hold a hearing entitled “Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses” on Wednesday, February 13, 2019, at 2:00 p.m. in room 2128 of the Rayburn House Office Building. This will be a two-panel hearing with the following witnesses:

Panel 1

- **The Honorable Ed Perlmutter**, Member of Congress

Panel 2

- **The Honorable Fiona Ma**, California State Treasurer
- **Maj. Neill Franklin (Ret.)**, Baltimore City & Maryland State Police Departments, and Executive Director, Law Enforcement Action Partnership (LEAP)
- **Ms. Rachel Pross**, Chief Risk Officer, Maps Credit Union, on behalf of Credit Union National Association (CUNA)
- **Mr. Gregory S. Deckard**, President, CEO and Chairman, State Bank Northwest, on behalf of Independent Community Bankers of America (ICBA)
- **Mr. Corey Barnette**, Owner, District Growers Cultivation Center & Metropolitan Wellness Center
- **Mr. Jonathan H. Talcott**, Partner, Nelson Mullins

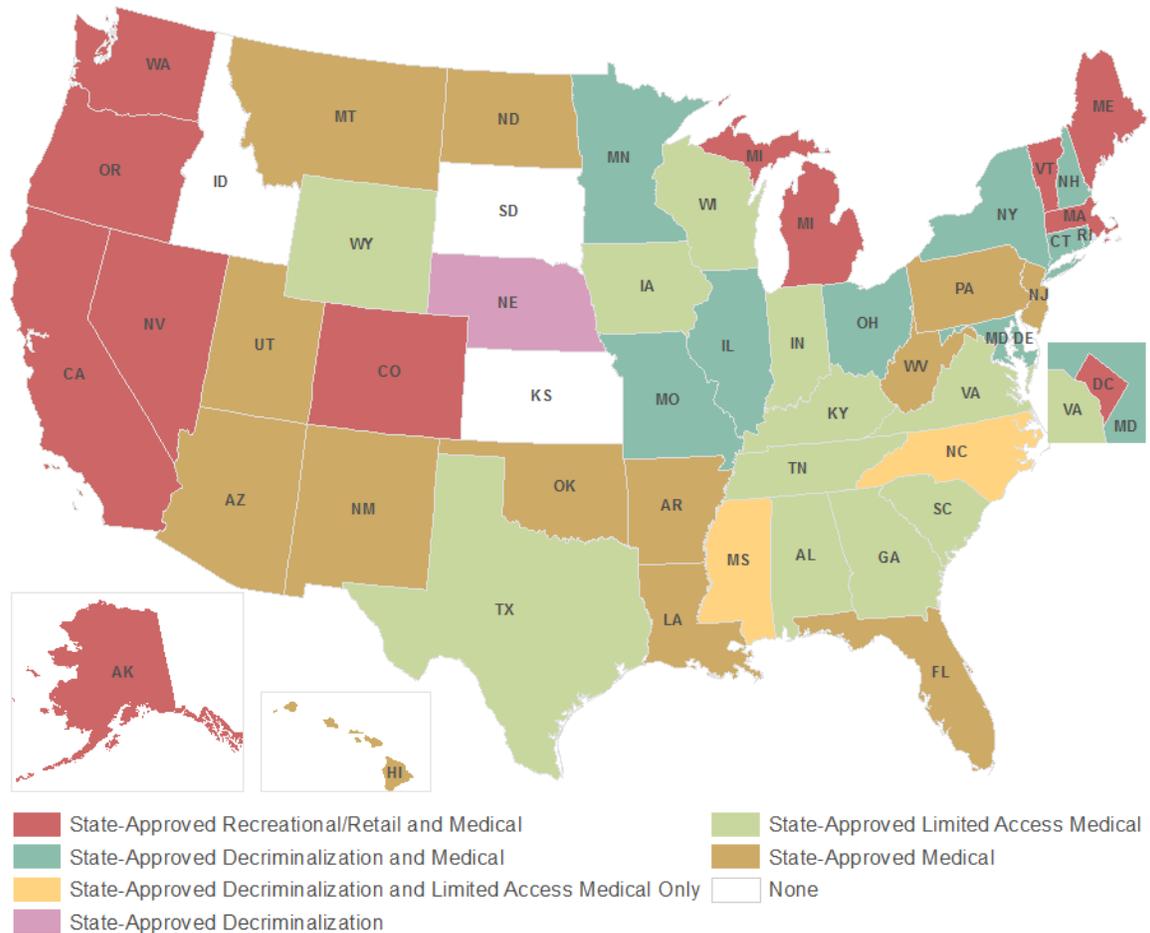
Additional witnesses may be invited.

Overview

An increasing number of financial institutions have expressed interest in providing banking services to state authorized cannabis-related businesses as nearly all states have authorized various degrees of cannabis use, such as for medical use (see Figure 1 below). However, many financial institutions are refraining from offering banking services to these businesses based on several legal and compliance risks. Furthermore, public safety and other concerns have been expressed by stakeholders, including state and local government officials regarding cannabis-related businesses having difficulties accessing basic banking services, such as depositing large sums of cash from their business activity.

Reps. Ed Perlmutter (D-CO), Denny Heck (D-WA), Steve Stivers (R-OH), and Warren Davidson (R-OH) have a discussion draft for the Secure and Fair Enforcement Banking Act of 2019 (SAFE Banking Act) that will be considered at this hearing. The proposal, among other things, would harmonize federal and state law concerning cannabis-related businesses and allow these businesses access to banking services. Additionally, depository institutions and their employees would be exempt from federal prosecution or investigation solely for providing banking services to a state authorized cannabis-related business.

Figure 1. Map of State Marijuana Laws
February 2019



Source: CRS presentation of data from the National Conference of State Legislatures.¹

Background

¹ Limited-access medical marijuana refers to cannabis with low THC content or cannabidiol (CBD) oil. "State-approved" refers to either state laws that (1) allow for recreational and/or medical marijuana use and/or (2) decriminalize the possession of marijuana in small amounts. "Decriminalization" refers to a state's action to remove accompanying criminal penalties for possession of marijuana in small amounts; however, civil penalties remain. While the District of Columbia (DC) has approved recreational retail of marijuana, Congress has blocked DC from using funds to regulate and tax marijuana sales. Of the U.S. territories, only the Northern Mariana Islands have approved recreational/retail marijuana use. Guam and Puerto Rico have approved medical marijuana use. Guam and the U.S. Virgin Islands have approved decriminalization of marijuana. American Samoa has not taken any action to either decriminalize marijuana or approve recreational or medical marijuana.

Under federal law, the cultivation, possession, and distribution of marijuana are illegal, except for the purposes of sanctioned research. States, however, have established a range of laws and policies regarding marijuana's medical and recreational use. Most states have deviated from an across-the-board prohibition of marijuana, and it is now more so the rule than the exception that states have laws and policies allowing for some cultivation, sale, distribution, and possession of marijuana—all of which are contrary to the federal Controlled Substances Act (CSA). Nearly all states allow for the medical use of marijuana in some capacity, and a small but increasing number of states allow for some recreational use of marijuana (see Figure 1 above). These developments have spurred several questions for policymakers, including issues relating to access to financial services provided by federally-insured depository institutions for state authorized cannabis-related businesses.²

Current federal anti-money laundering requirements affirmatively enlist financial institutions to aid in the investigation and prosecution of those who violate federal laws, including the CSA. For example, financial institutions generally must file suspicious activity reports (SARs) with FinCEN regarding financial transactions suspected to be derived from specified illegal activities, including the sale of marijuana. Depository institutions and certain other financial institutions also must establish and maintain anti-money laundering programs, designed to ensure that the institutions' officers and employees have sufficient knowledge of their customers and of the businesses of those customers to identify the circumstances under which filing SARs is appropriate. 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." The failure to comply with these reporting requirements can result in fines and imprisonment.

In response to ongoing state cannabis legalization efforts, both the Department of Justice (DOJ) and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) have issued various memos and guidance on the topic. For example, in an August 29, 2013 memorandum, former Deputy Attorney General James Cole stated that while marijuana remains an illegal substance under the CSA, DOJ would focus its resources on the "most significant threats in the most effective, consistent, and rational way." The memo outlined eight enforcement priorities for DOJ, including preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; and preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity.³ In a February 14, 2014 memorandum, Deputy Attorney General Cole further reinforced these enforcement priorities, specifically as they relate to the prosecution of marijuana-related financial crimes. The memo directed the U.S. Attorneys that "in determining whether to charge individuals or institutions with ... [certain financial] offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance."⁴

² For a broader discussion of these policy issues, see "The Marijuana Policy Gap and the Path Forward," Lisa N. Sacco, Congressional Research Service, March 10, 2017, available at: <http://www.crs.gov/Reports/R44782>. Furthermore, various state and local governments have explored different ways to address the specific challenges with access to financial services for cannabis-related businesses. For example, see the California Cannabis Banking Working Group materials, available at: <https://www.treasurer.ca.gov/cbwg/>.

³ "Guidance Regarding Marijuana Enforcement," U.S. Department of Justice, August 29, 2013, available at: <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁴ "Guidance Regarding Marijuana Related Financial Crimes," U.S. Department of Justice, February 14, 2014, available at: <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>.

FinCEN issued its own guidance with respect to cannabis-related financial crimes on February 14, 2014.⁵ This guidance provides a roadmap for financial institutions seeking to comply with suspicious activity reporting requirements when providing financial services to state authorized cannabis-related businesses, while also alerting FinCEN to transactions that might trigger federal enforcement priorities. Specifically, the FinCEN guidance states 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].⁶

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

1. Cannabis Limited SAR: The cannabis limited SAR is seen to be appropriate when the bank determines, after the exercise of due diligence, that a customer is not engaged in any activities that violate state law or implicate the investigation and prosecution priorities in the Cole Memorandum;⁷
2. Cannabis Priority SAR: A cannabis priority SAR must be filed when the financial institution believes a customer is engaged in activities that implicate DOJ's investigation and prosecution priorities;⁸ and,
3. Cannabis Termination SAR: A financial institution is instructed to file a cannabis termination SAR when it finds it necessary to sever its relationship with a customer to maintain an effective anti-money laundering program.

FinCEN also provides examples of “red flags” that may indicate that a cannabis priority SAR is appropriate.⁹

On January 4, 2018, then Attorney General Jeff Sessions issued a new DOJ memo on marijuana enforcement, effectively rescinding the memoranda written by former Deputy Attorney General Cole on the topic. However, after Reps. Heck, Perlmutter, Young and other Members of Congress wrote a letter urging FinCEN to maintain their 2014 guidance,¹⁰ the Treasury Department responded that the FinCEN guidance would remain in place.¹¹

Notwithstanding the FinCEN guidance remaining valid, many financial institutions remain reluctant to serve cannabis-related businesses, and many of those businesses continue to have little to no access to traditional banking services. As such, cannabis-related businesses have been

⁵ “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>.

⁶ Ibid.

⁷ “Guidance Regarding Marijuana Enforcement,” U.S. Department of Justice, August 29, 2013, available at: <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁸ Ibid., p. 4.

⁹ Ibid., pp. 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.”

¹⁰ <https://dennyheck.house.gov/sites/dennyheck.house.gov/files/FINCEN%20MJ%20Guidance%20Letter%20FINAL.pdf>

¹¹ https://dennyheck.house.gov/sites/dennyheck.house.gov/files/documents/Treasury%20Response%201.31.18_Heck.pdf

described as a “soft target” for being robbed and assaulted,¹² having their stores broken into,¹³ and their plants stolen.¹⁴ Despite the public safety and other risks, many of these businesses have to operate as purely cash businesses, unable to accept credit cards, deposit their profits or write checks to pay employees or taxes.

Additionally, there are related challenges that ancillary businesses face that provide various products and services to cannabis-related businesses, such as electricians, plumbers and landlords. Even those these businesses do not work directly with cannabis, maintaining a checking account or utilize payment processors can prove challenging.¹⁵ For example, in early 2017, dozens of companies selling ancillary products and services to cannabis-related businesses were unexpectedly purged and lost access to major payment processors, like PayPal and Square.¹⁶

SAFE Banking Act of 2019

Reps. Perlmutter, Heck, Stivers and Davidson have a discussion draft of the SAFE Banking Act of 2019 that will be considered at the hearing.¹⁷ With respect to providing banking services to cannabis-related businesses that are operating in accordance to state law, this legislation would harmonize federal and state law by prohibiting federal banking regulators from engaging in certain actions against financial institutions, such as discouraging, prohibiting, or penalizing depository institutions that serve cannabis-related legitimate businesses.

Additionally, any depository institution or employee of the institution would be exempt from federal prosecution or investigation solely for providing banking services to a state authorized cannabis-related business. This safe harbor is intended to provide certainty for financial institutions to offer their products and services to well-regulated cannabis-related businesses.

Compared to H.R. 2215, the discussion draft of the SAFE Banking Act of 2019, among other things: adds protections for ancillary businesses providing products or services to a cannabis-related legitimate business; specifies how businesses on tribal land could qualify; and requires the Federal Financial Institution Examination Council to develop guidance to help financial institutions lawfully serve cannabis-related legitimate businesses.

¹² “They See a Soft Target, They Are Going to Go After It’: Rip-Off Risks Remain in Cannabis Cash Economy,” Liz Wagner, Bethney Bonilla, Michael Bott, Michael Horn, NBC Bay Area, May 14, 2018, available at: <https://www.nbcbayarea.com/news/local/Rip-Off-Risks-Remain-in-Cannabis-Cash-Economy-482591081.html>.

¹³ “After a string of robberies, pot shops call for state’s help,” Deedee Sun, KIRO7, April 5, 2018, available at: <https://www.kiro7.com/news/local/after-a-string-of-robberies-pot-shops-call-for-states-help/727885863>.

¹⁴ “For Maine’s marijuana industry, security’s still high-risk,” Penelope Overton, Portland Press Herald, August 9, 2018, available at: <https://www.pressherald.com/2018/08/19/for-marijuana-industry-securitys-still-high-risk/>.

¹⁵ “When your business is serving cannabis companies, just keeping a bank account is tricky,” Tina Reed, Washington Business Journal, April 18, 2017, available at: <https://www.bizjournals.com/washington/news/2017/04/18/when-your-business-is-serving-cannabis-companies.html>. Also see “You already bank the pot industry. You just don’t know it,” Loren Picard, American Banker, June 30, 2017, <https://www.americanbanker.com/opinion/you-already-bank-the-pot-industry-you-just-dont-know-it>.

¹⁶ “Payment Processors Purge All Ancillary Marijuana Startups After Trump,” Will Yakowicz, Inc., April 10, 2017, available at: <https://www.inc.com/will-yakowicz/payment-processors-purge-marijuana-related-businesses.html>.

¹⁷ The bill is similar to H.R. 2215, the Secure and Fair Enforcement Act of 2017 (SAFE Banking Act) that was introduced in the 115th Congress by Reps. Perlmutter, Heck and others. H.R. 2215 (115th Congress), the Secure and Fair Enforcement Banking Act of 2017, available at: <https://www.congress.gov/bill/115th-congress/house-bill/2215>. Also see <https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=1717>.