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Not a SAFE Bet: Equitable Access to Cannabis Banking

An Analysis of the SAFE Banking Act

DRUG ENFORCEMENT AND POLICY CENTER

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ABSTRACT

According to its sponsors and supporters, the Safe and Fair Enforcement (“SAFE”) Banking Act would help address the challenges faced by small cannabis businesses that cannot currently access banking services or loans. With cannabis social equity programs ramping up across the nation but their participants lacking capital, a bill to solve that problem would be a well-timed blessing. But unfortunately, SAFE, as written, is unlikely to result in equitable access to financial services.

This paper summarizes the bill, analyzes why it would fall short of its purported goals, and makes recommendations to improve the bill. Here are our ten recommended amendments in short form, recognizing that none are an adequate solution on its own:

1. Use revenue collected by 280E to create a fund providing capital for businesses owned by people harmed by the War on Drugs.
2. As a condition of safe harbor, require financial institutions to demonstrate compliance with anti-discrimination laws such as the Equal Credit Opportunity Act.
3. Explicitly protect Minority Depository Institutions (MDIs) and Community Development Financial Institutions (CDFIs).
4. Raise evidentiary requirements and limit enforcement penalties for MDIs and CDFIs for servicing legitimate cannabis businesses.
5. Expand required federal guidance and reports to promote equity alongside diversity and inclusion.
6. Require federal banking regulators to identify best practices to achieve racial equity in financial services.
7. Clarify that cannabis criminal records are not an automatic red flag.
8. Identify barriers beyond marketplace entry by including barriers experienced before, during, and after the licensure process.
9. Study and report on diversity, equity, and inclusion in the hemp industry, as well as the cannabis industry.
10. Promote compliance with state and local regulatory requirements regarding business ownership.

ABOUT THE CANNABIS REGULATORS OF COLOR COALITION

The Cannabis Regulators of Color (CRCC) is a coalition of government officials appointed or selected to lead, manage, and oversee regulatory and policy implementation for legal medical and adult-use cannabis markets across the nation and abroad. As leaders in post-prohibition cannabis policy, we focus on equity-centered regulation, industry best practices and cannabis competency and standardization.

Our mission is to be a source of education for legislators and government agencies that aim to identify and eliminate racial disparities in cannabis policy and build sustainable cannabis regulatory frameworks designed to deliver on the reparative and restorative potential of the global cannabis legalization and decriminalization movement.

Described as architects of cannabis equity and policy reform in the United States, our collaboration strategy is to work with stakeholders who believe in our values and commit to our shared goals.

ABOUT THE AUTHORS



Cat Packer

Distinguished Cannabis Policy Practitioner in Residence, Drug Enforcement and Policy Center, Moritz College of Law, The Ohio State University

Vice Chair, Cannabis Regulators of Color Coalition

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Cat Packer is a leading expert on cannabis law and policy who envisions cannabis policy reform as both an opportunity and responsibility to promote harm reduction and advance equity and social justice. Currently, Packer serves as Distinguished

Cannabis Policy Practitioner in Residence at the Drug Enforcement and Policy Center, Vice Chair of the Cannabis Regulators of Color Coalition, and is a contributing author to the Thomas Reuters Cannabis Law Deskbook.

Packer is recognized as the first person of color in the nation to lead a medical and adult-use cannabis regulatory program. From 2017 to 2022, Packer served as the first Executive Director of the City of Los Angeles Department of Cannabis Regulation where she led efforts to advise and implement cannabis business licensing and regulation in 'the world's largest cannabis market.' Under her leadership, the City of Los Angeles licensed over 1200 cannabis businesses, collected over \$320 million in cannabis tax revenue and became one of the first jurisdictions in the nation to establish programming designed to promote equitable ownership and employment opportunities in the cannabis industry.

Prior to her role as a regulator, Packer worked for the Drug Policy Alliance where she organized cannabis-related legislative and public affairs strategies and partnerships at the state and local level. Packer is a proud alumna of The Ohio State University where she received a bachelor's degree in political science, a master's degree in public policy and management, a Juris Doctor and was named the 2020 Recipient of the Moritz College of Law Outstanding Recent Alumna Award.



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Shaleen Title is an Indian-American attorney and longtime drug policy activist who currently serves as Distinguished Cannabis Policy Practitioner in Residence at the Drug Enforcement and Policy Center. Title is co-founder of Parabola Center and vice-chair of the Cannabis Regulators of Color Coalition, and in 2021 was named

to Boston's 40 Under 40 List. She was appointed by the Massachusetts governor, attorney general, and treasurer to serve as one of five inaugural commissioners of the Cannabis Control Commission from 2017 to 2020. During her time as a regulator, she was widely recognized for her focus on racial justice and her efforts to make the cannabis industry more fair and inclusive. Before her term as commissioner, she worked on multiple state marijuana legalization campaigns, and as a founding board member of the Minority Cannabis Business Association she led the drafting of the first model bill created to give states guidance to implement a process of reinvestment and reconciliation. She is an advisor to Supernova Women, a nonprofit organization providing a space for women of color in cannabis, and the THC Staffing Group Mentorship Program.

Shaleen is a frequent lecturer on cannabis policy and has testified in front of governmental bodies around the world about restorative justice in marijuana laws. She has been interviewed by numerous media outlets and she routinely partners with leading drug policy organizations to support drug policy reform. Shaleen holds a business degree, law degree, and graduate degree in accounting.



Rafi Aliya Crockett

Commissioner, Washington, D.C. Alcoholic Beverage Control Board
Treasurer, Cannabis Regulators of Color Coalition

Rafi Aliya Crockett is founder of Maroon Compliance, a compliance, risk and regulatory consultancy. Having begun her career as a regulator at both OFAC and FinCEN, Ms. Crockett has over 15 years of experience driving compliance and regulatory change management for financial institutions, government agencies and private sector organizations, both domestically and internationally.

In 2019, Ms. Crockett was appointed to Washington, D.C.'s Alcoholic Beverage Control Board, the District's alcohol and cannabis regulator. As a board member, Ms. Crockett works with legislators and government agencies to drive change focused on eliminating disparities in access, ownership and participation in the city's alcoholic beverage and cannabis industries.

Ms. Crockett is Treasurer of the Cannabis Regulators of Color Coalition, a coalition of government officials focused on equity-centered regulation, industry best practices, and cannabis competency and standardization. Ms. Crockett is a member of the National Cannabis Industry Association, and the first regulator to serve on its Diversity, Equity and Inclusion Committee. Ms. Crockett is writer and executive producer of the forthcoming documentary film, Higher Power, about cannabis legalization, racial justice and statehood in Washington, D.C.



Dasheeda Dawson

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Chair, Cannabis Regulators of Color Coalition
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Dasheeda Dawson is a global cannabis advocate, award-winning Fortune 100 business strategist and bestselling author of *How to Succeed in the Cannabis Industry* featured across multiple outlets including *Entrepreneur*, *The New York Times*, and *Essence*. She has nearly 20 years of business development, strategic management and brand marketing excellence while leading transformative businesses for philanthropic and for-profit corporations. For over five years, she

has worked as a cannabis-focused educator, senior executive leader, and strategy expert for multiple businesses, municipalities, and media outlets across the country.

Currently, Dasheeda is the City of Portland's Cannabis Program Manager in the Office of Community & Civic Life, responsible for overseeing all regulatory licensing, compliance and equity initiatives for the city's cannabis industry. Supported by ongoing cannabis tax revenue allocation, her office oversees the Social Equity & Educational Development (SEED) Initiatives which includes the nationally-modeled SEED Grant Fund, the country's first community reinvestment fund tied to cannabis tax revenue. Under her leadership, Portland recently approved a multimillion dollar Cannabis Emergency Relief Fund (CERF) becoming the first government jurisdiction in the country to allocate cannabis tax revenue to specifically provide aid and emergency relief to the industry. In her role, she also serves as Chair of the Cannabis Regulators of Color Coalition (CRCC).

Dasheeda received her MBA from Rutgers Business School and completed her undergraduate degree in molecular biology at Princeton University. She is a weekly correspondent on SiriusXM Urban View (ch. 126) and co-host on *She Blaze*, an award-winning weekly cannabis news and culture podcast available on Spotify, Apple Podcasts and iHeartRadio. Dasheeda is co-founder and Chief Strategist for Cannabis Health Equity Movement (CHEM) and co-founder of Community Education Advocacy Symposium & Expo (CEASE), a Brooklyn-based nonprofit organization.

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EXECUTIVE SUMMARY

Passed by the U.S. House of Representatives seven times, the SAFE Banking Act would amend federal law to prevent federal banking regulators from penalizing depository institutions for providing financial services to “legitimate” cannabis and hemp businesses. SAFE would also establish that for anti-money laundering purposes, proceeds derived from state-legal cannabis businesses are not considered proceeds derived from unlawful activity. Whether these measures would significantly increase financial services provided to small cannabis businesses is unclear at best. This topic—cannabis banking reform as an equity issue—was briefly acknowledged and questioned¹ at a July, 26, 2022 hearing of the U.S. Senate Judiciary Subcommittee on Criminal Justice and Counterterrorism titled “Decriminalizing Cannabis at the Federal Level: Necessary Steps to Address Past Harms” further contributing to an ongoing debate² about the impact that the SAFE Banking Act could have on racial equity in cannabis banking.

The SAFE Banking Act would provide financial institutions protections for activities that have never actually been subject to severe consequences. Currently, an estimated 200 to 800 depository institutions already provide some form of financial services to cannabis-related businesses in accordance with 2014 FinCEN guidance. With the exception of one action taken against a credit union, based on an inadequate compliance program, it does not appear that federal regulators are penalizing financial institutions for banking the cannabis industry.

Of particular significance, the SAFE Banking Act would not require financial institutions to provide services to the cannabis industry and cannabis’s federally illegal status would remain unchanged. Instead, SAFE would maintain financial institutions’ discretion to decide whether to serve a particular client or industry. Because the application of this discretion is highly dependent on perceptions of risk and profit—both of which are impacted by cannabis’s federally illegal status—the bill is unlikely, without more comprehensive reforms, to significantly change existing issues related to access and equity for small cannabis businesses that currently have inadequate access to banking services or loans.

Moreover, the SAFE Banking Act neither acknowledges, nor takes any steps to address, existing and longstanding inequities that are prevalent throughout the financial services industry. These inequities are likely to persist and could worsen for cannabis businesses who experience compounded racial inequities in the cannabis industry. For these reasons, the SAFE Banking Act, in its current form, is not a safe bet to achieve fair and equitable access to financial services for those in the cannabis industry.

SAFE would address only the legal and regulatory consequences potentially faced by financial institutions for providing services to the cannabis industry. Without additional legislative amendments to directly address challenges related to fair and equitable access to financial services, small and minority-owned cannabis businesses that currently have inadequate access to banking services or loans are likely to continue to be denied the full breadth and depth of services offered to others. Based on our equity-focused experience regulating cannabis businesses across the nation, we believe that our recommendations, which include explicit efforts to address equity, taken together, can transform the SAFE Banking Act from a bill that is likely to maintain or, worse, widen the equity gap to a significant set of measures to benefit the people who need it most.

¹ Decriminalizing Cannabis at the Federal Level: Necessary Steps to Address Past Harms, Hearing of the U.S. Senate Judiciary Subcommittee on Criminal Justice and Counterterrorism, 117th Congress (2022) <https://www.youtube.com/watch?v=GJcHpSTOGdg>

² Jaeger, Kyle. “Is Cory Booker Ready to Embrace Marijuana Banking Reform? New Comments Hint at Possible Pivot.” Marijuana Moment, July 27, 2022 <https://www.marijuanamoment.net/is-cory-booker-ready-to-embrace-marijuana-banking-reform-new-comments-hint-at-possible-pivot/>

INTRODUCTION

Federal laws continue to criminalize activities involving cannabis and cannabis-related proceeds. Because of these laws, financial institutions that provide financial services to cannabis businesses are at risk of violating federal law, even when those cannabis businesses are compliant with state laws authorizing cannabis for medical and/or adult use. As a result, they could be subject to severe legal and regulatory consequences.

The SAFE Banking Act would eliminate the risk of these federal consequences by establishing safe harbor for financial institutions when providing financial services to hemp businesses and cannabis businesses complying with state laws, as well as when investing proceeds derived from those services. Proponents of SAFE claim that establishing this protection for banks will result in increased and fair access to banking for the cannabis industry³ and that this increase in access will promote financial transparency⁴ and public safety by reducing cash within the cannabis industry.⁵ Moreover, they allege the legislation would advance goals of racial equity within the cannabis industry by helping minority operators access much-needed capital and financial services.⁶

“Individuals who are truly concerned about access and equity should acknowledge that the SAFE Banking Act, in its current form, is not a safe bet to ensure fairness.”

However, despite claims that the SAFE Banking Act would improve issues related to access and equity, SAFE would maintain financial institutions’ discretion to decide whether to serve a particular client or industry. Moreover, although evidence suggests that many financial institutions’ *specific* concern regarding federal consequences has already been lowered by federal banking regulators’ generally laissez-faire approach, other financial institutions are likely to continue to decide against banking the cannabis industry due to concerns of other associated risks. Furthermore, documented patterns of discriminatory practices in the financial services industry indicate that if Congress does not take proactive measures to promote and prioritize equity, Black and Brown communities seeking financial services to participate in the legal cannabis industry are likely to experience continued inequities. As a result, SAFE’s offer of protection from federal consequences is unlikely to result in a dramatic change to the way financial institutions decide to whom to provide services within the cannabis industry.

Consequently, individuals who are truly concerned about access and equity should acknowledge that the SAFE Banking Act, in its current form, is not a safe bet to ensure fairness. Without immediate and ongoing prioritization of these issues, barriers to access are likely to remain prevalent and disparities could worsen. Those concerned about equity within cannabis public policy reform more generally should consider the impact that Congress’ prioritization of SAFE, rather than equity-centered reforms, could have on broader efforts to comprehensively address the Drug War’s lasting inequities. In other words, we should brace ourselves for the harm that the SAFE Banking Act will cause if passed as written.

FEDERAL LAWS AND LEGAL CONSEQUENCES

Federal laws, namely the Controlled Substances Act (CSA), the Bank Secrecy Act (BSA), and anti-money laundering (AML) laws, criminalize activities involving cannabis and cannabis-related proceeds. Because of these laws, financial institutions that provide financial services to the cannabis industry could be subject to severe legal and regulatory consequences, even if the cannabis businesses serviced are compliant with state laws authorizing cannabis for medical and/or adult use.

³ Smith, Aaron. National Cannabis Association. Letter to U.S. House Committee on Financial Services Chair Maxine Waters and Ranking Member Patrick McHenry. March 16, 2021. https://perlmutter.house.gov/uploadedfiles/national_cannabis_industry_association.pdf

⁴ Nichols, Rob. American Bankers Association. Letter to U.S. Reps. Ed Perlmutter, Nydia M. Velázquez, Steve Stivers, and Warren Davidson. March 17, 2021. https://perlmutter.house.gov/uploadedfiles/american_bankers_association.pdf

⁵ Cannabis Regulators Association. Letter to U.S. Senate Majority Leader Chuck Schumer and Minority Leader Mitch McConnell and U.S. House Speaker Nancy Pelosi and Minority Leader Kevin McCarthy. “Re: Urging Policy Action to Address Current Cannabis Banking Situation in States,” May 18, 2021. <https://www.cann-ra.org/news-events/1t70jdxso1c16t1zvea1o5zgbaocw>

⁶ Minority Cannabis Business Association. “The SAFE Banking Act of 2019.” <https://minoritycannabis.org/wp-content/uploads/2021/10/SAFE-Banking-Act-of-2019.pdf>

Under the Controlled Substances Act, the production, distribution, and possession of cannabis is a crime under federal law except for the purposes of research sanctioned by the Drug Enforcement Administration (DEA).⁷ Those who violate the CSA, including any state-legal cannabis business or consumer, could be subject to imprisonment and fines, and any property used to grow marijuana or facilitate its sale or use could be confiscated by federal authorities through civil or criminal forfeiture proceedings.⁸

Although a financial institution's provision of financial services to cannabis clients is not a direct violation of the CSA, federal AML laws criminalize the handling of proceeds that are knowingly derived from specified unlawful activities.⁹ The Financial Crimes Enforcement Network (FinCEN) defines money laundering as the process of making illegally gained proceeds appear legal.¹⁰ Consequently, when providing financial services to the cannabis industry, financial institutions are considered to be engaged in financial transactions involving proceeds derived from illegal activity and could be subject to imprisonment, fines, and civil or criminal asset forfeiture for violating federal AML laws.¹¹

Moreover, the Bank Secrecy Act requires financial institutions to establish and maintain AML programs and to assist law enforcement to detect and prevent money laundering. In order to accomplish these objectives, financial institutions are required to report and record financial transactions that are considered to have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."¹² Specifically, financial institutions are required to file suspicious activity reports (SARs) with FinCEN regarding financial transactions suspected to be derived from unlawful activities,¹³ which includes cannabis-related transactions. To mitigate the risks of money laundering, financial institutions are required to conduct customer due diligence, and institutions' officers and employees are required to have sufficient knowledge of their clients' businesses to identify when filing SARs is appropriate.¹⁴

Depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates who violate federal AML laws or the Bank Secrecy Act could be subject to administrative enforcement actions by federal banking regulators. These actions could include cease-and-desist orders, the imposition of civil money penalties, and the issuance of removal and prohibition orders that temporarily or permanently ban individuals from working for depository institutions.¹⁵ In certain cases, institutions could face revocation of their federal deposit insurance or even seizure and liquidation.

WHAT THE SAFE BANKING ACT DOES

Protections for Financial Institutions

To protect financial institutions from the aforementioned federal legal and regulatory consequences associated with activities involving cannabis and cannabis-related proceeds, SAFE would prevent federal banking regulators from penalizing depository institutions solely for providing financial services to legitimate hemp and cannabis businesses, with "legitimate" defined as complying with state laws and the 2018 Farm Bill. The legislation would also protect depository institutions and their personnel from some legal liability under the BSA, AML laws, and asset forfeiture laws when providing financial services to, or investing proceeds derived from serving, state-compliant hemp and cannabis businesses.¹⁶ Of particular note for anti-money laundering purposes, SAFE would declare that proceeds derived from state-legal cannabis businesses are not considered proceeds derived from unlawful activity.¹⁷

⁷ Controlled Substances Act. H.R. 18583 (1970).

⁸ 21 U.S.C. § 844(a) & 841(b).

⁹ 18 U.S.C. §§ 1956–1957.

¹⁰ "History of Anti-Money Laundering Laws." Financial Crimes Enforcement Network. <https://www.fincen.gov/history-anti-money-laundering-laws>

¹¹ 18 U.S.C. §§ 1956-1957.

¹² Bank Secrecy Act. H.R. 15073 (1970).

¹³ 31 U.S.C. § 5318(g).

¹⁴ 31 U.S.C. § 5318(g)–(h).

¹⁵ "Enforcement Actions." Board of Governors of the Federal Reserve System. <https://www.federalreserve.gov/supervisionreg/enforcement-actions-about.htm>

¹⁶ H.R. 1996, "Safe Banking Act of 2021." 117th U.S. Congress (2021–2022). <https://www.congress.gov/bill/117th-congress/house-bill/1996>

¹⁷ Ibid.

Updated Guidance from Federal Banking Regulators

SAFE would require federal banking regulators to update guidance for financial institutions serving cannabis and hemp businesses. Specifically, regulators would be required, within 180 days of enactment, to update the 2014 guidance titled “BSA Expectations Regarding Marijuana-Related Businesses” (FIN–2014–G001) to detail requirements for filing SARs regarding cannabis-related legitimate businesses or service providers. As for hemp, within 90 days of enactment, regulators would need to update “existing guidance, as applicable, regarding the provision of financial services to hemp-related legitimate businesses and hemp-related service providers.”¹⁸ SAFE would require legitimate cannabis and hemp businesses to comply with the updated guidance. SAFE would also require the Financial Institutions Examination Council to “develop uniform guidance and examination procedures” for depository institutions that provide financial services to cannabis-related businesses or service providers.¹⁹

Reports and Studies

SAFE would require federal banking regulators and the U.S. Government Accountability Office (GAO) to conduct certain studies and issue reports, including those pertaining to diversity and inclusion. Banking regulators would need to issue reports annually on “information and data on the availability of access to financial services for minority-owned and women-owned cannabis-related legitimate businesses” and “any regulatory or legislative recommendations for expanding access to financial services for minority-owned and women-owned cannabis-related legitimate businesses.”²⁰ The GAO, meanwhile, would be mandated to study “the barriers to marketplace entry, including in the licensing process, and access to financial services for potential and existing minority-owned and women-owned cannabis-related legitimate businesses.” The study’s findings would be included in a report to Congress along with “any regulatory or legislative recommendations.”²¹

SAFE would also require the GAO, within two years of the law’s enactment, to conduct a study to determine the effectiveness of SARs “at finding individuals or organizations suspected or known to be engaged with transnational criminal organizations” and whether such activity occurs in jurisdictions that have authorized cannabis-related activity.²² Unrelated to cannabis specifically, SAFE would also establish new requirements for federal banking agencies to follow when making deposit account termination requests and orders. SAFE would prevent agencies from requesting or ordering a depository to terminate a customer account unless the agency has a valid reason for doing so, and that reason is not based solely on reputational risk. SAFE would further require federal banking regulators to report related data annually to Congress.²³

WHY SAFE IS NOT LIKELY TO RESULT IN EQUITABLE ACCESS TO BANKING

Despite claims from both the financial services industry²⁴ and the cannabis industry²⁵ that the SAFE Banking Act is the most viable way to address the challenges associated with cannabis banking, including access and equity, evidence suggests that the safe harbor provisions in SAFE would have a limited practical impact. First, although the federal government has been aware of the existence of banks serving cannabis clients since at least 2014, its approach to cannabis banking has been chiefly to provide guidance. So far it has stopped short of imposing severe legal or regulatory consequences. Second, SAFE would not explicitly require that financial institutions provide services to the cannabis industry. Instead, it would leave the decision to the discretion of individual financial institutions. Consequently, many financial services providers are likely, at least in the immediate future, to choose not to provide services to the cannabis industry based on other sources of perceived risk. Third, without additional efforts to acknowledge and address equity, existing racial disparities in the financial industry are likely to be perpetuated

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Nichols. American Bankers Association. Ibid.

²⁵ Smith. National Cannabis Association. Ibid.

and exacerbated for businesses in the cannabis industry that seek financial services. For these reasons, SAFE may increase access to cannabis banking services for some, but it is unlikely to result in fair access for all.

The Current State of Cannabis Banking

Despite the authority that law enforcement and regulators technically have under the CSA, the BSA, and AML laws, federal agencies' reaction to recent state-level cannabis legalization has been to provide guidance rather than to penalize financial institutions solely for providing financial services to the cannabis industry.

In 2014, FinCEN issued guidance, titled "BSA Expectations Regarding Marijuana-Related Businesses" (FIN-2014-G001), that acknowledged the existence of both "state initiatives to legalize certain marijuana-related activity" and financial institutions that were already seeking to provide services to marijuana-related businesses.²⁶ This guidance reiterated the illegal status of cannabis under the CSA and identified related federal law enforcement priorities established within a 2013 Department of Justice memo²⁷ but clarified that financial institutions could provide services to marijuana-related businesses consistent with their BSA obligations to file a suspicious activity report on financial transactions involving illegal activity. Regulators said at the time that they expected the guidance to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses."²⁸ Specifically, the 2014 FinCEN guidance notes that "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. 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's suspicious activity reporting requirements and related thresholds."²⁹

The guidance specifies that financial institutions serving cannabis businesses must file one of three types of SARs: A marijuana limited SAR should be filed when a financial institution determines, based on its customer due diligence, that a cannabis business is not engaged in activities that violate state law or federal enforcement priorities. A marijuana priority SAR should be filed when a financial institution believes, based on its customer due diligence, that a cannabis business is engaged in activities that violate state law or federal enforcement priorities. And a marijuana termination SAR should be filed when a financial institution deems it necessary to terminate a relationship with a cannabis business in order to maintain an effective anti-money laundering compliance program.³⁰

Since the FinCEN guidance was released, available data has revealed an increasing number of financial institutions providing services to the cannabis industry. According to Bloomberg, the cannabis banking industry is "booming."³¹ Moreover, this reality is no secret to banking regulators: Federal data confirm not only the existence of financial institutions that provide financial services to the cannabis industry but also the growing number of such institutions.³² As of September 2021, FinCEN reported that 755 depository institutions claimed to provide some form of financial services to marijuana-related businesses, up from 686 a year prior.³³

While FinCEN notes that, as of September 2021, there were 755 depository institutions banking legitimate cannabis-related businesses (CRBs), the exact figure is disputed. Many in the cannabis and financial services industries claim a more accurate number is between 200 and 250. Green Check Verified, which provides technology and advisory services to financial institutions in order to service CRBs, currently works with more than 100 institutions in nearly every state with some form of legal cannabis program, according to Peter Su, Green Check's national relationship manager. Of those, 58 percent are banks and 42 percent are credit unions, and according to Su, they offer "a full spectrum of commercial banking products, aside from credit cards and certain restrictions with wires." Though the

²⁶ "BSA Expectations Regarding Marijuana-Related Businesses," FIN-2014-G001. Financial Crimes Enforcement Network (FinCEN), February 14, 2014. <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf>

²⁷ Cole, James M., Deputy Attorney General, U.S. Department of Justice. "Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes," August 29, 2013. <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

²⁸ "BSA Expectations..." FinCEN. Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Kary, Tiffany. "Cannabis Banking Is Booming Despite Federal Uncertainty." Bloomberg, January 18, 2022.

<https://www.bloomberg.com/news/newsletters/2022-01-18/marijuana-banking-is-moving-forward-despite-federal-uncertainty>

³² "Marijuana Banking Update." Financial Crimes Enforcement Network, 2021.

https://www.fincen.gov/sites/default/files/shared/305326_MJ%20Banking%20Update%204th%20QTR%20FY2021_Public_Final.pdf

³³ Ibid.

boundaries of financial services currently being provided to the cannabis industry are unclear,³⁴ existing data confirms that cannabis banking in accordance with guidance has existed for years without evidence of penalties.

Although federal banking regulators are often characterized by their “strong, flexible administrative enforcement powers”³⁵ and “comprehensive supervisory regimes to ensure that depository institutions operate in a safe and sound manner and comply with applicable laws,”³⁶ to date, no regulator has brought sanctions against a financial institution simply for providing services to a CRB. This is true despite the fact that federal regulators reportedly have prioritized BSA and AML compliance to fight financial crime in recent years by increasing both the number of actions and the size of monetary penalties.³⁷

Instead of taking a punitive approach, federal banking regulators’ response to financial institutions that provide financial services to the cannabis industry has ranged from passive acknowledgment to active support for legislative reforms. At certain times they’ve repeated that the activity is illegal but nevertheless occurs,³⁸ and at others they’ve issued statements confirming that financial institutions would not face enforcement based solely on doing business with the cannabis industry.³⁹

In February 2021, the National Credit Union Administration took its first-ever action against a credit union relating to cannabis banking services. Notably, however, the action was due to the institution’s compliance program being inadequate, not because it was providing financial services to cannabis businesses.⁴⁰ The enforcement action is widely considered to be the first example of a federal banking regulator penalizing a financial institution for compliance-related failures explicitly related to the cannabis industry.⁴¹

In July 2022 federal banking agencies made their position on cannabis banking even clearer in a joint statement intended “to remind banks of the risk-based approach to assessing customer relationships and conducting customer due diligence.” This joint statement reinforced their “longstanding position that no customer type presents a single level of uniform risk or a particular risk profile related to money laundering, terrorist financing, or other illicit financial activity” and encouraged banks “to manage customer relationships and mitigate risks based on customer relationships, rather than decline to provide banking services to entire categories of customers.”⁴²

The Impact of Risk Assessments on Banking Access

Because the SAFE Banking Act would provide financial institutions with only narrow protections for activities that have never actually been subject to the severe legal and regulatory consequences that federal law technically permits, the practical impact that a safe harbor provision would have on the financial services industry’s decision to bank the cannabis industry is unknown.

³⁴ “The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap,” R44782. Congressional Research Service, April 7, 2022. <https://crsreports.congress.gov/product/pdf/R/R44782>

³⁵ Ibid.

³⁶ Ibid.

³⁷ Carpenter, David H. “Financial Services for Marijuana Businesses.” In Focus. Congressional Research Service, November 27, 2019. <https://crsreports.congress.gov/product/pdf/IF/IF11373> Citing: Sykes, Jay B. “Trends in Bank Secrecy Act/Anti-Money Laundering Act Enforcement,” R45076. Congressional Research Service, January 12, 2018. <https://crsreports.congress.gov/product/pdf/R/R45076>

³⁸ In 2020, then-FDIC Chair Jelena McWilliams said in a media Q&A, “As a federal regulator, I still have to say it’s illegal to bank marijuana. But to the extent you’re doing it because it’s legal in your state, please follow FinCEN guidance.” Manes, Nick. “Q&A: FDIC Chair Jelena McWilliams on state of banking industry, PPP, marijuana business.” Crain’s Detroit, June 3, 2020. <https://www.craigslist.com/banking/qa-fdic-chair-jelena-mcwilliams-state-banking-industry-ppp-marijuana-business>

³⁹ As NCUA Board Member Rodney E. Hood’s said at an industry event in April 2022, “We make it clear to credit unions, in particular state chartered credit unions in states where marijuana is legal, are welcome to serve cannabis- and marijuana-related businesses provided that they do their due diligence, observe all relevant ‘Know Your Customer’ and Bank Secrecy Act requirements, and adhere to the FinCEN guidance.”

Hood, Rodney E. “NCUA Board Member Rodney E. Hood’s Remarks at the Emerging Markets Coalition in Washington, D.C.” National Credit Union Administration, April 7, 2022. <https://www.ncua.gov/newsroom/speech/2022/ncua-board-member-rodney-e-hoods-remarks-emerging-markets-coalition-washington-dc>

⁴⁰ “Administrative Order: Stipulation and Consent to Cease and Desist Order.” In the Matter of Live Life Federal Credit Union, 21-0105-ER. National Credit Union Administration, February, 2021. <https://www.ncua.gov/regulation-supervision/enforcement-actions/administrative-orders/2021/administrative-order-matter-live-life-federal-credit-union>

⁴¹ Dubow, Jay, James Steves, and Jeremy Tobes. Troutman Pepper. “Credit Union’s Marijuana-Related Compliance Failure Is a Warning to Lenders.” JD Supra, March 19, 2021. <https://www.jdsupra.com/legalnews/credit-union-s-marijuana-related-1873542/>

⁴² Joint Statement on the Risk-Based Approach to Assessing Customer Relationships and Conducting Customer Due Diligence,” SR 22-5. Division of Supervision and Regulation, Board of Governors of the Federal Reserve System, July 6, 2022. <https://www.federalreserve.gov/supervisionreg/srletters/SR2205.htm>

Moreover, although financial service providers have reported that the risk of legal consequences is one reason they are unwilling to work with marijuana clients, it is unlikely that existing legal and regulatory consequences are the sole factor affecting a financial service provider's decision. In fact, financial services providers admit that "the SAFE Banking Act is not a cure all for the cannabis banking challenge," and is only one of several steps "toward enabling financial services for cannabis-related businesses."⁴³

Despite this reality, proponents of SAFE within the cannabis industry frequently make questionable claims based on assumptions that the establishment of safe harbor for financial institutions will automatically translate into access for smaller cannabis businesses who currently lack capital.⁴⁴ Access to financial services for the cannabis industry, however, will remain at the discretion of individual financial institutions and highly dependent on perceptions of risk and profit, resulting in varied levels of access to banking.

The SAFE Banking Act itself would not require financial institutions to provide financial services to the cannabis industry. SAFE explicitly states, "Nothing in this Act shall require a depository institution, entity performing a financial service for or in association with a depository institution, or insurer to provide financial services to a cannabis-related legitimate business, service provider, or any other business."⁴⁵ Furthermore, existing FinCEN guidance states that "the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution" that may include "its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively." This guidance emphasizes the point that "thorough customer due diligence is a critical aspect of making this assessment."⁴⁶

For financial institutions, risk assessment and risk management is not just a regulatory requirement, but an ongoing business strategy⁴⁷ to support their bottom line. Intended to "address the varying degrees of risk associated with its products, services, customers, and geographic locations," a financial institution's risk assessment may, among other considerations, include a review of whether or not a particular client's business is subject to frequent legal and regulatory changes, faces high ongoing compliance standards, or may require additional staff or technology.⁴⁸ Based on the factors that impact a financial institution's assessment of risk, some clients and industries are considered high-risk and, as a result, experience challenges accessing financial services. For example, a 2021 GAO study found that financial institutions "limit or deny services to money transmitters and nonprofit charitable organizations largely because of their efforts to comply with Bank Secrecy Act/anti-money laundering (BSA/AML) regulations."⁴⁹ Similarly, financial institutions' risk assessments often deem cash-intensive businesses, like restaurants, liquor stores, cigarette distributors, and parking garages high-risk despite being legal, even common business ventures.⁵⁰ Thus, the combination of non-enforcement and risk assessment may blunt the impact that the SAFE Banking Act's safe harbor would have on whether financial institutions decide to service cannabis businesses. According to the American Bankers Association, although "some financial institutions have weighed the prevailing climate of non-enforcement and have decided to shoulder the risk in order to serve the needs of their communities, the majority of financial institutions will not take the legal, regulatory, or reputational risk associated with banking cannabis-related businesses without congressional action."⁵¹

In addition to enforcement and reputational concerns, financial institutions cite the high cost of compliance with FinCEN's reporting requirements as a deterrent. It is unclear if, or by how much, these costs would be reduced under SAFE. The SAFE Banking Act establishes that proceeds from a transaction involving activities of a cannabis-related

⁴³ Nichols. American Bankers Association. Ibid.

⁴⁴ Hawkins, Steven W. U.S. Cannabis Council. Letter to U.S. Reps. Ed Perlmutter, Steve Stivers, Nydia M. Velázquez, and Warren Davidson. April 19, 2021. https://perlmutter.house.gov/uploadedfiles/safe_support_letter_from_steve.pdf

⁴⁵ H.R. 1996, "Safe Banking Act of 2021." Ibid.

⁴⁶ "BSA Expectations..." FinCEN. Ibid.

⁴⁷ "Banking Topic: Risk Management." American Bankers Association. <https://www.aba.com/banking-topics/risk-management#>

⁴⁸ "BSA/AML Risk Assessment." BSA/AML Manual. FFIEC Bank Secrecy Act/Anti-Money Laundering Act InfoBase.

<https://bsaaml.ffiec.gov/manual/BSAAMLRiskAssessment/01>

⁴⁹ "Views on Proposals to Improve Banking Access for Entities Transferring Funds to High Risk Countries," from GAO-22-104792. Report to Congressional Committees, U.S. Government Accountability Office, December 2021. <https://www.gao.gov/assets/gao-22-104792.pdf>

⁵⁰ "Risks Associated with Money Laundering and Terrorist Financing: Cash-Intensive Businesses" BSA/AML Manual. FFIEC Bank Secrecy Act/Anti-Money Laundering Act InfoBase.

<https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/29#:~:text=Risk%20Factors,currency%20for%20illicit%20criminal%20activities>

⁵¹ Nichols. American Bankers Association. Ibid.

legitimate business shall not be considered proceeds from an unlawful activity.⁵² As such, it should follow that marijuana limited SARs (and the associated excessive compliance costs) should be significantly reduced. Nonetheless, this is not spelled out in SAFE. Rather, SAFE would require FinCEN to update its 2014 guidance to ensure that it “does not significantly inhibit the provision of financial services to a cannabis-related legitimate business.”⁵³ To date, FinCEN has not signaled how it would interpret this mandate, and whether it would continue to require extensive reporting on transactions involving cannabis related businesses.

The SAFE Banking Act would maintain cannabis’ federally illegal status. Consequently, despite safe harbor that would be established by SAFE, financial institutions are likely to continue making risk-based assessments that render the federally illegal cannabis industry more risky than other business ventures, leading to heightened compliance standards and costs. Until more comprehensive policy reforms are achieved, perceptions of risk are likely to be framed by the continued criminal prohibition of cannabis at the federal level, regardless of standalone banking reforms.

Finally, equitable access to banking within the cannabis industry is of particular concern. SAFE could result in increased access to banking overall—though not on the grand scale implied by advocates—while still allowing financial institutions to limit the range and depth of services that they offer to specified and limited categories of persons or businesses within the cannabis industry. For example, to limit perceived risks amidst a nascent, burgeoning and highly-regulated industry still considered illegal at the federal level, some financial institutions could choose to provide certain services exclusively to persons or businesses that are considered most viable. Banks could implement policies where viability is determined in part by evidencing a certain amount of capital, demonstrating an ability to operate across multiple jurisdictions, or business ownership that excludes individuals with any criminal history. Similarly, financial institutions could charge higher services fees to categories of persons or businesses within the cannabis industry that are considered high risk in order to mitigate costs associated with risk management. If financial institutions continue existing patterns and practices, the benefits of expanded access to capital and financial services will disproportionately aid large and well-resourced businesses rather than those owned by minorities and persons who are low income or who have past cannabis convictions—those who were most harmed by cannabis prohibition and its enforcement.

Racial Disparities in the Financial Services Industry

The financial services industry has a long history of racial discrimination that includes the support of the federal government. In the 1930s, around the same time that cannabis use was prejudicially associated with Black and immigrant communities and subsequently criminalized,⁵⁴ the federal government encouraged financial institutions to deny mortgages to people who lived in predominantly Black or immigrant neighborhoods in a practice known as redlining.⁵⁵

“Despite efforts since the 1930s to address inequities in financial services, including the Fair Housing Act, Equal Credit Opportunity Act, and the Community Reinvestment Act, disparities in the financial services industry persist today.”

Despite efforts since the 1930s to address inequities in financial services, including the Fair Housing Act, Equal Credit Opportunity Act, and the Community Reinvestment Act, disparities in the financial services industry persist today.

⁵² H.R. 1996, “Safe Banking Act of 2021.” 117th U.S. Congress (2021–2022).

⁵³ H.R. 1996, “Safe Banking Act of 2021.” 117th U.S. Congress (2021–2022).

⁵⁴ Staples, Brent. “The Federal Marijuana Ban Is Rooted in Myth and Xenophobia.” The New York Times, July 29, 2014. <https://www.nytimes.com/2014/07/30/opinion/high-time-federal-marijuana-ban-is-rooted-in-myth.html>

⁵⁵ Gross, Terry. “A ‘Forgotten History’ Of How The U.S. Government Segregated America.” Fresh Air. NPR, May 3, 2017. <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>

In 2019, the median net worth of a typical white household, \$188,200, was 7.8 times that of a typical Black household, \$24,100.⁵⁶ Today's racial wealth gap is fueled by disparities in access to capital and financial services for individuals and businesses alike.

In 2021, the Brookings Institution analyzed financial institutions in Black-majority communities and found that Black borrowers and depositors experienced considerable challenges when seeking access to banking services.⁵⁷ According to the group's report, both Black individuals and businesses faced marked disparities, compared to their white counterparts, in access to banking services and deposits, mortgage credit, and small business loans.⁵⁸

The existence of these disparities is further supported by a 2021 Federal Reserve report that found that Black and Latino-owned businesses were less than half as likely as their white counterparts to be fully approved for loan applications during the last year.⁵⁹ Considering the inequities within access to capital and financial services generally, it should come as no surprise that minority cannabis entrepreneurs cite a lack of access to capital and financial services as a major barrier to entering the legal cannabis industry.⁶⁰ The situation is so grim that some proponents of SAFE believe that "even one more Black or Brown entrepreneur getting access to a bank account is an improvement over the status quo."⁶¹

However, individuals concerned about equity in cannabis banking should consider that without additional effort to ensure these discriminatory practices are addressed, it's possible, indeed likely, that Black and Brown communities seeking to participate in the legal cannabis industry will experience the same inequities that are experienced by Black and Brown communities that seek to access financial services generally.

Imagine a scenario where Black and Brown individuals seeking to participate in the cannabis industry have increased "access" to banking services, but, because of unchecked discrimination within the financial services industry, these entrepreneurs have fewer banking options, weaker banking relationships, and lower loan approval rates. They receive lower business credit scores, pay higher interest rates and bank fees, and are subject to more restrictive terms and conditions than their white counterparts. Such a scenario would be, at best, a continuation of the status quo. And it could actually exacerbate disparities.

If the banking industry's approach to cannabis banking is 'banking as usual,' the SAFE Banking Act could rapidly accelerate existing patterns of market domination by multi-state operators⁶² and increased market consolidation⁶³, where large and well-resourced companies, owned primarily by white males⁶⁴, are further enabled to outcompete or acquire smaller and less resourced competitors. However, with amendments that appropriately acknowledge and address these potential consequences, the SAFE Banking Act, could establish a more equitable approach.

⁵⁶ Bhutta, Neil, Andrew C. Chang, Lisa J. Dettling, Joanne W. Hsu, and Julia Hewitt. "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances." FEDS Notes. Board of Governors of the Federal Reserve System, September 28, 2020. <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>

⁵⁷ Broady, Kristen, Mac McComas, and Amine Ouazad. "An analysis of financial institutions in Black-majority communities: Black borrowers and depositors face considerable challenges in accessing banking services." The Brookings Institution, November 2, 2021. <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>

⁵⁸ Ibid.

⁵⁹ "2021 Report on Firms Owned by People of Color." Small Business Credit Survey, The Federal Reserve Banks. U.S. Federal Reserve System, 2021. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color>

⁶⁰ "National Cannabis Equity Report 2022." Minority Cannabis Business Association, February 2022. <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf>

⁶¹ Castille, Kaliko. "Minority Cannabis Business Association. "Cannabis Reformers Can Get SAFE Banking Or Nothing From Congress—Which Is It?" Marijuana Moment, December 8, 2021. <https://www.marijuanamoment.net/cannabis-reformers-can-get-safe-banking-or-nothing-from-congress-which-is-it-op-ed/>

⁶² Smith, Jeff. "US cannabis MSO revenue surges in 2021, fueled by expansions, acquisitions." Marijuana Moment, April 5, 2022.

⁶³ Title, Shaleen. "Bigger is Not Better: Preventing Monopolies in the National Cannabis Market (January 26, 2022)." Ohio State Legal Studies Research Paper No. 678, Drug Enforcement and Policy Center, 2022 <https://ssrn.com/abstract=4018493>

⁶⁴ "Women and Minorities in the Cannabis Industry." Marijuana Business Daily. 2021. <https://mjbizdaily.com/wp-content/uploads/2021/10/MJBizDaily-Women-and-Minorities-in-Cannabis-Report.pdf>

RECOMMENDATIONS TO MORE EQUITABLY ACHIEVE BANKING REFORM

Financial institutions *shouldn't* face federal legal and regulatory consequences solely for providing services to the cannabis industry. The cannabis industry *should* have fair and widespread access to capital and financial services. Racial disparities *shouldn't* exist within cannabis banking. These positions are not mutually exclusive and can and should be addressed concurrently.

Due to SAFE's inability to ensure both that the cannabis industry has access to banking and that such access is equitable, the legislation cannot be expected, in its current iteration, to fix issues of access and equity. As such, advocates should be aware that without immediate and ongoing prioritization, inequities could become worse. Moreover, individuals concerned about equity within cannabis public policy reform more generally should consider what impact Congress's prioritization of SAFE, which fails to explicitly address equity over more equity-centered reforms, could have on efforts to comprehensively acknowledge and address inequities born of the War on Drugs.

“To improve future reforms to cannabis banking, people focused on access and equity should continue to strategize and advocate legislative amendments that better address these challenges.”

To improve future reforms to cannabis banking, people focused on access and equity should continue to strategize and advocate legislative amendments that better address these challenges. We offer the following recommendations to improve the SAFE Banking Act:

RECOMMENDATION 1: Use revenue collected by 280E to create a fund providing capital for businesses owned by people harmed by the War on Drugs.

Access to capital is consistently cited by small and minority-owned cannabis businesses as their most urgent concern⁶⁵ and by proponents of SAFE as a leading problem their bill would fix.⁶⁶ It would therefore be reasonable to assume that the bill's passage would quickly provide loans to the struggling cannabis businesses that need it. But the legislation doesn't do this. As written, SAFE does not create any mechanism to provide capital to disadvantaged businesses, and it's unlikely to improve current dynamics with respect to capital.

But the bill could be amended to do exactly that. Every year, the Internal Revenue Service (IRS) collects billions of dollars in taxes from federally illegal cannabis businesses,⁶⁷ and because Internal Revenue Code Section 280E prohibits those businesses from writing off ordinary expenses and overhead costs that other businesses are allowed,⁶⁸ they pay far more than their fair share. Until that policy is changed, or until marijuana becomes federally legal, that excess tax revenue should be pooled and used to provide forgivable loans for businesses owned by people who have been unfairly targeted by the War on Drugs.

Although it is difficult to estimate the total taxes overpaid by cannabis businesses, the Joint Committee on Taxation estimated in a 2016 letter sent to Senator Cory Gardner claiming that repealing 280E would lower federal receipts by up to \$5 billion over ten years.⁶⁹ For as long as the provision remains in place and the funds collected, they should be used to repair the related harms caused by the federal government's War on Drugs.

⁶⁵ “National Cannabis Equity Report 2022.” Ibid.

⁶⁶ Perlmutter, Ed., U.S. House of Representatives. Twitter post, January 28, 2022. <https://twitter.com/RepPerlmutter/status/1487182610057117707>

⁶⁷ Smith, Aaron. “IRS collects billions in pot taxes, much of it in cash.” CNN Business, January 18, 2018. <https://money.cnn.com/2018/01/18/smallbusiness/marijuana-industry-taxes-irs/index.html>

⁶⁸ “Cannabis Industry Frequently Asked Questions.” Internal Revenue Service. <https://www.irs.gov/businesses/small-businesses-self-employed/cannabis-industry-frequently-asked-questions>

⁶⁹ Harvey, Robert P. Congressional Joint Committee on Taxation. Letter to U.S. Sen. Cory Gardner, December 1, 2017. <https://newtax.files.wordpress.com/2018/12/370531229-Senator-Gardner-280E-Score-12-04-2017.pdf>

RECOMMENDATION 2: As a condition of safe harbor, require financial institutions to demonstrate compliance with anti-discrimination laws such as the Equal Credit Opportunity Act.

Each of the seven times the SAFE Banking Act has so far passed a chamber of Congress, the period before the vote has yielded an explosion of campaigns,⁷⁰ videos,⁷¹ photo ops,⁷² and high-profile media placement⁷³ to make the case that SAFE will address racial disparities in cannabis banking. The bill may not entirely fix the financial system or reverse institutional racism, so the talking points go, but at least it's an incremental step in the right direction.

If the goal is, in fact, to take a small step in the right direction, the best way to create an incremental measure toward justice is to ensure that the direct beneficiaries of the law—banks—only receive the benefit of safe harbor if they demonstrate compliance with existing anti-discrimination lending laws. Existing equal protection measures would be strengthened and reinforced by limiting banking protections to institutions that provide access to financial services for minority-owned businesses under terms commensurate with the terms they offer everyone else.

Fair lending laws are already on the books and intended to level the playing field, but as evidenced by previously described disparities in the financial services industry, they're not working. Giving banks access to the cannabis industry without any additional protections or incentives toward equity will result in the same racial disparities in financial services among cannabis businesses as within other industries, or likely worse, given the federal illegality of the product.

To implement this recommendation, SAFE could be amended to require regulators to add an additional requirement to a financial institution's consumer compliance examination. In addition to a review of policies and procedures, examiners would test the institution's actual lending record for specific types of discrimination such as underwriting or pricing discrimination. A financial institution should be able to affirmatively demonstrate that its loan approval rates for minority-owned legitimate cannabis businesses are commensurate with its rates for other legitimate cannabis businesses. In addition, financial institutions should demonstrate that they offer products and services to minority-owned legitimate cannabis businesses at prices in line with those offered to other legitimate cannabis businesses. When regulators identify inadequate policies and procedures, they can respond with the goal of correcting the issue before a disparity in lending occurs. However, if evidence of discrimination is found, regulators should respond with strong enforcement actions.

RECOMMENDATION 3: Explicitly protect Minority Depository Institutions and Community Development Financial Institutions.

SAFE should explicitly provide protections for MDIs and CDFIs to reduce their perception of regulatory risk when offering commercial loans and transactional services to small, minority-owned CRBs. Congress and federal regulators have long recognized the importance of minority depository institutions (MDIs), financial institutions that primarily serve underserved and disinvested communities, as critical "resources to foster the economic viability of these communities."⁷⁴ According to a February 2022 report, about 45 percent of branches and branch deposits of MDIs are located in counties the Centers for Disease Control and Prevention designates as socially vulnerable and prone to economic, health and safety challenges, including illness and natural disaster.⁷⁵ Given the longstanding commitment of MDIs to the same communities that were targeted by the War on Drugs, it is imperative that cannabis banking legislation explicitly preserve, protect and invest in MDIs.

Section 308 of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 defines an MDI as

⁷⁰ SAFE Banking for Equity. <https://safe4equity.org>

⁷¹ Daines, Steve, U.S. Senate. "A bankers perspective on the Safe Banking Act." YouTube, June 6, 2022. <https://youtu.be/MTOnyVM604>

⁷² "Senator Patty Murray Pushes for Passage of Safe Banking Act." U.S. Senator Patty Murray, April 20, 2022.

<https://www.murray.senate.gov/senator-murray-pushes-for-passage-of-safe-banking-act/>

⁷³ Ali, Charlene S. and Adam Ali, HiFive Edible Wonders. "SAFE Banking Will Support Level Playing Field for NY's Cannabis Future." Long Island Press, May 8, 2022. <https://www.longislandpress.com/2022/05/08/oped-safe-banking-will-support-level-playing-field-for-nys-cannabis-future/>

Demko, Paul and Natalie Fertig. "'There's no stopping the industry now': Democratic control is a big win for marijuana." Politico, January 31, 2021. <https://www.politico.com/news/2021/01/31/marijuana-policy-democrats-senate-463816>

⁷⁴ "Semiannual Report to the Congress, April 1, 2019 – September 30, 2019." Office of Inspector General, 2019. p.10.

<https://www.fdicioig.gov/sites/default/files/publications/SemiOIG-Oct19.pdf>

⁷⁵ Cetina, Jill, Kelly Klemme, and Michael A. Perez. "Minority Depository Institutions Have Vital Role Serving Vulnerable Communities." Federal Reserve Bank of Dallas, February 1, 2022. <https://www.dallasfed.org/research/economics/2022/0201.aspx>

any federally insured depository institution where 51 percent or more of the voting stock is owned by Black American, Native American, Hispanic American, or Asian American individuals. This includes institutions collectively owned by a group of minority individuals, such as a Native American tribe. In addition to the institutions that meet the ownership test, an institution is considered an MDI if the community it serves is predominantly minority and a majority of its board of director positions are held by Black American, Native American, Hispanic American, or Asian American individuals.⁷⁶

FIRREA directs federal regulatory bodies to preserve existing MDIs while encouraging the establishment of new ones. Specifically, the act established the following goals: preserving the number of MDIs; preserving the minority character in cases involving merger or acquisition of an MDI; providing technical assistance to help prevent insolvency of MDIs; promoting and encouraging creation of new MDIs; and providing training, technical assistance, and educational programs for MDIs.⁷⁷

MDIs represent 3 percent of U.S. banks and hold only 1 percent (\$320 billion) of U.S. bank assets. While total assets held by MDIs have grown over the past 10 years, the number of MDIs has decreased by 20 percent, from 186 to 148.⁷⁸ It is imperative that MDIs, as institutions uniquely positioned to repair communities, receive not just safe harbor but also incentives to provide financial services to CRBs. This strategy is beneficial for both MDIs and CRBs, as it would give CRBs better access to business lending and other banking services while simultaneously increasing the assets of MDIs.

In addition to a focus on MDIs, cannabis banking legislation should also explicitly protect and incentivize Community Development Financial Institutions (CDFIs) due to the outsized role they already play in areas of lending that are particularly relevant to the cannabis industry. CDFIs are mission-driven financial institutions that create economic opportunity for individuals and small businesses, quality affordable housing and essential community services. Community development banks primarily provide financial services to low- and moderate-income individuals or communities.⁷⁹ Commercial real estate, small business, and agricultural lending by CDFIs far exceed their relative size within the banking industry overall, according to a 2020 study by the Federal Deposit Insurance Corporation (FDIC). CDFIs hold 30 percent of commercial real estate loans, 36 percent of small business loans and 70 percent of agricultural loans,⁸⁰ which are the very types of financing most needed by cannabis entrepreneurs.

RECOMMENDATION 4: Raise evidentiary requirements and limit enforcement penalties for MDIs and CDFIs for servicing legitimate cannabis businesses.

SAFE should both raise the evidentiary requirements and limit the penalties for enforcement against MDIs and CDFIs to clarify that simply providing services to a cannabis-related legitimate business or service provider should not be considered an unsafe or unsound practice. And enforcement actions should be adjudicated for a violation of law under a clear and convincing evidence standard. These actions may encourage more MDIs and CDFIs to provide services to cannabis-related legitimate businesses.

RECOMMENDATION 5: Expand required federal guidance and reports to promote equity alongside diversity and inclusion.

By expanding SAFE's guidance and reporting requirements to include specific equity-focused measures, SAFE would be better positioned to address equity in the cannabis industry. Although SAFE includes provisions that would require studies and reports focused on minorities and women in order "to promote diversity and inclusion,"⁸¹ SAFE fails to

⁷⁶ "Statement of Policy Regarding Minority Depository Institutions." FDIC Law, Regulations, Related Acts. Federal Deposit Insurance Corporation, 2021. <https://www.fdic.gov/regulations/laws/rules/5000-2600.html#fdic5000policyso>

⁷⁷ *Financial Institutions Reform, Recovery and Enforcement Act*. H.R. 1278 (1989). § 308, Title III. <https://www.fdic.gov/regulations/laws/rules/8000-3100.html>

⁷⁸ Cetina, et al. Ibid.

⁷⁹ "Community Development Financial Institution (CDFI) and Community Development (CD) Bank Resource Directory." Office of the Comptroller of the Currency. <https://www.occ.gov/topics/consumers-and-communities/community-affairs/resource-directories/cdfi-and-cd-bank/index-cdfi-and-cd-bank-resource-directory.html>

⁸⁰ "FDIC Community Banking Study." Federal Deposit Insurance Corporation, December 2020. §§ 4–2 <https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf>

⁸¹ "SAFE Banking Act." Congressman Ed Perlmutter. <https://perlmutter.house.gov/safe-banking-act/>

acknowledge or address equity, which as a public policy objective is notably distinct from, and equally as important as, diversity and inclusion.

The Biden administration defined the terms in a recent executive order on diversity, equity, inclusion, and accessibility in the federal workforce.⁸² The term “diversity” means the practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities. The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment. The term “inclusion” means the recognition, appreciation, and use of the talents and skills of employees of all backgrounds.

Due to racial inequities within the financial services industry and racial inequities in drug policy, which the White House’s 2022 National Drug Control Policy identified as “longstanding” and warranting a “long overdue” “increased focus,”⁸³ specific measures are needed to acknowledge, end, repair and prevent disparities moving forward. Within the context of state and local efforts to license and regulate cannabis businesses, policies and programs to promote equity in the cannabis industry have focused on prioritizing individuals and communities most impacted by cannabis prohibition and its enforcement,⁸⁴ often as evidenced by a cannabis arrest and/or conviction or another factor associated with related harm.⁸⁵ Moreover, decades of data corroborate that these harms were disproportionately suffered specifically by Black, Brown, and low-income individuals and communities.⁸⁶

As such, SAFE’s existing provisions that require data collection regarding minority and women-owned businesses should be expanded to include equity-owned businesses as defined by state and local regulatory programs. By expanding SAFE in this way, SAFE could include and prioritize equity alongside diversity and inclusion and would be better positioned to identify, end, repair, and prevent specific disparities that may be associated with individuals who participate in state and local programs designed to promote equity in the cannabis industry.

Last, SAFE requires the GAO to conduct two studies—one regarding diversity and inclusion, the other regarding the effectiveness of suspicious activity reporting on finding persons engaged with transnational criminal organizations. Currently, SAFE requires the GAO to report on findings in the latter report within two years of SAFE’s enactment, but imposes no deadline for the GAO to report on findings for the report regarding diversity and inclusion. In order to ensure that issues related to diversity, equity and inclusion are not just included but also prioritized, SAFE should be amended to provide a deadline for the GAO’s report regarding diversity and inclusion.

RECOMMENDATION 6: Require federal banking regulators to identify best practices to achieve racial equity in financial services.

As written, SAFE would require federal banking regulators to update guidance for financial institutions seeking to provide services to cannabis and hemp businesses. The bill should be amended to require that federal banking regulators include in both updates information regarding best practices for financial institutions to promote racial equity. By providing information regarding these best practices *before* safe harbor would become effective, financial institutions would have early and clear direction on efforts that can be taken to promote equity and prevent inequities. By seeking to proactively prevent disparities, rather than identifying and addressing disparities after the fact, this approach is likely to have more equitable outcomes than the current approach taken by SAFE.

⁸² Biden, Joseph R., Jr. “Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.” The White House, June 25, 2021. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/>

⁸³ “National Drug Control Strategy.” Office of National Drug Control Policy, Executive Office of the President. The White House, April 2022. <https://www.whitehouse.gov/wp-content/uploads/2022/04/National-Drug-Control-2022Strategy.pdf>

⁸⁴ “National Cannabis Equity Report 2022.” Minority Cannabis Business Association. Ibid.

⁸⁵ Ibid.

⁸⁶ “The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests.” American Civil Liberties Union, June 2013. <https://www.aclu.org/report/report-war-marijuana-black-and-white>

RECOMMENDATION 7: Clarify that cannabis criminal records are not an automatic red flag.

Existing federal guidance, titled, “BSA Expectations Regarding Marijuana-Related Business,” identifies red flags that indicate that cannabis businesses may be engaged in activity that violates state law or implicates federal enforcement priorities.⁸⁷ Among the red flags identified is “negative information” such as a criminal record or “involvement in the illegal purchase or sale of drugs.”⁸⁸ Given the disproportionate impact that cannabis arrests have had on Black and Brown communities, guidance from FinCEN and regulatory agencies should clearly exclude prior cannabis-related criminal records from being automatically considered a red flag. At the state and local levels, many jurisdictions already explicitly include allowances for individuals with cannabis arrests or convictions to enter the legal industry.

RECOMMENDATION 8: Identify barriers beyond marketplace entry by including barriers experienced before, during, and after the licensure process.

Currently, SAFE would require the GAO to study and report on “the barriers to marketplace entry, including in the licensing process, and the access to financial services for potential and existing minority-owned and women-owned cannabis-related legitimate businesses.”⁸⁹ However, as minority-owned and women-owned businesses experience barriers that continue beyond entry into the legal marketplace, this study should be expanded to include any barriers that may be experienced before, during, and after the licensure process. Furthermore, this study should include a comprehensive review of state and local efforts to identify and address related barriers and direct engagement with both cannabis and hemp regulators and cannabis and hemp business owners.

RECOMMENDATION 9: Study and report on diversity, equity, and inclusion in the hemp industry, as well as the cannabis industry.

Currently, the SAFE Banking Act only requires that the GAO and federal banking regulators study and report on information and data on the availability of access to financial services for minority-owned and women-owned businesses within the cannabis industry.⁹⁰ SAFE should be amended to require that the GAO and federal banking regulators collect data related to minority-owned, women-owned and equity-owned businesses within the hemp industry as well. Similarly, SAFE should be amended to require the GAO to conduct a study on the barriers to marketplace entry, including in the licensing process, and the access to financial services for potential and existing minority-owned, women-owned and equity owned hemp-related legitimate businesses and issue a report to Congress regarding the study’s findings as well as any regulatory or legislative recommendations.

RECOMMENDATION 10: Promote compliance with state and local regulatory requirements regarding business ownership.

Studies and reports mandated by SAFE should acknowledge that the definition of ownership varies at the state and local levels, which may impact assessments of whether or not businesses are truly “owned” by minorities and/or women.

SAFE should also be amended to require that if, during the course of its customer due diligence, a financial institution discovers that a CRB’s ownership is not compliant with state and local law or regulations, the financial institution must report the discrepancy to the state and/or local regulatory authority. This amendment would help promote compliance with state and local regulatory requirements regarding business ownership, including ownership requirements related to programs designed to acknowledge and address harms of cannabis prohibition and its enforcement and to promote equity within the cannabis industry.

⁸⁷ “BSA Expectations...” FinCEN. Ibid.

⁸⁸ Ibid.

⁸⁹ H.R. 1996, “Safe Banking Act of 2021.” Ibid.

⁹⁰ H.R. 1996, “Safe Banking Act of 2021.” Ibid.

CONCLUSION

The continued criminalization of cannabis at the federal level, coupled with an increasing number of states authorizing medical or adult-use cannabis activity, has resulted in an ever-widening policy gap⁹¹ between federal and state cannabis laws. However, due to cannabis's widely accepted medical use,⁹² existing state and local efforts to authorize, license and regulate cannabis for medical and adult-use,⁹³ and bipartisan support from the American public regarding cannabis legalization,⁹⁴ many believe that it is no longer a matter of 'if' or 'when' this gap will be addressed, but 'how'.⁹⁵

This gap continues to unnecessarily put millions of stakeholders at legal risk and fuels racial disparities in drug policy that the president's 2022 National Drug Control Strategy identifies as a "longstanding problem affecting both public health and public safety."⁹⁶ Therefore, the widely-impactful public policy decision on how to address this gap requires a comprehensive plan that includes and prioritizes equity. However, amidst the many stakeholders who continue to be harmed by federal cannabis prohibition, and the enumerable challenges caused by a widening policy gap, there is increasing pressure⁹⁷ and speculation⁹⁸ that Congress might prioritize financial institutions' concern of federal legal and regulatory consequences that have never materialized over other desperately needed and long-overdue reforms. As such, people concerned about equity within cannabis public policy reform generally should consider what impact Congress' prioritization of SAFE rather than equity-centered reforms could have on efforts to comprehensively acknowledge and address inequities born of the War on Drugs.

Ongoing efforts are needed to evaluate all cannabis-related legislation based on whether or not it acknowledges, addresses, and centers individuals who are least resourced and most impacted (or most likely to be impacted) and the impact on those individuals when their issues are not acknowledged, addressed or centered. According to the Government Alliance on Racial Equity, "Too often, policies and programs are developed and implemented without thoughtful consideration of racial equity. When racial equity is not explicitly brought into operations and decision-making, racial inequities are likely to be perpetuated."⁹⁹ The alliance recommends the use of an institutional approach that "identifies who will benefit or be burdened by a given decision, examines potential unintended consequences of a decision and develops strategies to advance racial equity and mitigate unintended negative consequences."¹⁰⁰

In the context of SAFE, financial institutions are not only the most-resourced stakeholders involved in the current push for cannabis-related reforms, but are also, due to federal enforcement priorities, amongst those that are least likely to be subject to legal consequences. Yet, for some policymakers, this tops the priority list.

Meanwhile, even if the bill becomes law, cannabis possession and cannabis business will remain federally criminalized. Cannabis arrests and criminal records will continue to cause unnecessary harm. Efforts to research and regulate cannabis will be stifled, continuing to prevent veterans, patients, and consumers from accessing legal, tested products. And, alas, issues related to access and equity within cannabis banking will remain.

Amidst the many stakeholders who continue to be harmed by federal cannabis prohibition, and the enumerable challenges caused by a widening policy gap, Congress will decide whose harms and which harms get addressed first on the road to federal cannabis reform. The decision is likely to have long-lasting implications for future reforms at the federal, state, and local level. Though speculation regarding federal cannabis policy reform has largely focused on

⁹¹ "The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap." Ibid.

⁹² "Examining the 2022 National Drug Control Strategy and the Federal Response to the Overdose Crisis." U.S. House Committee on Oversight and Reform, June 27, 2022. <https://oversight.house.gov/legislation/hearings/examining-the-2022-national-drug-control-strategy-and-the-federal-response-to>

⁹³ "The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap." Ibid.

⁹⁴ "Support for Legal Marijuana Holds at Record High of 68%" Gallup, November 4, 2021. <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx>

⁹⁵ Packer, Cat. "The Role of Social Equity in Cannabis Policy Reform." Chapter 7, Cannabis Law Deskbook, 2021–2022 ed. Thomson Reuters, 2021.

⁹⁶ "National Drug Control Strategy." Office of National Drug Control Policy, Executive Office of the President. The White House, April 2022.

⁹⁷ "SAFE Banking Act." Congressman Ed Perlmutter. Ibid.

⁹⁸ Jaeger, Kyle. "Marijuana Banking Reform Will Not Be Enacted As Part Of Manufacturing Bill, Congressional Leaders Agree." Marijuana Moment, June 23, 2022. <https://www.marijuanamoment.net/marijuana-banking-reform-will-not-be-enacted-as-part-of-manufacturing-bill-congressional-leaders-agree/>

⁹⁹ "Racial Equity Toolkit: An Opportunity to Operationalize Equity." Local and Regional Government Alliance on Race and Equity, September 2015. <https://www.racialequityalliance.org/resources/racial-equity-toolkit-opportunity-operationalize-equity/>

¹⁰⁰ Ibid.

the tension between “the dueling pushes¹⁰¹” of more comprehensive reform like the Cannabis Administration and Opportunity Act¹⁰² and more limited, incremental reforms like the SAFE Banking Act, due to the panoply of harms and inequities perpetuated and exacerbated by cannabis prohibition, all legislation can and should be written and implemented in a way that centers and promotes equity. In order to do so, however, policymakers must be willing to prioritize equity as a public policy objective. As such, regardless of whether Congress decides to pass cannabis banking reform as a part of more comprehensive cannabis policy reform or as a standalone issue, Congress should ensure that any legislation related to cannabis banking reform includes explicit provisions that seek to ensure fair and equitable access to financial services for all in the cannabis industry. Until the SAFE Banking Act is amended to include such provisions it should not be considered a safe bet to achieve equity in cannabis banking.

¹⁰¹ Jaeger, Kyle. “New Details On Congressional Marijuana Omnibus Bill Emerge As Lawmakers Work For 60 Senate Votes.” Marijuana Moment, June 10, 2022.

¹⁰² S.4591 - 117th Congress (2021-2022): Cannabis Administration and Opportunity Act, S.4591, 117th Cong. (2022), <http://www.congress.gov/>.