

**Testimony of Senator Jeff Merkley**  
**Senate Committee on Banking, Housing, and Urban Affairs**  
***Challenges for Cannabis and Banking: Outside Perspectives***  
**Tuesday, July 23, 2019**

Chairman Crapo and Ranking Member Brown, thank you for convening this hearing on the challenges faced by the cannabis industry in the banking sector, and for considering the legislation put forth by Senator Gardner and myself, *the Secure And Fair Enforcement (SAFE) Banking Act (S. 1200)*.

The lack of availability of financial services for cannabis-related businesses in states where it is legalized has created a scenario where businesses are forced to operate in all cash, leading to unsafe environments for all parties involved. Financial institutions support legal clarity and certainty and a legislative hearing would provide an opportunity to address outstanding questions and ensure a better understanding of the proposed bipartisan legislation.

As of today, a majority of states and U.S. territories allow for some form of legal cannabis. In total, thirty-four states, the District of Columbia and various U.S. territories have legal frameworks that allow for either medical or adult-use of cannabis. Eleven states have allowed for legal adult and medicinal use of cannabis in a regulated program. Twenty-three states have a comprehensive medical marijuana program. In addition to these 34 states, another thirteen have a limited medical use program, which includes use of products containing cannabidiol (CBD) or low tetrahydrocannabinol (THC).<sup>1</sup>

#### Legal Uncertainty

Currently, a limited number of state and federally chartered financial institutions operate under guidance issued in February 2014 by the Financial Crimes Enforcement Network (FinCEN) for cannabis related businesses in states where cannabis is legal.<sup>2</sup> While the FinCEN guidance offers some clarity to financial institutions that are offering financial services to cannabis businesses, these institutions are forced to operate in an uncertain legal environment.

This uncertain legal environment was exasperated when former Attorney General Sessions rescinded the guidance known as the “Cole Memorandum” on January 4, 2018.<sup>3</sup> The guidance directed U.S. Attorneys in states with regulatory and enforcement systems that marijuana

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<sup>1</sup> National Conference of State Legislatures. “Marijuana Overview.” *National Conference of State Legislatures*. May, 28, 2019. Available at: <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

Vox. “Illinois just legalized marijuana” June 25, 2019. Available at:

<https://www.vox.com/2019/6/25/18650478/illinois-marijuana-legalization-governor-jb-pritzker>

<sup>2</sup> Department of the Treasury Financial Crimes Enforcement Network. “BSA Expectations Regarding Marijuana-Related Businesses.” FinCEN. February 14, 2014. Available at:

<https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>

<sup>3</sup> Department of Justice. “Memorandum for all United States Attorneys on Guidance Regarding Marijuana Enforcement.” August 29, 2013. Available at:

<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

enforcement should be managed at the state and local level. On April 9, 2019, Treasury Secretary Mnuchin testified before the House Financial Services Committee that, “if this is something that Congress wants to look at on a bipartisan basis, I’d encourage you to do this. This is something where there is a conflict between federal and state law that we and the regulators have no way of dealing with.”<sup>4</sup>

### SAFE Banking Act of 2019

The Secure and Fair Enforcement (SAFE) Banking Act of 2019 would give legitimate businesses acting in compliance with state cannabis laws access to the banking system, including protection against prosecution or asset forfeiture *solely* for providing services to a state-sanctioned cannabis-related business.

Financial institutions that provide banking services to legitimate cannabis businesses, including tribal businesses conducting state sanctioned activities in Indian Country, are currently vulnerable to criminal prosecution under Federal law. Few banks and credit unions are willing to risk providing services to cannabis-related businesses, leaving many of them cut off by financial institutions and unable to accept credit cards, deposit revenues, or write checks to meet payroll or pay taxes. Cannabis-related legitimate businesses have lost their accounts at both banks and credit unions because of the uncertainty. Forcing business and tribes to operate in all cash creates a serious safety risk for the businesses and the neighboring community. By allowing banks and credit unions to service legitimate state-regulated cannabis businesses and tribes engaging in the cannabis industry in states where it is legal, this bill will help law enforcement protect our communities, and help local, state, tribal, and federal taxing agencies collect taxes due on state-sanctioned cannabis sales.

This legislation:

- Provides safe harbor for depository institutions and credit unions by preventing Federal banking regulators from:
  - Terminating or limiting depository institutions’ Deposit Insurance Fund or credit unions’ share insurance under the National Credit Union Share Insurance Fund for providing services to a state-sanctioned and regulated cannabis business, or to a tribe that has cannabis-related businesses, solely because that institution is providing services to a legitimate state-sanctioned and regulated cannabis business;
  - Prohibiting, penalizing, or discouraging a depository institutions from providing financial services to a legitimate state-sanctioned and regulated cannabis business;
  - Recommending or incentivizing a depository institution to halt or downgrade providing any kind of banking services to these businesses; or
  - Taking any action on a loan to an owner or operator of a cannabis-related business.
- Creates safe harbor from liability and asset forfeiture for institutions and their officers and employees who provide financial services to legitimate cannabis businesses pursuant to state or tribal law.

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<sup>4</sup> Tom Angell, “State Financial Regulators Press Congress to Allow Marijuana Banking Access,” *Forbes*, April 16, 2019. Available at: <https://www.forbes.com/sites/tomangell/2019/04/16/state-financial-regulators-press-congress-to-allow-marijuana-banking-access/#768692a755c9>

- Does not require depository institutions or credit unions to provide financial services to a cannabis-related legitimate business.
- Requires depository institutions and credit unions to file Suspicious Activity Reports under the Bank Secrecy Act pursuant to relevant FinCEN guidance.

### Widespread Support

There is widespread support across local government, law enforcement, and industry to provide a safe harbor for cannabis businesses to access financial services. In April 2019, a bipartisan coalition of twenty-five state banking regulators sent a letter to Congress emphasizing the need for a permanent resolution to cannabis businesses' access to financial services. Their letter highlighted the risk to the economy, financial institutions, and public safety caused by the uncertainty between federal and state law. Another bipartisan coalition of 17 state treasurers have also supported taking up the SAFE Banking Act. And in May 2019, a bipartisan group of thirty-eight state attorneys general sent a letter to Congress urging they take up the SAFE Banking Act, in the interest of public safety and bringing cannabis into the regulated banking sector.

A large swath of the financial industry, including the Independent Community Banks of America, the American Bankers Association, the Credit Union National Association, the Ohio Bankers League, and the Ohio Credit Union League have endorsed the SAFE Banking Act as a mechanism for financial institutions to offer services to cannabis and cannabis affiliated businesses without violating law. Finally, the National League of Cities also endorsed passage of the SAFE Banking Act as a way to provide cannabis businesses access to the banking system.

In the U.S. House of Representatives, the SAFE Banking Act (*H.R. 1595*) passed through the House Financial Services Committee on June 5, 2019, with strong bipartisan support and a vote of 45 to 11.

### Closing

In closing, I thank you for this legislative hearing today, which will give members the opportunity to hear directly from witnesses who have direct experience with the challenges facing the financial sector, the cannabis industry, and law enforcement. More than half of the states in our country allow for medical or adult-use of cannabis. As more states consider legalization of cannabis for medical and adult-use, it is critical that this Committee create a path for the financial sector's role in serving the growing cannabis industry.