

Proposed U.S. Federal Cannabis Legislation: Three Different Paths Before Congress

FALL 2019 EDITION

September 24, 2019



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We will continue to update the memorandum as the bills make their way through Congress.

Introduction

- There are now three primary cannabis reform bills in Congress, each of which takes a very different path to legalization.

	SAFE Banking Act Focus on Banking and Payments	STATES Act Defers to State Law	MORE Act Nationwide Descheduling
Bipartisan Sponsors	✓	✓	✗
Contains Social Justice Initiatives	✗	✗	✓
Places a Special Tax on Cannabis	✗	✗	✓
Encourages Development of an Interstate Market	✗	✓	✓
Permits Bank Accounts for Cannabis-Related Businesses	✓	✓	✓
Permits Payments and Money Transmission	✓	✓	✓
Permits Capital Markets Activity	✗	✓	✓
Permits Investment Activity	✗	✓	✓
Contains Directions to Regulators	✓	✗	✓
Protects Insurers	✓	✓	✓

THE SAFE BANKING ACT

Overview

- The **Secure and Fair Enforcement Banking Act** (the **SAFE Banking Act**)

- Most recently introduced in the [House](#) (H.R. 1595) by Reps. Ed Perlmutter (D-CO), Denny Heck (D-WA), Steve Stivers (R-OH), and Warren Davidson (R-OH) on March 7, 2019 and amended on September 19 ahead of an anticipated House floor vote.
 - A version was also introduced in the Senate (S. 1200) by Sens. Jeff Merkley (D-OR) and Cory Gardner (R-CO).
- Aims to improve public safety by expanding [financial services](#) (as defined below) to [cannabis-related legitimate businesses](#) (CRBs) and [service providers](#) and reducing the amount of cash at such businesses.
 - Given uncertain enforcement of the Controlled Substances Act ([CSA](#)) and U.S. anti-money laundering ([AML](#)) laws and possible heavy penalties, the vast majority of financial institutions currently avoid knowingly providing financial services to U.S. CRBs.
- Clarifies that [hemp](#) is currently legal under Federal law and protects depository institutions providing financial services to [hemp-related businesses](#) (HRBs) and [service providers](#).
 - Due to ongoing confusion about the legal status of hemp, many financial institutions also avoid knowingly providing financial services to HRBs.
- Provides a safe harbor from Federal banking regulators taking certain actions against depository institutions solely for providing financial services to CRBs, HRBs or service providers.
- Provides that proceeds of a transaction involving a CRB, HRB or service provider shall not be considered proceeds of an unlawful activity under the Money Laundering Control Act ([MLCA](#)) solely because the transaction involves such businesses.
- Provides certain protections from (1) liability under any Federal law for depository institutions and insurers that provide financial services to CRBs, HRBs or service providers, and (2) forfeiture of certain collateral for depository institutions that provide financial services to such businesses.
- Requires financial institutions to comply with FinCEN's guidance when filing suspicious activity reports ([SARs](#)) related to CRBs and service providers.
- Requires the Federal Financial Institutions Examination Council ([FFIEC](#)) to issue guidance and examination procedures.
- Requires Federal banking regulators to provide best practices for providing financial services to HRBs.

Safe Harbor for Depository Institutions

- The SAFE Banking Act provides a **safe harbor** for **depository institutions**, which would prohibit a **Federal banking regulator** from:
 - Terminating or limiting a depository institution's deposit insurance, or taking any other adverse action against a depository institution solely because it provides financial services to CRBs or service providers operating pursuant to State law, or to HRBs or service providers operating pursuant to Federal law.
 - Prohibiting or penalizing a depository institution for or discouraging a depository institution from providing financial services to such businesses or to a State exercising jurisdiction over such businesses
 - Recommending or incentivizing a depository institution not to offer financial services to certain account holders involved in such businesses
 - Taking adverse or corrective actions on loans to such businesses, to certain persons involved in such businesses, or to owners or operators of real estate or equipment leased to such businesses solely because such businesses are CRBs, HRBs or service providers
 - Prohibiting or penalizing a depository institution (**or entity performing services for the depository institution**) for or discouraging such institution from engaging in a financial service for CRBs, HRBs or service providers.
- The safe harbor also extends to institutions applying for **depository institution charters**.

Federal banking regulators

- Federal Reserve Board
- Consumer Financial Protection Bureau (CFPB)
- Federal Deposit Insurance Corporation (FDIC)
- Office of the Comptroller of the Currency (OCC)
- National Credit Union Administration (NCUA)
- Treasury Department
- FinCEN
- Office of Foreign Assets Control (OFAC)
- Any Federal agency or department that regulates banking or financial services

THE SAFE BANKING ACT

Selected Definitions

- The SAFE Banking Act covers **depository institutions** and **insurers** that offer a **financial service** to CRBs, HRBs or service providers.
 - “**Depository institution**” means a depository institution (as defined in 12 U.S.C. § 1813(c)); or a Federal credit union or State credit union (as defined in 12 U.S.C. § 1752).
 - “**Financial service**”
 - means a “**financial product or service**,” as defined in 12 U.S.C. § 5481;
 - plus the following additional products and services:
 - the “**business of insurance**,” which is cross-referenced to mean “the writing of insurance or the reinsuring of risks by an insurer” as well as all necessary acts and related activities;
 - whether performed directly or indirectly, **functions related to payments or funds**, where such payments or funds are made or transferred by any means (e.g., payment cards, accounts, checks, or electronic funds transfers);
 - acting as a **money transmitting business** which directly or indirectly makes use of a depository institution in connection with effectuating or facilitating a payment for a cannabis-related legitimate business or service provider in compliance with 31 U.S.C. § 5330, and applicable State law; and
 - acting as an **armored car service** for processing and depositing with a depository institution or the Federal Reserve Board with respect to any monetary instruments.

financial product or service

The term comes from the consumer provisions of the Dodd-Frank Act establishing the CFPB.

Protections for Ancillary Businesses and Directions to Regulators

Protections for Ancillary Businesses

- For the purposes of the MLCA and all other provisions of Federal law, the **proceeds** from a transaction involving a CRB, HRB or service provider shall not be considered proceeds from an unlawful activity solely because the transaction was conducted by a CRB, HRB or service provider, as applicable.
 - Notably, this provision is *not* limited to any particular type of entity or individual institution and appears to apply to depository institutions, other financial institutions, and even to CRBs, HRBs and service providers.

Directions to Regulators

- The SAFE Banking Act requires the Treasury Secretary to ensure that guidance issued by FinCEN:
 - Is consistent with the SAFE Banking Act's purpose and intent; and
 - Does not **significantly** inhibit financial institutions from providing services to CRBs or service providers in State or local jurisdictions that permit such cannabis-related activity.
- Within 90 days after the SAFE Banking Act's enactment, Federal banking regulators must jointly issue guidance (1) **confirming** the legality of hemp under Federal law and (2) providing **best practices** for financial institutions providing financial services to HRBs.
- Within 180 days after the SAFE Banking Act's enactment, the FFIEC must develop **uniform guidance and examination procedures** for **depository institutions** that provide financial services to CRBs, HRBs and service providers.

THE STATES ACT Overview

The **Strengthening the Tenth Amendment Through Entrusting States Act** (the **STATES Act**)

- The STATES Act was most recently introduced in the [Senate](#) on April 4, 2019 by:
 - Senators Elizabeth Warren (D-MA) and Cory Gardner (R-CO) in the Senate (S. 1028); and
 - Representatives Earl Blumenauer (D-OR) and David Joyce (R-OH) in the House (H.R. 2093).
- The purpose of the bill is to [amend the CSA](#) to create a new standard regarding the CSA's application to marijuana.
- The bill provides that the CSA generally would not apply to marijuana-related conduct that is legal under State law, including the CSA's restrictions on trafficking in a controlled substance.
- The bill would protect CRBs and their investors by providing that:
 - The proceeds of any marijuana transaction conducted in compliance with State law would not be deemed the proceeds of an unlawful transaction under the [MLCA](#) or [any other provision of law](#); and
 - Marijuana-related conduct that is legal under State law would not serve as a basis for criminal or civil asset forfeiture.

Amendment to the CSA

- The STATES Act would amend the CSA by inserting a [new section \(710\)](#) that specifically governs marijuana-related activities:
 - Renders inapplicable CSA prohibitions on “[the manufacture, production, possession, distribution, dispensation, administration, or delivery](#)” of marijuana where such activity complies with State or tribal law.
 - This language would encompass a [wide range](#) of CRB business models.
 - The STATES Act does not apply if the CRB violates other provisions of the CSA, distributes to persons under 21 years old or if another exception applies.
 - For a full list of exceptions, see the July 22 version of this memorandum, slide 22 [[Link](#)].

Protections for Investors

- Of particular importance to investors is the STATES Act's new rule of construction, which provides that proceeds from CRBs operating in compliance with the STATES Act will not trigger prosecution under the MLCA.
 - Marijuana-related activity in compliance with State law and the STATES Act shall not:
 - Be unlawful;
 - Constitute "trafficking" of a controlled substance within the meaning of the CSA (21 U.S.C. § 841) or any other provision; or
 - Constitute the basis for criminal forfeiture under the CSA (21 U.S.C. § 881) or civil forfeiture under 18 U.S.C. § 981.
 - Proceeds from transactions involving marijuana-related activity in compliance with State law and the STATES Act shall not:
 - Be deemed the proceeds of an unlawful transaction under the MLCA or any other law.

The **Marijuana Opportunity Reinvestment and Expungement Act of 2019** (the **MORE Act**)

- The MORE Act was introduced in the [Senate](#) and the [House](#) on July 23, 2019 by:
 - Senator Kamala Harris (D-CA) in the Senate (S. 2227); and
 - Representative Jerrold Nadler (D-NY) in the House (H.R. 3884).
- The purpose of the bill is to [deschedule cannabis](#) on a nationwide basis while accomplishing social justice goals related to business ownership, employment and criminal records.
- The bill [amends the CSA](#) by striking 21 U.S.C. 812(10) and (17), which currently schedule “marihuana” and THC, respectively, as Schedule I substances.
 - The MORE Act’s provisions exclude hemp, presumably because hemp is on a separate path towards federal legalization.
- The bill implements [a national 5% tax](#) on sales of cannabis products manufactured or imported into the U.S., which would be used to fund the social justice programs established by the bill.
- The bill does not implement a licensing or permitting process for sales of cannabis, which would still be administered by States.

Social Justice Goals – Opportunity Fund

- The MORE Act aims to ensure that business opportunities created by federal descheduling of cannabis are distributed fairly, in light of the disproportionate impact that federal cannabis laws have had on minority communities.
- The bill establishes an [Opportunity Trust Fund](#), financed by revenues from [a national 5% sales tax on cannabis products](#) (described on next slide), to fund three specific grant programs:
 - 60% of the trust would go to the [Community Reinvestment Grant Program \(CRGP\)](#) to fund 501(c)(3) non-profits providing social services, such as job training and substance abuse treatment, to “[individual\[s\] most adversely impacted by the War on Drugs](#).” The CRGP would be administered by a new office in the Department of Justice, the Cannabis Justice Office.
 - An “an individual most adversely impacted by the War on Drugs” means an individual who (1) has had an income below 250% of the Federal Poverty Level for at least five of the past 10 years and (2) has been arrested or convicted for a cannabis-related offense, or whose family member has been arrested or convicted for such an offense.
 - 20% of the trust would go to the [Cannabis Opportunity Grant Program \(COGP\)](#) to fund loans to small businesses owned and controlled by “[socially and economically disadvantaged individuals](#)” in the cannabis industry. The COGP would be administered by the Small Business Association (SBA).
 - The bill adopts the definition of “socially and economically disadvantaged individual” contained in Section 8(d)(3)(C) of the Small Business Act: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantages [under the Small Business Act].”
 - 20% of the trust would go to the [Equitable Licensing Grant Program \(ELGP\)](#) to fund State licensing programs that meet at least four of five specified factors, each aimed at [ensuring that States’ licensing regimes are equitable](#). The ELGP would be administered by the SBA.

Social Justice Goals – Criminal Records

- The bill requires [expungement and resentencing](#) of individuals who have been charged, arrested or convicted of a federal cannabis-related offense, with [retroactive effect](#).
- The bill [prohibits denial of federal benefits or immigration status](#) based on an individual's use of cannabis.
- The bill extends federal [small business loan programs](#) to “cannabis-related legitimate business and service providers.”
 - “Cannabis-related legitimate business and service providers” generally includes any person that handles cannabis products or provides “any business” to such person.
- The bill requires the [Department of Justice](#), as well as the [Treasury](#) and the [SBA](#), to take any additional steps needed to effect implementation of the bill.

National Sales Tax and Other Provisions

- The MORE Act would amend Section 5701 of the Internal Revenue Code (IRC) to impose a **5% sales tax** for “cannabis products” manufactured in or imported into the U.S.
 - “Cannabis product” means “any cannabis or any article which contains cannabis or any derivative thereof,” but **excludes prescription drugs and hemp**.
 - The bill also amends portions of the IRC that impose a special tax on tobacco products to include cannabis products.
 - The tax would go into effect **one year** after the MORE Act is implemented.
- The MORE Act also directs the Bureau of Labor Statistics to regularly compile and publish a **demographic survey of business owners and employees** in the “cannabis industry,” including information about individuals’ age, race, sex, educational attainment and veteran status.
 - “Cannabis industry” is defined as an “individual or entity that is licensed or permitted under a State or local law to engage in commercial cannabis-related activity.”
 - “Cannabis” is defined however it is defined under the relevant State or local law.

Hemp's Path Toward Full Legalization

USDA Analysis Has Clarified that Hemp is No Longer a Controlled Substance, but Additional Implementation of the 2018 Farm Bill is Still Needed.

- The 2018 Farm Bill legalized the production of industrial hemp for purposes beyond research by removing hemp from the definition of “marihuana” in Schedule I of the CSA.
 - To assume primary regulatory authority over hemp production, states must submit a plan to the U.S. Department of Agriculture ([USDA](#)) and the USDA must approve the plan.
 - In the absence of an approved state plan, regulation of hemp production within a state would be subject to the federal plan established and implemented by the USDA.
- The General Counsel of the USDA issued a memorandum and legal opinion on May 28, 2019 [[Link](#)] concluding:
 - Hemp and tetrahydrocannabinols ([THC](#)) in hemp have been removed from Schedule I of the CSA and are no longer controlled substances. The decontrolling of hemp and THC in hemp is self-executing. The CSA implementing regulations must be updated to reflect the amendments to the CSA but the publication of updated regulations is not necessary to execute the removal of hemp and THC from Schedule I.
 - [After the USDA publishes regulations implementing the 2018 Farm Bill](#), states and Indian tribes may not prohibit the interstate transportation of hemp lawfully produced under a state or tribal plan or under a license issued under a USDA plan; nor may states and Indian tribes prohibit the interstate transportation of hemp lawfully produced under the 2014 Farm Bill.
 - The 2018 Farm Bill does not affect the authority of the Secretary of Health and Human Services or the Commissioner of the Food and Drug Administration ([FDA](#)) under applicable FDA laws.
- In recognition of the current grey area surrounding hemp, the SAFE Banking Act directs Federal banking regulators to clarify that hemp is currently legal, and protects depository institutions providing financial services to HRBs and service providers.

The Emerging Regulatory Structure Affecting Hemp

Once the USDA Releases its Implementing Regulations for the 2018 Farm Bill, Hemp Will be Regulated by the Following Authorities:

Activity	Regulator
Licensing and Permitting for Producers and Sellers	<ul style="list-style-type: none">• State-level regulators, unless a State adopts the regime described in the USDA's implementing regulation
Prohibiting States' Interference with Interstate Transportation of Hemp	<ul style="list-style-type: none">• United States Department of Agriculture
Hemp Importing	<ul style="list-style-type: none">• United States Department of Agriculture
Pharmaceutical Uses of Hemp and CBD	<ul style="list-style-type: none">• Food and Drug Administration
Health Claims by Hemp Products	<ul style="list-style-type: none">• Food and Drug Administration; Federal Trade Commission

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