

House Financial Services Committee Advances the SAFE Banking Act to the Full House

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Cannabis banking legislation reached a new milestone last week. Following a markup session, the House Financial Services Committee on March 28 approved an amended SAFE Banking Act in a 45-15 vote. As our [visual memorandum](#) discussed in February, the bill offers a safe harbor and other protections for depository institutions serving cannabis-related businesses acting pursuant to the laws of states that have legalized marijuana. The bill would provide relief for banks considering banking the cannabis sector and some measure of clarity for banks on how to approach legitimate businesses that interact with the cannabis sector.

Despite a number of helpful improvements,¹ the latest iteration of the SAFE Banking Act still does not provide protections for capital markets and wholesale activities. As our visual memorandum observed, the SAFE Banking Act primarily covers depository institutions, and some of the bill's core protections would not shield broker-dealers, underwriters, asset managers, and custodians. These protections cover only those depository institutions providing a "financial product or service," as that term is defined in the Consumer Financial Protection Bureau (CFPB) provisions of the Dodd-Frank Act. One hopes that we would have learned from the experience of the Volcker Rule that trans-statutory cross-references need to be carefully thought out.² The use of this cross-reference is particularly problematic for capital markets and wholesale activities since the precise term is used in Title X with the CFPB's jurisdiction in mind.³ As a result, it leaves out insurance, broker-dealers, and wholesale markets because these are not part of the CFPB's mission. The March 28 markup of the SAFE Banking Act specifically added coverage for insurance, payment services, and money transmitters.

There is still time to improve the bill, and the limited scope of protection should be addressed.⁴ Rather than relying solely upon the CFPB definition, we believe it makes more sense to build on the traditional definitions used in the financial services area for many years such as "business of banking" or "financial in nature,"⁵ each of which is broader in scope and has years of judicial precedent, specific regulations, and supervisory guidance.⁶ It would be better to develop a definition from the traditional base of banking law and regulation or to use both the Title X definitions and the traditional definitions to cover the widest possible field. We take no view at this point on exactly which one of these definitions might work and exactly how it should be incorporated into this bill. We simply urge that the seemingly random choice of a Dodd Frank CFPB provision designed for a completely different policy purpose not be imported into a core banking law.

Law Clerk Suiwen Liang contributed to this post.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- ¹ Since our visual memorandum, the bill has adopted a safe harbor provision for entities performing payments-related functions, a section governing proceeds, and, most recently, protections for insurance companies.
- ² See Erik F. Gerding, *Volcker's Covered Funds Rule and Trans-Statutory Cross References: Securities Regulation in the Service of Banking Law*, 10 Cap. Mkts. L.J. 488 (2015).
- ³ Because Title X focuses on the consumer protection context, its definition of "financial product or service" does not include key financial services for businesses.
- ⁴ The next stop for the SAFE Banking Act is the floor of the full House.
- ⁵ To ascertain whether a company is "predominantly engaged in financial activities," the Federal Reserve examines whether activities that are "financial in nature" or "incidental to a financial activity" comprise at least 85% of the company's consolidated annual gross revenues. The list of such activities, as enumerated in the Bank Holding Company Act and the Federal Reserve's implementing regulations, represents the traditional list of financial services.
- ⁶ Michael S. Barr, Howell E. Jackson & Margaret E. Tahyar, *Financial Regulation: Law and Policy* 189–216, 693–96, 699–701 (2d ed. 2018).