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The Cannabis Industry & the SAFE Banking Act: Looking to the Future, Planning for the Present

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Were it to become federal law, the Secure and Fair Enforcement Banking Act, or the "SAFE Banking Act," would create a "safe harbor for depository institutions," reducing the risk to them of doing business with the state-legal cannabis industry in the United States.

Despite multiple attempts, however, passage of this important legislation, which has received bipartisan support, remains elusive. Although it has more than once received the U.S. House of Representatives' stamp of approval, the legislation continues to stall out in the U.S. Senate. Efforts to pass this necessary legislation — which remains a priority for the U.S. cannabis industry — are ongoing.

Unless and until the SAFE Banking Act becomes law, however, the U.S. cannabis industry will continue to face increased risk. Today, many banks and other financial institutions refuse to work with cannabis-related businesses – turning away their deposits and refusing to issue them credit cards, for example. To succeed and protect itself, a cannabis-related business must be prepared to address these additional operational challenges and to mitigate the additional risk they present.

What is the SAFE Banking Act?

According to the Congressional Research Service ("CRS"), the SAFE Banking Act "generally prohibits a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business."

In relevant part, the legislation provides:

> With respect to providing a financial service to a cannabis-related legitimate business (where such cannabis-related legitimate business operates within a State, political subdivision of a State, or Indian country that allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to a law or regulation of such State, political subdivision, or Indian Tribe that has jurisdiction over the Indian country, as applicable) or a service provider (wherever located), a depository institution, entity performing a financial service for or in association with a depository institution, or insurer that provides a financial service to a cannabis-related legitimate business or service provider, and the officers, directors, and employees of that depository institution, entity, or insurer may not be held liable pursuant to any Federal law or regulation —
>
> 1) solely for providing such a financial service; or
> 2) for further investing any income derived from such a financial service.

Also according to CRS, passage/enactment of this legislation would mean that "proceeds from a transaction involving activities of a legitimate cannabis-related business [would] not [be] considered proceeds from unlawful activity. … Furthermore, a depository institution [would] not, under federal law, [be] liable or subject to asset forfeiture for providing a loan or other financial services to a legitimate cannabis-related business."

CRS further explains: "The bill also provides that a federal banking agency may not request or order a depository institution to terminate a customer account unless (1) the agency has a valid reason for doing so, and (2) that reason is not based solely on reputation risk."

Also significant, the SAFE Banking Act would provide "protections for insurers." Creating a safe harbor for them as well, the legislation provides that, in a jurisdiction where cannabis is legal locally, "an insurer that engages in the business of insurance with a cannabis-related legitimate business or service provider or who otherwise engages with a person in a transaction permissible under State law related to cannabis, and the officers, directors, and employees of that insurer may not be held liable pursuant to any Federal law or regulation … (1) solely for engaging in the business of insurance; or (2) for further investing any income derived from the business of insurance."

What is the current status of the SAFE Banking Act?

The SAFE Banking Act and the protections it affords still are not law in the United States.

The House has passed the SAFE Banking Act more than once, but, so far, the Senate has been unwilling to do so.

Rep. Ed Perlmutter (D–Colo.), who *Cannabis Business Times* calls the "chief author" of the SAFE Banking Act, has publicly stated his intention to work for the immediate passage of the legislation.

However, at least certain key U.S. Senators appear to favor comprehensive cannabis reform in the United States over passage of piecemeal legislation, including the SAFE Banking Act.

As such, despite the bipartisan support for the legislation, if and when the SAFE Banking Act will become law remains uncertain.

SCAN ME

Scan this code for the latest updates on the SAFE Banking Act.

From the Field

Michael and Richard give their in-depth analysis about the SAFE Banking Act and its effect on cannabis businesses.

Why is the SAFE Banking Act necessary and important?

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Currently — for fear that doing so will be deemed a violation of U.S. federal law — many banks and other financial institutions in the United States will not do business with the cannabis industry. In fact, there have been reports of banks learning that cannabis-related businesses maintained accounts with them and then kicking those businesses out of the banks. The impediments to banking obviously makes it harder for state-compliant cannabis businesses to operate.

Likewise, cannabis' current status under federal law has curtailed the insurance market for this industry. Because cannabis is still federally illegal, many traditional insurers are unwilling to write insurance for businesses in this industry.

If the SAFE Banking Act became law, banks, credit card companies, insurers, and other financial institutions likely will be protected and therefore may be much more willing to do business with this industry, which, in turn, would remove many logistical hurdles, reduce transaction costs, and increase options for insurance.

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It goes beyond just banking. The vast majority of insurers and reinsurers will not consider working with a cannabis business, with most citing cannabis' status under federal law. In the United States, it remains illegal for anyone to knowingly or intentionally manufacture, distribute, dispense, or possess with the intent to manufacture, distribute, or dispense marijuana, which is a Schedule I drug.

Many large (re)insurers and brokerages have federal contracts or other close federal ties. The insurers that are participating make a risk calculation similar to that of a cannabis business — so long as they are only working with legal and compliant businesses (under state law), the federal enforcement risk is perceived to be low. Should the SAFE Banking Act become law, this risk calculation looks more favorable.

For example, with explicit protection from confiscation of premiums, insurers may become more comfortable with the overall status of cannabis and thus be more willing to offer insurance.

Additional benefits of the SAFE Banking Act becoming law could include:

- Standard and admitted insurance companies likely will consider increasing insurance or reinsurance capacity for cannabis businesses. The current insurance landscape is so limited that the entry of just one or two of the top U.S. insurers has the potential to significantly decrease rates and improve coverage.
- Reduced reliance on cash at the point of sale and for payments between companies, helping to reduce theft and cargo risk.

From the Field

In the absence of the protections afforded by the SAFE Banking Act, what additional challenges and risks do cannabis-related businesses face?

MHS

In the absence of the protections afforded by the SAFE Banking Act, state-compliant cannabis-related businesses face a number of challenges and risks largely unique to this industry. Most notably, access to financial institutions for banking/deposit purposes is limited. In fact, there have been multiple reports of large banks actually closing accounts of compliant cannabis-related businesses – not just plant-touching businesses.

Similarly, many credit card companies still refuse to extend their services to the cannabis industry, which creates headaches not just for businesses in the industry but for their customers and patients.

Additionally, while – make no mistake – insurance coverage is certainly available for cannabis-related businesses, the insurance market available to the cannabis industry is still limited. As a result, there are not a lot of options for cannabis-related businesses when it comes to insurers and insurance policies, there is limited capacity, and premiums are higher than they might otherwise be if cannabis was legal in the United States.

If and when the SAFE Banking Act becomes law, we would expect to see more insurers willing to write insurance for cannabis-related businesses. The basic laws of supply and demand tell us that, if and when that happens, we should also expect to see increased capacity and lower premiums. Obviously, that result would be a positive development for the cannabis industry.

RG

The lack of access to banking and related services is the primary reason the cannabis business has been so dependent on cash. From collecting cash at the point of sale to paying vendors, cannabis businesses face an additional logistical and security challenge. Dispensaries and distribution centers are common theft targets, as their dependence on cash is well known. Cannabis businesses are also challenged when it comes to accessing funding and capital, managing payroll, and a variety of other critical business activities that are assisted by access to financial services. This challenge has created a heavy reliance on third-party service providers.

From the Field

Unless and until the SAFE Banking Act becomes law, what else can cannabis-related businesses do to minimize risk?

MHS

There are a number of steps a cannabis-related business can take right now to try to mitigate risk.

For one, know the law: Understand what the business can and cannot do. Understand what actions may expose the business to additional risk or scrutiny, and structure operations accordingly.

One other seemingly obvious step is to purchase insurance, even if the options are somewhat limited. And, do not just focus on product-liability or property insurance. A cannabis-related business should make sure that it is insuring against all of its risks by obtaining, for example, cyber insurance and/or employment practices liability insurance.

Additionally, partnering with experienced insurance professionals, including insurance brokers, knowledgeable about the cannabis industry to help place, renew, and review insurance policies is critical.

Finding a local bank or credit union at which to bank is, of course, another important step. Cannabis-related businesses should be transparent; they should not try to disguise the nature of their operations in order to bank or access other financial institutions.

To the extent that a cannabis-related business is heavily dependent on cash sales, it should make sure it has appropriate physical security in place.

Further still, it is really important that cannabis-related businesses know with whom they are doing business and adequately vet their vendors and service providers. Because cannabis remains federally illegal, cannabis-related businesses sometimes have to look at non-traditional, or cannabis-specific, entities that have formed to try to service this industry. Not all businesses are created equal, however. So, a cannabis-related business will want to do its due diligence and make sure that it is picking the best vendors and providers, who take the law, compliance, and risk-management as seriously as do the businesses themselves.

These are just a handful of examples of ways in which cannabis-related businesses can work to manage risk. Consulting with qualified legal counsel that is knowledgeable about the cannabis industry can also help identify risk and ways to mitigate risk.

RG

With theft being a primary cause of loss for cannabis businesses, establishing advanced security protocols for storing and moving cash becomes critical. This means identifying trustworthy and established third-party logistics partners, and/or ensuring your own fleet vehicles are equipped with the latest in security and safety. GPS tracking technology implemented in the bags used to carry cash can help improve recovery rates. Full interior and exterior camera coverage, motion detection, safes and vaults, employee background checks, etc. are all key components of a holistic security strategy. When building a new facility, cannabis businesses should go beyond state security requirements and implement a more comprehensive program.

Cannabis businesses also need to look closely at their property and cargo insurance policies, which may exclude or heavily limit coverage for theft of money and securities. Theft by employees is almost universally excluded in these policies. A dedicated crime policy can help fill this gap, and often covers theft of product along with cash. A full review of all insurance policies in order to identify and minimize the impact of coverage gaps, whether through improved insurance or risk management, can prevent a potentially uncovered claim or minimize its impact.

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Prior to joining Symphony Risk Solutions, Rich led the cannabis practice for Aon North America. Having served clients from single-location dispensaries to the largest multi-state operators, Rich has negotiated a huge variety of cannabis insurance transactions including some of the largest and most complex in the U.S.

In addition, Rich has worked with insurers to introduce new capacity and improve processes to alleviate the challenges cannabis businesses face in purchasing coverage.

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