

Pa. Cannabis Banking Law Won't Allay Finance Industry Fears

By **Michael Sampson** (August 12, 2022)

With the federal Secure and Fair Enforcement Banking, or SAFE Banking, Act, stalled in Congress, Pennsylvania recently took matters into its own hands.

On July 11, Pennsylvania Gov. Tom Wolf signed H.B. 331 into law, formally authorizing financial institutions and insurers to provide services to Pennsylvania's legitimate cannabis industry and generally prohibiting adverse state action against them solely for doing business with that industry.



Michael Sampson

While this new law is of course a welcome development for Pennsylvania's medical marijuana industry, the unfortunate reality is that it is unlikely to have much, if any, practical effect.

Unless and until the SAFE Banking Act or similar legislation becomes federal law — or marijuana is legalized federally — banks, other financial institutions and insurance companies, including ones otherwise doing business in the Keystone State, likely will continue to largely avoid even state-legal cannabis-related businesses.

Today, marijuana remains a Schedule I controlled substance under federal law. Although some form of marijuana — i.e., medical marijuana, adult-use marijuana or both — is now legal in a majority of states, the federal Controlled Substances Act still makes it illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana.

Federal illegality, in turn, makes many banks, other financial institutions and insurance companies reluctant when it comes to cannabis.

For example, the Brookings Institution's John Hudak and Aaron Klein wrote in CNN Business, "Since cannabis remains illegal under federal law — and the federal government oversees all banks and credit unions — banks are often skittish about granting bank accounts to these businesses."

In a separate 2018 report from the Brookings Institution that originally appeared in The Oregonian, Klein explained:

The complex web of federal regulations that deter banks from working with legal dispensaries starts with the federal government requiring banks and financial firms to file "suspicious activity reports" that help federal investigators detect and uncover criminal enterprises.

As a result, many, if not most, banks will not accept deposits from cannabis-related businesses; many, if not most, major credit card companies will not authorize transactions with cannabis-related businesses; and a number of prominent insurers will not write insurance policies covering cannabis-related businesses and risks.

Lack of access to banking, insurance and other financial services causes more than just operational challenges. It also causes the cannabis industry to be overly reliant on cash,

which in turn raises numerous safety and security concerns.

As The Associated Press reported in April, "[B]ig banks and credit card companies have long been reluctant to work with the industry, leaving the businesses heavily reliant on cash and making them attractive marks for robbers."

Pennsylvania's new law speaks to many of these concerns.

In relevant part, for example, it provides generally that financial institutions and insurers are authorized to provide financial services and insurance services, respectively, in the commonwealth, "to or for the benefit of a legitimate cannabis-related business and the business associates of a legitimate cannabis-related business," subject only to certain conditions.

Specifically, those services must also be provided consistent with, generally speaking:

- Other legal authority generally applicable to the provision of such services to other customers;
- All of the commonwealth's applicable consumer protection laws;
- Any other requirements imposed by a commonwealth agency or department that are applicable to providing services to the cannabis industry; and
- Any other jurisdiction's requirements to the extent that services are being provided to a "legitimate cannabis-related business or its business associates in another jurisdiction."

The new law also defines key terms:

- "Business associate" is generally defined to mean someone who purchases or supplies goods or services from, to, "or for the benefit of a legitimate cannabis-related business" or someone employed by or associated with a legitimate cannabis-related business, such as a director or officer.
- "Financial institution" is defined to mean "[a] depository institution, trust company, licensee, [or] a person subject to the jurisdiction of a federal financial regulatory agency or ... the jurisdiction of the Department of Banking and Securities under the ... the Pennsylvania Securities Act of 1972."

- "Insurer" is defined to mean someone "authorized ... to transact the business of insurance" in the commonwealth, as well as eligible surplus-lines carriers. It also includes persons licensed in Pennsylvania "to sell, solicit or negotiate insurance," as well as the "officers, directors, agents and employees" of any such person.
- "Legitimate cannabis-related business" is defined to mean "[a] person that participates in any business or organized activity that involves handling cannabis or a cannabis product, including cultivating, producing, manufacturing, selling, transporting, displaying, dispensing, distributing or purchasing cannabis or a cannabis product in compliance with federal law, the laws of [the] Commonwealth or a law established by another state."

"Financial service" and "insurance service," as well as many other important terms, are also defined in the new law.

In addition to prescribing other conduct and imposing certain disclosure requirements, the new law also mandates that "[n]o agency or political subdivision of [the] Commonwealth may ... prohibit, penalize or otherwise discourage a financial institution or insurer from providing financial or insurance services to" Pennsylvania's medical marijuana industry.

And, it ostensibly provides still other protections to that industry:

- Generally, it proscribes "criminal prosecution, sanction or [a] claim for damages or any equitable remedy, solely because [a financial] institution or insurer is providing financial or insurance services to or for the benefit of a legitimate cannabis-related business or the business associates of a legitimate cannabis-related business."
- "The proceeds of any transaction involving the activities of a legitimate cannabis-related business may not be considered proceeds from an unlawful activity, solely because the transaction involves ... proceeds" relating to cannabis.
- "No legitimate cannabis-related business, or a business associate of a legitimate cannabis-related business, shall be denied any right or privilege by a state agency solely because of the business's or business associate's lawful participation" in Pennsylvania's medical marijuana program.

The new law, however, makes clear that it does not require, among other things, any "financial institution or insurer to provide financial or insurance services to" anyone, and, it is likely that many, if not most, of these entities still will not do so.

After all, it is not state law or the threat of state prosecution that spooks banks, insurers and others; rather, it is federal law and regulations that keep them away from this industry.

For example, the American Bankers Association has observed that because

the possession, distribution or sale of marijuana remains illegal under federal law ... any contact with money that can be traced back to state marijuana operations could be considered money laundering and expose a bank to significant legal, operational and regulatory risk.[1]

That is why the SAFE Banking Act is so important. In addition to offering other relief, that legislation provides, in pertinent part, that certain financial institutions, as well as insurance companies, "may not be held liable pursuant to any Federal law or regulation ... solely for providing ... a financial service" to the cannabis industry.

In other words, the SAFE Banking Act would provide a safe harbor from federal prosecution. In relevant part, that legislation — which has passed the U.S. House of Representatives seven times already, but has never passed the U.S. Senate — provides protections similar to those now codified in Pennsylvania.

However, instead of just applying in one state, those protections would apply in any

[s]tate, 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 [applicable] law or regulation.

In contrast, the new Pennsylvania law does not do anything to remove the fear of federal regulation and reprisal. Rather, it restricts action only by Pennsylvania actors.

Indeed, it could not go further and impede federal action. As the U.S. Supreme Court emphasized in its 2005 *Gonzales v. Raich* decision, "The Supremacy Clause [in the U.S. Constitution] unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." [2] In other words, the CSA still trumps state law.

As such, while it might assuage some concerns of certain state-chartered banks or credit unions, the new Pennsylvania law is unlikely to allay the fundamental concerns underlying the reluctance of many banks, other financial institutions and insurance companies to do business with the cannabis industry. It does nothing — because it cannot do anything — to remove the fear of federal law, regulation and reprisal.

Therefore, despite its clearly good intentions, the new Pennsylvania law unfortunately is unlikely to fundamentally change the behavior of most banks, other financial institutions and insurers.

Michael H. Sampson is a partner, co-leader of the cannabis industry group and leader of the insurance coverage practice group at Leech Tishman Fuscaldo & Lampl LLC.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.aba.com/advocacy/our->

issues/cannabis#:~:text=ABA%20Position&text=Yet%20the%20possession%2C%20distribution%20or,legal%2C%20operational%20and%20regulatory%20risk.

[2] *Gonzales v. Raich*, 545 U.S. 1 (2005).