

Safe Harbor Needed for Cannabis Banking

On behalf of the more 52,000 community bank locations across the nation represented by ICBA, we thank Chairman Crapo, Ranking Member Brown, and members of the Banking Committee for convening today's hearing on "Challenges for Cannabis and Banking: Outside Perspectives." We are pleased to submit this statement for the record which provides the perspective of thousands of community banks that operate in the 33 states that have legalized cannabis in various forms and for various purposes.

The current conflict between state and federal law has created a cloud of legal uncertainty for community banks, inhibited access to the banking system for cannabis-related businesses (CRBs) and created a serious public safety concern. ICBA urges this committee to consider legislation that would create a federal safe harbor for banks that offer direct or indirect services to CRBs that comply with state law. The SAFE Banking Act, sponsored by Senators Merkley and Gardner, would create such a safe harbor.

At the outset, we wish to clarify that ICBA's support for a safe harbor must not be interpreted as support for legalization of cannabis for any use. ICBA makes no moral or scientific judgments with regard to cannabis use.

Cannabis Banking Too Risky for Overwhelming Majority of Community Banks

CRBs licensed in the states that have legalized cannabis today remain illegal under the federal Controlled Substances Act, which puts cannabis in the same category as heroin and LSD. All community banks, including those that are state chartered, are regulated, supervised, and examined by federal bank regulators, the Federal Deposit Insurance Corporation (FDIC) or the Federal Reserve. Based on long experience with examiners, bankers fear they will be highly critical of loans to businesses that are illegal under federal law. An examiner could, for example, reduce the balance sheet value of a sound and performing loan, forcing the bank to raise capital, or even pressure the bank to terminate the relationship. The legal stakes are simply too high for most community bank management and boards to tolerate.

Risk Goes Beyond *Direct* Cannabis Lending

For community bankers, the risk extends beyond *direct* cannabis businesses – the licensed growers, processors, and retailers. Any vendor of a direct CRB is an indirect CRB and also presents a risk to its banks. This could include even plumbers, internet service providers, or bookkeepers that offer their services to the broader public and whose customer base, knowingly or unknowingly, includes cannabis-related businesses. Many banks may not know that they are implicated with cannabis. The problem extends to consumer lending. Employees of cannabis-related businesses are paid from the sale of cannabis, illegal proceeds under federal law and technically subject to a superior federal lien. This means that a bank cannot rely on the employee's salary to underwrite consumer debt.

The SAFE Banking Act of 2019

In sum community banks in states that have legalized cannabis face a legal and compliance quagmire. While a small number of institutions have chosen to assume the risk of serving cannabis-related businesses, the industry remains cash intensive and a target for armed robbery. This is the most urgent aspect of limited access to banking services for cannabis-related businesses.

The solution is an effective, statutory safe harbor such as that embodied in the SAFE Banking Act. Among other provisions, the Act would:

- Prohibit federal banking regulators from taking certain actions against a depository institution that provides financial services to cannabis-related legitimate businesses. These include threatening or limiting a bank's deposit insurance, downgrade a loan, prohibit or discourage the provision of banking services, or take any other prejudicial action solely because a bank customer is a CRB.
- Provide protection from liability under any federal law for providing financial services to cannabis-related legitimate businesses and from forfeiture of collateral for loans to such businesses or to owners of real estate or equipment leased to cannabis-related legitimate businesses.
- Clarify that the SAFE Act does not impose a new obligation to provide financial services to cannabis-related legitimate businesses.
- Amend the BSA to require financial institutions to comply with guidance issued by FinCEN when filing suspicious activity reports (SARs) related to cannabis-related legitimate businesses.

Public Banking is Not a Viable Solution

With an effective safe harbor, America's community banks have ample capacity and willingness to serve all facets of the legal cannabis-related industry, should they choose to.

ICBA urges this committee not to consider various forms of public banking as a viable solution to the banking access problem. The California State Treasurer's Office recently commissioned a study of the feasibility of establishing a state bank in California to serve the cannabis industry.¹ That study, conducted by Level 4 Ventures, Inc., a business analytics firm specializing in cost modeling, was released in December 2018. The study found that such a bank would not be viable because it would be too costly to capitalize and would not return a profit for at least 30 years. The study states that: "Our conclusion is that no option for a public bank focused on the cannabis industry is feasible."

We concur with the conclusion of this independent study. It is worth noting that then-California Treasurer John Chiang, Ms. Ma's predecessor, had previously suggested the creation of a public bank, so the report's conclusions were not predetermined by its sponsorship. Following the release of the report, Chiang said, "While today's announcement [on the infeasibility of providing a California public bank to service the cannabis industry] may not lay out the path some of us had hoped, it did reinforce the inconvenient reality that a definitive solution will remain elusive until the federal government takes action."

Beyond the question of viability, community bankers are rightly concerned that once established, a special purpose cannabis bank would expand beyond its original scope and compete directly with community banks and other private sector competitors. We've seen this time and again with the creation of limited purpose financial institutions.

¹ <https://www.treasurer.ca.gov/comm-external-urls/cannabis-feasibility-full-report.pdf>. See also: Laura Alix. "Public Bank Isn't the Answer for California's Pot Industry: Report." American Banker. December 28, 2018. <https://www.americanbanker.com/news/public-bank-isnt-the-answer-for-californias-marijuana-industry-report>.

Conclusion

Thank you again for convening this hearing and raising the profile of a critical issue in the states that have legalized cannabis. If a solution is not found, the problems described in this statement will only become more urgent in the coming years. ICBA hopes to work with this committee to advance the SAFE Banking Act of 2019 to create a statutory safe harbor so that banks are free to serve the growing cannabis industry, should they choose to do so, without fear of legal and regulatory repercussion.