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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Missing Elements From New Cannabis Banking Bill

By **Thomas Delaney, David Beam and Jeffrey Taft**
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Thomas Delaney


David Beam


Jeffrey Taft

Legalization of certain cannabis-related activities by over 30 states has led to a surge in companies that grow and produce cannabis and related products, but banks and other financial services companies have been hesitant to serve this growing population of potential customers due to conflicting statutes and enforcement policies under federal law.

On Thursday, March 28, 2019, the Financial Services Committee in the U.S. House of Representatives took a step toward clearing some ambiguity at least for federally insured financial institutions. The Secure and Fair Enforcement Banking Act of 2019, which was approved on a vote of 45-15, with 11 of the panel's Republican members voting in favor, has been cleared for consideration by the full House.

The SAFE Act provides a safe harbor against retaliatory enforcement action by federal bank regulators directed at banks (including federal branches of non-U.S. banks), savings associations and credit unions that provide services to cannabis businesses or service providers. In addition, the SAFE Act prohibits federal regulators from discouraging depository institutions from offering financial services, including loans, to an account holder on the basis that the account holder is: a cannabis-related business or service provider; an employee, owner or operator of a cannabis related business; or, an owner or operator of real estate or equipment that is leased to a cannabis related business.

Furthermore, the SAFE Act provides that officers, directors and employees of depository institutions and the Federal Reserve banks may not be held liable under federal law or regulations based solely on their provision of financial services to cannabis-related businesses or for investing any income derived from such businesses. These protections only apply to cannabis-related businesses located in states, political subdivisions of states or an Indian country where local law permits the cultivation, production, manufacture, sale, transportation, distribution or purchase of cannabis.

While potentially lifting the haze that has clouded the ability of federally regulated and insured depository institutions to provide financial services to cannabis businesses, the SAFE Act does not alter

the status of cannabis under federal law. Cannabis remains a controlled substance under the Controlled Substance Act and under federal law it is illegal to manufacture, distribute or dispense marijuana.

On Aug. 29, 2013, amidst a growing number of states legalizing certain cannabis-related actives, the U.S. Department of Justice under the Obama administration issued updated guidance concerning cannabis-related enforcement policies. That guidance, known as the Cole Memorandum, set forth the following priorities for the prosecution of marijuana offenses:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

In line with the Cole Memorandum, in February 2014 the Financial Crimes Enforcement Network issued updated guidance governing procedures that financial institutions must implement if they take on cannabis businesses as customers. Among other things, that guidance required financial institutions to subject cannabis businesses to significantly enhanced due diligence, including confirming with relevant state authorities that that business is properly licensed and that it does not in any way implicate priorities set forth in the Cole Memorandum. In addition, financial institutions were required to file a specific type of suspicious activity report known as a marijuana limited SAR for each cannabis business the financial institution took on as a customer.

Then-Attorney General Jeff Sessions rescinded the Cole Memorandum on Jan. 4, 2017, but FinCEN did not withdraw its February 2014 guidance, which did little to alleviate the uncertainty that continued to deter federally regulated financial institutions from serving cannabis businesses. Notably, the SAFE Act

requires FinCEN to modify its SAR guidance to ensure that it is consistent with the purpose and intent of the act and does not significantly inhibit the provision of financial services to cannabis companies.

Passage of the SAFE Act is significant not only because it is a first step in clarifying federal enforcement policy governing the provision of financial services to cannabis companies but also because of the support the legislation received from Republican members of the House Financial Services Committee.

The bill must be approved by the full House of Representatives and bipartisan support will not only be critical to its prospects on the House floor but will also be critical to persuading Senate Majority Leader Mitch McConnell, R-Ky., to permit a vote on the bill or something similar to it by the full Senate.

As the bill progresses through the legislative process, it will be interesting to see whether it is further amended to address aspects of the financial services industry that are not currently covered by the SAFE Act but which nevertheless play a critical role in the functioning of financial services to retail businesses. The SAFE Act only addresses financial services provided by insured depository institutions — banks, savings associations and credit unions.

It does not, for example, address whether uninsured banks, such as trust companies, or bank holding companies and their nonbank subsidiaries would be permitted to provide services to cannabis businesses to the same extent as banks. Such an outcome would be anomalous but that appears to be the result if the SAFE Act were signed into law today.

Another apparent gap is the treatment of credit card intermediaries and payment processors. While many credit cards and payment devices are issued by banks, there are a number that are not and, more significantly, the networks that process card transactions are not insured depository institutions. An objective of the SAFE Act is to reduce the amount of cash held by cannabis businesses.

Facilitating credit card payments and other forms of electronic payments would be consistent with that goal; however, card and payment networks are not currently addressed in the bill and it is unclear whether these companies will be comfortable processing cannabis-related transactions without protections similar to those provided to insured depository institutions.

Similarly, money services businesses and money transmitters, which process a significant number of consumer payment transactions, particularly for the large portion of the U.S. population that do not have bank accounts, are also not covered by the SAFE Act. Leaving aside the absence of a strong policy rationale for differentiating this component of the financial services sector, this gap in the legislation could spur additional amendments before the SAFE Act is brought to the House floor for a final vote.

The SAFE Act is a welcome step toward clarifying the uncertainty that has surrounded the provision of financial services to cannabis businesses. However, it does not fully remedy the issues associated with providing financial services to this growing industry.

Thomas J. Delaney, David L. Beam and Jeffrey P. Taft are partners at Mayer Brown LLP.