

X. *Remedying the Underbanked Cannabis Industry: Prospects of Federal Banking Reform*

A. Introduction

It is no secret that in recent years, the cannabis industry in America has experienced exponential growth.¹ In 2018 alone, legal sales exceeded \$10 billion,² and estimates indicate that such sales will reach \$16 billion in 2019³ and \$80 billion by 2030.⁴ The successes of the industry are likely attributable to the intersectionality of cannabis uses; legal cannabis may be incorporated into the products of a variety of industries including, but not limited to, medicine, pharmaceutical, wellness and beauty, banking, cryptocurrency, agriculture, food, alcohol, and construction.⁵ While such industries develop “plant-touching” companies, the cannabis industry has also driven the growth of “ancillary” companies.⁶ “Plant-touching” businesses are those that “handle the cannabis plant itself” and “[a]ncillary businesses are all the companies in the space needed to support the actual growth, processing and sale of cannabis products.”⁷ Such companies include data platforms,

¹ Don Reisinger, *The Legal Marijuana Industry is Soaring—And 2019 Could Be Its Best Year Yet*, FORTUNE (Dec. 27, 2018), <https://fortune.com/2018/12/27/legal-marijuana-industry-sales/> [<https://perma.cc/2QB2-3SGF>] (stating that only \$5 billion was invested in the three years prior to 2018, and in 2018 alone, \$10 billion was invested).

² Associated Press, *Legal marijuana industry had banner year in 2018 with \$10B worth of investments*, NBC NEWS (Dec. 27, 2018, 9:18 AM), <https://www.nbcnews.com/news/us-news/legal-marijuana-industry-had-banner-year-2018-10b-worth-investments-n952256> [<https://perma.cc/32J6-FWUV>] (“Legal marijuana was a \$10.4 billion industry in the U.S. in 2018 . . .”).

³ *Id.* (“[T]he combined North American market is expected to reach more than \$16 billion in 2019.”).

⁴ Emily McCormick, *Cannabis is poised to be an \$80 billion industry in the U.S. in 2030: Cowen*, YAHOO FINANCE (Jan. 8, 2019), <https://finance.yahoo.com/news/cannabis-poised-80-billion-industry-222331008.html> [<https://perma.cc/J74G-7QQ7>] (reporting that Cowen’s managing direct, Vivien Azer, forecasted for cannabis sales “to reach \$80 billion by 2030”).

⁵ *See generally Cannabis for . . . Everything? 23 Industries Seizing the \$32B Market Opportunity*, CB INSIGHTS, <https://www.cbinsights.com/research/report/cannabis-disruption-legal-marijuana/> [<https://perma.cc/2P75-LLUM>].

⁶ *See id.*

⁷ *Id.*

point of sale systems, attorneys, accountants, payment processors, and digital marketers.⁸

Despite the ongoing economic success of the industry, cannabis businesses face severe banking obstacles as the substance remains illegal on the federal level.⁹ With most banks refusing to finance cannabis companies, the cannabis industry operates largely as a cash-only industry.¹⁰ Senator Jeff Merkley often recounts the story of shadowing a cannabis dispenser who “stuffed a backpack with \$70,000 in \$20 bills and drove fifty miles—unguarded—with the bulging bag in the back seat” in order to pay state taxes.¹¹ Tom DiGiovanni, a cannabis business chief financial officer, endures a similar routine where he must physically count the millions of dollars of his company’s revenue before transporting it to a state credit union that is willing to deposit the revenue.¹² The all-cash nature of the cannabis industry poses safety threats for companies who seek financial services. Alyson Martin, co-founder of Cannabis Wire, a news site, stated “[b]ecause these are essentially cash-only businesses, they become sitting ducks for robberies [and] thefts”¹³ Until national banks are cleared to

⁸ *Id.* (stating that ancillary businesses “include data platforms, ag-tech companies, point-of-sale systems, payment processors, digital marketers, attorneys, accountants and more”).

⁹ See generally Controlled Substances Act, 21 U.S.C. §§ 801–971 (1970).

¹⁰ See Ellen Sheng, *Underbanked cannabis industry struggles to finance double-digit growth, leaving business owners empty-handed*, CNBC (Oct. 1, 2019, 10:28 AM), <https://www.cnbc.com/2019/10/01/underbanked-cannabis-industry-struggles-to-finance-double-digit-growth.html> [https://perma.cc/C935-HYLX] (“Business owners and industry consultants can recount numerous stories about businesses operating primarily in cash to pay staff, rent, equipment and taxes.”).

¹¹ Elizabeth Rembert, *Bags Stuffed with Cash Add to Pressure for Cannabis Banking Law*, BLOOMBERG (Aug. 7, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-08-07/bags-stuffed-with-cash-add-to-pressure-for-cannabis-banking-law>.

¹² Yuki Noguchi, *Bags of Cash, Armed Guards And Wary Banks: The Edgy Life of a Cannabis Company CFO*, NPR (Apr. 10, 2019, 12:39 PM), <https://www.npr.org/2019/04/10/710076855/bags-of-cash-armed-guards-and-wary-banks-the-edgy-life-of-a-cannabis-company-cfo> [https://perma.cc/66DW-NB XF] (reporting that DiGiovanni “leans into an unmarked armored can where there’s a metal cage to protect the revenues for his company . . . from would-be thieves”).

¹³ *Id.*

service the cannabis industry without fear of federal prosecution, these obstacles will remain a hindrance on the industry's full potential.

This article will cover a brief history of the federal laws that work together to criminalize cannabis and prevent federally-backed institutions from servicing the cannabis industry. It will highlight the financial and banking difficulties faced by cannabis companies that arise from the federal constraints. Finally, the article will conclude with an overview of proposed federal reform to alleviate such banking concerns.

B. History: The Controlled Substances Act, the Bank Secrecy Act, and the Money Laundering Act

Federal law effectively criminalized cannabis when it established the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Controlled Substances Act or Act).¹⁴ Cannabis is classified as a Schedule I substance.¹⁵ This means that cannabis is considered unsafe, has a "high potential for abuse," and has "no accepted medical use."¹⁶ It is in the same class of substances as heroin, lysergic acid diethylamide (LSD), and ecstasy, and is considered more dangerous than cocaine, crystal meth, and fentanyl.¹⁷ The Act makes it illegal to "knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."¹⁸ This classification not only prevents federally-backed institutions from servicing cannabis companies, but it also prevents federally-funded research into the medical benefits of cannabis.¹⁹ United States Surgeon General, Jerome Adams, expressed concerns

¹⁴ See Controlled Substances Act, *supra* note 9.

¹⁵ *Id.* at § 812.

¹⁶ Ben Curren, *It's Time to Remove Cannabis from the Federal Drug Schedules*, FORBES (Dec. 17, 2018, 9:52 AM), <https://www.forbes.com/sites/bencurren/2018/12/17/its-time-to-remove-cannabis-from-the-federal-drug-schedules/#3bd663dc6a93> [<https://perma.cc/4LUC-ZLRX>].

¹⁷ *Id.* (purporting that "the Schedule I designation means the federal government views cannabis to be more dangerous than cocaine, crystal meth and fentanyl, all of which are on Schedule II").

¹⁸ Controlled Substances Act, *supra* note 9, at § 841.

¹⁹ Curren, *supra* note 16 (stating that a Schedule I classification creates substantial barriers to obtaining federally funded research in efforts to discover medical benefits).

regarding the placement of cannabis in the Controlled Substances Act due to its “effect on restricting scientific and medical research.”²⁰

Additional federal regulations that play a role in the criminalization of servicing the cannabis industry include the Bank Secrecy Act and the Money Laundering Control Act. The Currency and Foreign Transactions Reporting Act of 1970, or the Bank Secrecy Act, establishes strict reporting requirements for banks.²¹ More specifically, banks are “required to assist U.S. government agencies in detecting and preventing money laundering.”²² Financial institutions must file suspicious activity reports (SARs) when criminal activity is suspected.²³ The restraints on banks are further enhanced when the Bank Secrecy Act is considered in conjunction with the Money Laundering Control Act, which was enacted in 1986.²⁴ The Money Laundering Control Act made money laundering a federal crime and was established in an effort to pressure banks to comply with the Bank Secrecy Act.²⁵ Furthermore, it imposes substantial penalties for any violators:

Whoever . . . conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in

²⁰ Andrew Blake, *Surgeon general says marijuana’s controlled substance status is hindering research*, WASH. TIMES (Dec. 7, 2018), <https://www.washingtontimes.com/news/2018/dec/7/surgeon-general-suggests-reconsidering-marijuanas/> [<https://perma.cc/D4DC-8KWA>].

²¹ Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311–5330 (1971).

²² *Bank Secrecy Act (BSA)*, OFFICE OF THE COMPTROLLER OF THE CURRENCY <https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html> [<https://perma.cc/DZB4-XNBW>].

²³ *Id.* (“As of April 1, 2013, financial institutions must use the Bank Secrecy Act BSA E-Filing System in order to submit Suspicious Activity Reports.”).

²⁴ Money Laundering Control Act, 18 U.S.C. §§ 1956–1957 (1986).

²⁵ *History of Anti-Money Laundering Laws*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/UA96-57MG>] (stating that the Money Laundering Control Act “[d]irected banks to establish and maintain procedures to ensure and monitor compliance with the reporting and recordkeeping requirements of the [Bank Secrecy Act]”).

the transaction, which is greater, or imprisonment for not more than twenty years, or both.²⁶

Despite the still-active federal regulations that criminalized cannabis on the federal level, cannabis law has been developing at the state level since 1996.²⁷ In 1996, California was the first state to legalize medical marijuana.²⁸ Sixteen years later, in 2012, Colorado was the first state to legalize the recreational use of cannabis.²⁹ Today, “[m]edical marijuana is now legal in 34 states and 11 states have legalized recreational marijuana.”³⁰ Given that the percentage of Americans who support legal marijuana has been steadily increasing over the past couple of decades,³¹ it is likely that the number of states to legalize the substance will increase as well.

C. **Relevance: The Underbanked, the Department of Justice, and the Financial Crimes Enforcement Network**

1. *The Underbanked Cannabis Industry*

Banks are wary of servicing the cannabis industry due to the federal regulations discussed in Part B. In addition to the civil and criminal penalties that may be imposed on banks for violating the Money Laundering Control Act,³² banks that get written up for anti-

²⁶ Money Laundering Control Act, *supra* note 24.

²⁷ Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (Apr. 19, 2017), <https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws> [<https://perma.cc/B6BN-Y78Z>] (“In 1996, California became the very first state in the country to legalize medical marijuana.”).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Marijuana Banking Issue Brief*, NAT’L ASS’N OF FEDERALLY-INSURED CREDIT UNIONS, at 2, <https://www.nafcu.org/system/files/files/NAFCU-Marijuana-Banking-Issue-Brief-Aug19.pdf> [<https://perma.cc/NSA5-VZ48>].

³¹ See Jeffrey M. Jones, *In U.S., Medical Aid Top Reason Why Legal Marijuana Favored*, GALLUP (June 12, 2019), <https://news.gallup.com/poll/258149/medical-aid-top-reason-why-legal-marijuana-favored.aspx> [<https://perma.cc/JJ3F-2EEF>] (“Gallup has documented a sharp increase in the percentage of Americans favoring legal marijuana in the past decade, from 44% in 2009 to 64% in the current survey.”).

³² Money Laundering Control Act, *supra* note 24.

money laundering violations “cannot be termed ‘well managed’ . . . [and thus,] cannot engage in certain M&A transactions or branching transactions.”³³ Financial institutions may be subject to the aforementioned federal penalties even if the state in which the institution is operating has legalized the sale of cannabis.³⁴ Some local and state-chartered banks—as opposed to federally-chartered banks—provide banking services to the cannabis industry but often charge excessively higher fees for their services due to the risks associated with providing such services.³⁵ Because of this, many cannabis businesses resort to operating in cash as they, unlike non-cannabis businesses, are left “without the ability to accept debit or credit card payments, to use electronic payroll services, to maintain checking accounts, or to avail themselves of other common banking services.”³⁶

In an effort to circumvent prohibitive federal regulations, cannabis businesses often seek financing “through friends and family, hard money lending, crowdfunding, [and] accredited and unaccredited investors.”³⁷ Other sources of financial assistance include investment funding such as “private equity firms, venture capitalist, angel investors, alternative financing companies, structured finance, working capital, equipment capital, and bridge loans.”³⁸ For example, venture

³³ John Crabb, *Banks still scared of cannabis businesses*, PROQUEST (Apr. 3, 2019), https://search-proquest-com.ezproxy.bu.edu/docview/2229069280?accountid=9676&rfr_id=info%3Axi%2Fsid%3Aprimo.

³⁴ See *United States v. McIntosh*, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016) (asserting that while the Controlled Substances Act remains in effect, “states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law”).

³⁵ Parker et al., *Risk management within the cannabis industry: Building a framework for the cannabis industry*, 28 FIN. MKTS., INST. & INSTRUMENTS 3, 32 (2019) (asserting that some state-chartered or community banks “may charge excessively higher fees for their services because of the litany of other restrictions placed on cannabis-related customers to meet regulatory requirements”).

³⁶ *Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses: Hearing Before the H. Comm. on Fin. Servs. Subcomm. on Consumer Protection and Fin. Insts.*, 116th Cong. 5 (2019) (statement of David H. Carpenter, Legislative Att’y) [hereinafter, *Challenges and Solutions*].

³⁷ Hilary Bricken, *Funding and Financing a Marijuana Business*, PROQUEST (2017), <https://search.proquest.com/docview/1902612537?pq-origsite=gscholar>.

³⁸ Parker et al., *supra* note 35, at 33.

capitalist and private equity firms dominate start-up funding in the cannabis industry.³⁹ Yet another option includes using real estate investment trusts (REITs).⁴⁰ REITs can “offer longer-term and lower interest rate loans than traditional financing,” but using them results in “minimal capital being available for expansion and growth” of the business.⁴¹ Thus, cannabis businesses may have financing options other than federally-backed banks, but making use of such options comes at a cost.

2. *Efforts of the Department of Justice and the Financial Crimes Enforcement Network*

In spite of the reluctance of banks to engage with the cannabis industry, the Department of Justice (DOJ) and the Financial Crimes Enforcement Network (FinCEN) attempted to provide federally-backed institutions with assurances by issuing guidance regarding how financial institutions could navigate conflicting state and federal cannabis law so as to serve the needs of their communities.⁴² The efforts of the DOJ to offer guidance to banks entail a number of memos issued by various attorney generals. In August 2013, Deputy Attorney General James Cole issued a memo (2013 Cole Memo) that provided guidance regarding marijuana enforcement.⁴³ The 2013 Cole Memo outlined eight areas where federal enforcement of the Con-

³⁹ *Id.* (“The significant and rapid growth in the cannabis industry has unlocked opportunities for new entrants to create products, technologies, and services that are ancillary to the cultivation and distribution of cannabis itself. This has resulted in a significant portion of start-up funding for the cannabis industry through venture capitalist and private equity firms.”).

⁴⁰ See generally Randall S. Guttery & Stephen L. Poe, *Using a Cannabis Real Estate Investment Trust to Capitalize a Marijuana Business*, 24 J. REAL EST. PORTFOLIO MGMT. 201–06 (2018) (discussing how cannabis REITs can be used to capitalize a cannabis business).

⁴¹ *Id.* at 201.

⁴² *Challenges and Solutions*, *supra* note 36, at 2 (stating that the DOJ and FinCEN “have previously issued guidance on the interplay of federal marijuana laws and conflicting state legalization efforts.”).

⁴³ James M. Cole, *Memorandum to All United States Attorneys on Guidance Regarding Marijuana Enforcement*, U.S. DEPT. OF JUSTICE (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/VB5Z-JK2H>].

trolled Substance Act would be focused.⁴⁴ Thus, anything that fell outside of the eight points would be enforced by state and local authorities in accordance with state laws.⁴⁵ Where the 2013 Cole Memo fell short, however, was that it failed to directly address how its guidance applied to financial institutions, and subsequently, to potential crimes by such institutions involving cannabis funds.⁴⁶

In February 2014, Deputy Attorney General James Cole issued another memo (2014 Cole Memo) that provided guidance regarding marijuana related financial crimes.⁴⁷ The 2014 Cole Memo reiterated the eight priorities for federal prosecutors to consider, and emphasized the importance of compliance with requirements under the Bank Secrecy Act to file SARs, or face federal prosecution.⁴⁸ Additionally, the 2014 Cole Memo went further to assert that “if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.”⁴⁹ The 2014 Cole Memo was released concurrently with the FinCEN guidance, which focused on the Bank Secrecy Act expectations regarding marijuana-related businesses.⁵⁰ The guidance “clarifies how financial

⁴⁴ See *id.* at 1–2 (“Preventing the distribution of marijuana to minors; [p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states; [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; [p]reventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [p]reventing marijuana possession or use on federal property.”).

⁴⁵ *Marijuana Banking Issue Brief*, *supra* note 30, at 7.

⁴⁶ *Id.* (“[T]he guidance did not specifically address applicability to financial institutions, or financial crimes involving marijuana-related funds.”).

⁴⁷ James M. Cole, *Memorandum for All United States Attorneys on Guidance Regarding Marijuana Related Financial Crimes*, U.S. DEPT. OF JUSTICE (Feb. 14, 2014), <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf> [<https://perma.cc/7XN6-4BQL>].

⁴⁸ *Id.* at 1, 3 (asserting that inadequate state enforcement efforts may be prosecuted against by the federal government).

⁴⁹ *Id.* at 2–3.

⁵⁰ Financial Crimes Enforcement Network, *Guidance on BSA Expectations Regarding Marijuana-Related Businesses*, U.S. DEPT. OF THE TREASURY

institutions can provide services to marijuana-related businesses consistent with their Bank Secrecy Act obligations, and aligns the information provided by financial institutions in Bank Secrecy Act reports with federal and state law enforcement priorities.”⁵¹ It strongly urges financial institutions to conduct thorough customer due diligence, and to comply with the recommendations of the 2014 Cole Memo.⁵² Thus, the DOJ and FinCEN made clear their intention to provide assurances to financial institutions that may have been considering servicing cannabis companies, but such assurances were diminished only a few years later.

In January 2018, former U.S. Attorney General Jeff Sessions issued a memo (Sessions Memo) that effectively rescinded the Cole Memos.⁵³ The Sessions Memo stated “[t]his memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations.”⁵⁴ It had the effect of further deterring banks from providing service to the cannabis industry after the Sessions Memo asserted that the government would pursue cannabis-related crimes as it would all other controlled substances categorized by the Controlled Substances Act.⁵⁵

(Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [<https://perma.cc/68QN-4THM>] (“The Financial Crimes Enforcement Network (“FinCEN”) is issuing guidance to clarify Bank Secrecy Act (“BSA”) expectations for financial institutions seeking to provide services to marijuana-related businesses.”).

⁵¹ *Id.* at 1.

⁵² *Id.* at 2–3 (“In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence . . . [and] a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law.”).

⁵³ Jefferson B. Sessions, *Memorandum to All U.S. Attorneys on Marijuana Enforcement*, U.S. DEPT. OF JUSTICE (Jan. 4, 2018), <http://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/URL3-GJWR>] (“Given the Department’s well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”).

⁵⁴ *Id.*

⁵⁵ *See* Crabb, *supra* note 33 (“When Jeff Sessions revoked the Cole Memo and confirmed that the government was going to prosecute marijuana as it would all other controlled substances under the CSA as a federal felony, it stopped a lot of bankers from getting further into this.”).

During his confirmation hearing in January 2019, U.S. Attorney General William Barr weighed in on the aforementioned memos.⁵⁶ Barr stated “I am not going to go after companies that have relied on the Cole Memorand[um],” but with respect to legalization, it is an issue best resolved “through the legislative process” and not via “executive discretion.”⁵⁷ Thus, because the FinCEN guidelines remain in effect, and the DOJ guidelines are not consistent with them, the future of the cannabis industry remains “uncertain” due to the conflicting guidance issued by financial regulators on one side, and the federal government on the other.⁵⁸

D. Proposed Reform: The STATES Act and the SAFE Act

Given the hands-off approach being taken by Barr, it appears that federal banking reform related to the cannabis industry must originate in the nation’s legislature. Earlier this year, the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act) and the Secure and Fair Enforcement Banking Act (SAFE Act) were introduced to the 116th Congress in an effort to provide financial institutions with protections against federal prosecution for servicing the cannabis industry.⁵⁹

⁵⁶ Letter from Att’y Gen. William P. Barr to the Hon. Lindsey Graham and Hon. Dianne Feinstein, at 50–51 (Jan. 27, 2019) (on file with the S. Judiciary Comm.) (providing answers regarding his opinion on the legalization of marijuana and a course of action for the federal government).

⁵⁷ *Id.* at 51.

⁵⁸ See *Marijuana Banking Issue Brief*, *supra* note 30, at 9 (“Despite [the Cole Memo] rescission, FinCEN’s 2014 guidance remains intact, leaving the industry to face an uncertain future because on the one hand, you have a financial regulator allowing the banking of a MRB, but on the other hand you could face federal prosecution by the DOJ.”).

⁵⁹ See generally Jodi L. Avergun et al., *Cannabis Finance—SAFE in the STATES and Maybe Beyond?*, NAT’L L. REV. (Apr. 8, 2019), <https://www.natlawreview.com/article/cannabis-finance-safe-states-and-maybe-beyond> [<https://perma.cc/4VUQ-EWR7>].

1. *The STATES Act*

The STATES Act was introduced to committees of the House of Representatives on April 4, 2019.⁶⁰ The purpose of this bill is “[t]o amend the Controlled Substances Act to provide for a new rule regarding the application of the Act to mari[j]uana, and for other purposes.”⁶¹ The STATES Act’s broad approach proposes to amend the Controlled Substances Act in a way that would prohibit its application to state law abiding individuals and companies; it states that the provisions of the Controlled Substances Act “as applied to marijuana, . . . shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marijuana.”⁶² In response to the STATES Act, the American Bar Association also issued a Resolution in which it urged Congress to (1) exempt cannabis-related business that is in compliance with state laws from the Controlled Substances Act; (2) remove cannabis from Schedule I of the Controlled Substances Act; and (3) to enact legislation that would encourage federally-backed scientific research into cannabis.⁶³

Proponents of the STATES Act argue that if it were enacted into law, it would go further than any other bill in the steps to eliminating the divide between federal and state law with respect to marijuana.⁶⁴ Critics, on the other hand, argue that the STATES Act is too “vague” and would actually draw forth contradictions between federal and state law, resulting in greater bureaucratic obstacles.⁶⁵ Furthermore, getting the STATES Act to pass in the Senate presents a challenge as Senator Lindsey Graham, the chair of the Judiciary

⁶⁰ Strengthening the Tenth Amendment Through Entrusting States Act of 2019, H.R. 2093, 116th Cong. (1st Sess. 2019).

⁶¹ *Id.*

⁶² *See id.*

⁶³ *Report to the House of Delegates*, 2019 A.B.A. SEC. CRIM. JUST. 104. [<https://perma.cc/ZAA2-NYC3>].

⁶⁴ *See* Avergun et al., *supra* note 59 (“If enacted, [the STATES Act] would go further than any other bill introduced to date, including the SAFE Act, to remove significant hurdles that exist for state-compliant businesses . . .”).

⁶⁵ *See* J.J. Rich, *The STATES Act Would Signal Progress But Could Also Create Many Problems*, REASON FOUND. (May 3, 2019), <https://reason.org/commentary/the-states-act-congress-marijuana-legalization/> [<https://perma.cc/EW29-E7ZL>] (arguing that the STATES Act is “incredibly vague and would elicit many contradictions between state and federal laws”).

Committee, stated he was “not very excited about the legislation.”⁶⁶ The STATES Act was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on May 15, 2019, but it has not seen further action since then.⁶⁷

2. *The SAFE Banking Act*

When compared to the STATES Act, the SAFE Act appears to have a greater likelihood of getting signed into law.⁶⁸ The SAFE Act was re-introduced to the House of Representative on March 7, 2019,⁶⁹ and to the Senate on April 11, 2019.⁷⁰ It was first heard at the House Subcommittee on Consumer Protection and Financial Institutions on February 13, 2019.⁷¹ On September 25, 2019, the SAFE Act was passed in the House by a landslide vote of 321–103.⁷² The next day, the SAFE Act was received in the Senate and referred to the Committee on Banking, Housing, and Urban Affairs.⁷³

The SAFE Act is more limited in scope than the STATES Act; the purpose of the SAFE Act is “[t]o create protections for depository institutions that provide financial services to cannabis-related legitimate businesses and service providers for such businesses, and

⁶⁶ Kyle Jaeger, *Democratic Senator Pulled Out as Marijuana Bill Cosponsor, Sources Say*, MARIJUANA MOMENT (Apr. 5, 2019), <https://www.marijuana-moment.net/democratic-senator-pulled-out-as-marijuana-bill-cosponsor-sources-say/> [<https://perma.cc/ZDB2-29BS>].

⁶⁷ *H.R.2093 – STATES Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/2093/all-actions?q=%7B%22search%22%3A%5B%22h.r.2093%22%5D%7D&s=4&r=1> [<https://perma.cc/5Y3H-9W2J>].

⁶⁸ Jack Queen, *State AGs Urge Passage of Federal Cannabis Banking Bill*, LAW360 (Sept. 23, 2019, 9:12 PM), <https://www-law360-com.ezproxy.bu.edu/articles/1201878/state-ags-urge-passage-of-federal-cannabis-banking-bill> (asserting that the “SAFE Banking Act has thus far made more headway in Congress”).

⁶⁹ Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (1st Sess. 2019).

⁷⁰ Secure and Fair Enforcement Banking Act of 2019, S. 1200, 116th Cong. (1st Sess. 2019).

⁷¹ *Challenges and Solutions*, *supra* note 36.

⁷² *H.R. 1595 – Secure and Fair Enforcement Banking Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1595/actions?q=%7B%22search%22%3A%5B%22h.r.1595%22%5D%7D&r=1&s=1> [<https://perma.cc/AE9R-5UL6>].

⁷³ *Id.*

for other purposes.”⁷⁴ The bill emphasizes public safety as a primary concern.⁷⁵ The enactment of the SAFE Act would effectively eliminate the dangers of operating an all-cash business as discussed in Part A.⁷⁶ Furthermore, the SAFE Act impacts ancillary businesses to the cannabis industry.⁷⁷ Some activities that will be afforded protection include “real estate finance of marijuana properties, broker-dealer custody of cannabis-related stocks and their receipt of dividends paid on those stocks,” amongst others.⁷⁸ Given the specificity and narrowed focus of the SAFE Act, it has garnered vast support across party lines.⁷⁹

E. Conclusion

The enactment of the SAFE Act into federal law would be a large step forward for banking in the cannabis industry.⁸⁰ Despite wide-ranging support for the SAFE Act, some members of Congress are wary of the bill as its passage may deter the legislature from pursuing widespread cannabis law reform that stretches beyond the

⁷⁴ H.R. 1595, *supra* note 69.

⁷⁵ *Id.* (“The purpose of this Act is to increase public safety by ensuring access to financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses.”).

⁷⁶ See Rembert and Noguchi, *supra* notes 11 & 12, respectively.

⁷⁷ See H.R. 1595, *supra* note 69 (“the proceeds from a transaction conducted by a cannabis-related legitimate business or service provider shall not be considered as proceeds from an unlawful activity solely because the transaction was conducted by a cannabis-related legitimate business or service provider, as applicable.”).

⁷⁸ Avergun et al., *supra* note 59.

⁷⁹ See H.R. 1595, *supra* note 72 (stating there are 206 cosponsors of the SAFE Act in the House of Representatives); see also *S.1200 – Secure and Fair Enforcement Banking Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1200/cosponsors?q=%7B%22search%22%3A%5B%22s.1200%22%5D%7D&r=1&s=2> [<https://perma.cc/6MJW-UKBM>] (stating there are 33 cosponsors of the SAFE Act in the Senate).

⁸⁰ See Satish Kini et al., *Cannabis Banking Bill Faces Long Odds in Senate*, LAW360 (Oct. 1, 2019, 5:22 PM), <https://www-law360-com.ezproxy.bu.edu/articles/1203750/cannabis-banking-bill-faces-long-odds-in-senate> (“The bill’s passage—with substantial bipartisan support—represents a significant win for financial institutions and reform advocates that are seeking changes in the federal law governing marijuana.”); see also Queen, *supra* note 68 (stating that the SAFE Act is “more tailored to the needs of the financial industry”).

scope of the financial industry.⁸¹ Additionally, the SAFE Act does not provide “regulatory alignment” within the cannabis industry, and thus, varying state laws create “expensive barriers to market entry” for cannabis businesses seeking to operate across state lines.⁸² While it is true that the SAFE Act alone will not resolve all of the issues encompassed by federal cannabis law, the SAFE Act remains the strongest prospect for federal banking reform in the cannabis industry.

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⁸¹ Satish Kini et al., *supra* note 80 (reporting that Senators such as Sen. Cory Booker, have expressed concern that criminal justice issues related to the federal marijuana laws will not be addressed if cannabis reform focuses solely on banking legislation).

⁸² Tyler G. Welti et al., *INSIGHT: Growing Pains—The Cannabis Industry’s Need for Standards*, BLOOMBERG L. (July 3, 2019, 4:00 AM), https://www.bloomberglaw.com/product/blaw/document/X7F3AQU000000?bc=W1siU2VhemNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NIYXJjaC9yZXN1bHRzLzA4YWVkMTQ2ZWVIZjdiODM2YTFkYTg2OTljNTljMTQ4I11d-e3de91ce17909e4a6084be0ada2fe5dceccc9f57&guid=8e5d2f5c-832f-4c29-a301-a763e5a780b6&search32=vAt-xGQEml-rXzccUmVfMQ%3D%3DkawSfluOl3o6fkiqNZVhnaJE6eAfwrqw7K4JdFPFA0HdT3OKu-zW9_kuwxZr_GQxSecyHZ1RwgAoQIATFalhUOZgQ3SMIIYYCkpgpkLbUfTfPxtY03nS86OEUxXlaYKNmGLTHCn-iykMdCrTjVQcuw%3D%3D (stating that the lack of regulatory alignment is costly and the costs of such inconsistencies impose expensive barriers to market entry where cannabis-related businesses may have to comply with state-specific packaging requirements).

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