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## Cannabis Reform: High on the Banking Agenda

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# Cannabis Reform: High on the Banking Agenda

## I. INTRODUCTION

The rising tension between federal and state law has trapped banks between their mission to serve what has been referred to as “the next great” and “America’s fastest-growing industry”<sup>1</sup> and their fear of federal enforcement action.<sup>2</sup> Cannabis is illegal under the Controlled Substance Act<sup>3</sup> (“CSA”); yet eleven states and Washington D.C. have legalized cannabis recreationally and thirty-three states have legalized cannabis medically.<sup>4</sup> Within these state borders, the cannabis industry is challenged in seeking banking services.<sup>5</sup> Consequently, the multibillion-dollar legal cannabis industry has been denied access to the financial sector.<sup>6</sup> At the same time, banks have been deprived of the opportunity to serve a multibillion-dollar industry that is expected to grow swiftly within the next decade.<sup>7</sup>

This Note examines the alternatives cannabis-related businesses are using in lieu of the basic financial services normally provided by banks. After analyzing some of the unconventional financing alternatives that cannabis businesses have resorted to, this Note considers what will happen if banks are allowed to serve the cannabis sector freely. Part II explains the history of cannabis legislation and its recent evolution.<sup>8</sup> Part

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1. Shannon L. McCarthy & Dawn Newton, *Franchising A Marijuana Business: It's Not Quite Mission Impossible*, 35 FRANCHISE L. J. 357, 358 (2016).

2. *Cannabis Banking, Bridging the Gap Between State and Federal Law*, AM. BANKERS ASS'N, <https://www.aba.com/advocacy/our-issues/cannabis> [<https://perma.cc/DS66-PJWE>] (last visited Feb. 8, 2020).

3. 21 U.S.C. § 841 (2018).

4. Jeremy Berke & Skye Gould, *Legal Marijuana Just Went on Sale in Illinois*, BUS. INSIDER (Jan. 1, 2020, 8:41 AM), <https://www.businessinsider.com/legal-marijuana-states-2018-1> [<https://perma.cc/8UED-BHDZ>].

5. See Hilary V. Bricken, *Navigating the Hazy Status of Marijuana Banking*, AM. BAR ASS'N (Aug. 15, 2017), [https://www.americanbar.org/groups/business\\_law/publications/blt/2017/08/03\\_bricken/](https://www.americanbar.org/groups/business_law/publications/blt/2017/08/03_bricken/) [<https://perma.cc/8RLM-YCXZ>] (highlighting the “financial chaos across the state-legalized cannabis industry”).

6. Norman M. Vigil, *XV. The States Act: A Response to the Rescission of the Cole Memo*, 38 REV. BANKING & FIN. L. 196, 207 (2018).

7. *Id.*

8. See *infra* Part II.

III discusses why banks are reluctant to serve the cannabis industry.<sup>9</sup> Part IV recounts the nontraditional banking alternatives that cannabis businesses have embraced as a result.<sup>10</sup> Part V examines proposed federal cannabis reform legislation.<sup>11</sup> Part VI anticipates how the cannabis industry, the banking industry, and the national economy would be impacted if the reform legislation were to pass.<sup>12</sup>

## II. MODERN CANNABIS LEGISLATION

The CSA was enacted in 1970 to target drug abuse and to control the legitimate and illegitimate circulation of controlled substances.<sup>13</sup> The CSA makes it illegal to “knowingly or intentionally manufacture, distribute, dispense or possess . . . a controlled substance” unless authorized by the Act.<sup>14</sup> The Act establishes five “schedules” of controlled substances.<sup>15</sup> As Schedule I drugs, “marihuana”<sup>16</sup> (“marijuana”) and “tetrahydrocannabinols”<sup>17</sup> (“THC”) are both characterized as having a high potential for abuse, no currently accepted medical utility, and a lack of accepted safety for use under medical supervision.<sup>18</sup> Schedule I drugs are the most highly regulated.<sup>19</sup> As a

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9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Part V.

12. *See infra* Part VI.

13. 28 C.J.S. *Drugs and Narcotics* § 210 (2019).

14. 21 U.S.C. § 841(a)(1) (2018).

15. *Id.* at § 812; *see* U.S. DEPT. OF JUSTICE DRUG ENF’T ADMIN., A DEA RESOURCE GUIDE ON DRUGS OF ABUSE (2017) (outlining the five drug schedules and providing some examples of each).

16. *See* 21 U.S.C. § 802 (defining marijuana under the CSA); *Monson v. Drug Enf’t Admin.*, 598 F.3d 952, 961 (8th Cir. 2009) (“Under the CSA, marijuana is defined to include *all* Cannabis sativa L. plants, regardless of THC concentration.”).

17. *See Monson*, 598 F.3d at 955 (describing THC as the substance that gives marijuana its psychoactive properties); *see also* *United States v. White Plume*, 447 F.3d 1067, 1073 (8th Cir. 2006) (“The plain language of the CSA states that Schedule I(c) includes ‘any material . . . which contains *any quantity* of [THC] . . . .’”).

18. 21 U.S.C. § 812.

19. John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/> [<https://perma.cc/F6AK-E4DN>].

result, federal law banned cannabis<sup>20</sup> of any kind.<sup>21</sup> However, the Agriculture Improvement Act of 2018<sup>22</sup> (“2018 Farm Bill”) amended the general ban on cannabis by federally legalizing hemp.<sup>23</sup> Hemp is any part of the cannabis plant that contains less than 0.3% of THC.<sup>24</sup>

The 2018 Farm Bill transformed federal hemp policy by amending the original CSA definition of “tetrahydrocannabinol” to exclude the THC in hemp.<sup>25</sup> Under the 2018 Farm Bill, “‘hemp’ means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis.”<sup>26</sup>

In distinguishing hemp from cannabis, the 2018 Farm Bill removed hemp-derived products from Schedule I status under the CSA.<sup>27</sup> As a result, any cannabinoid<sup>28</sup> derived from hemp is legal if a licensed grower produces it in a manner consistent with the 2018 Farm Bill and accompanying federal and state regulations.<sup>29</sup> All other cannabinoids

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20. See Dominique Astorino, *What’s the Difference Between CBD, THC, Cannabis, Marijuana, and Hemp?*, SHAPE, <https://www.shape.com/lifestyle/mind-and-body/difference-between-cbd-thc-marijuana-hemp-cannabis> [https://perma.cc/WZM6-6CY8] (last visited Nov. 2, 2019) (providing that cannabis is the “umbrella term” used for both marijuana and hemp and explaining that the term cannabis is often used because it creates a “softer barrier to entry” in comparison to marijuana or hemp).

21. See *White Plume*, 447 F.3d at 1073 (providing that the CSA did not distinguish between marijuana and hemp).

22. Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018).

23. *Id.*; Hudak, *supra* note 19.

24. Hudak, *supra* note 19.

25. 21 U.S.C. § 812 (2018).

26. 7 U.S.C. § 1639o (2018); see Hudak, *supra* note 19 (explaining the key difference between hemp and cannabis).

27. See Hudak, *supra* note 19 (“It explicitly allows the transfer of hemp-derived products across state lines for commercial or other purposes. It also puts no restrictions on the sale, transport, or possession of hemp-derived products, so long as those items are produced in a manner consistent with the law.”).

28. “Cannabinoid” is defined as the components in the cannabis plant. See Astorino, *supra* note 20.

29. See Hudak, *supra* note 19 (detailing the 2018 Farm Bill’s restrictions on hemp cultivation); see also Ken McCarthy, *Customers Bancorp Banking Hemp-Related Firms in New York, Pennsylvania*, AM. BANKER (Sept. 17, 2019), <https://www.americanbanker.com/news/customers-bancorp-to-bank-cannabis-firms-in-new-york-pennsylvania> [https://perma.cc/B5MU-94L8] (noting Customers Bancorp’s decision to offer commercial deposit products and services to hemp-related businesses and hemp-derived CBD product companies in light of the 2018 Farm Bill); see also Kathleen Felton, *Every Question You Have About CBD—Answered*, HEALTH (Feb. 14, 2019), <https://www.health.com/pain/what-is-cbd> [https://perma.cc/C5AU-GASS] (defining CBD, short for cannabidiol, as one of the many non-psychoactive chemical compounds found in the cannabis sativa plant); see also Alex Williams, *Why Is CBD Everywhere?*, N.Y. TIMES (Oct.

remain illegal as Schedule I substances under federal law,<sup>30</sup> despite the growing number of states that have legalized cannabis.<sup>31</sup> The 2018 federal reform to hemp policy sparked optimism that it might be “a first step toward broader federal cannabis reform.”<sup>32</sup>

On December 3, 2019, a group of federal banking regulators<sup>33</sup> issued a statement clarifying the legal status of hemp and Suspicious Activity Report (“SAR”)<sup>34</sup> filing obligations under the Bank Secrecy Act (“BSA”).<sup>35</sup> Prior to the 2018 Farm Bill, banks were required to file SARs for any hemp-related client account.<sup>36</sup> Under the interim final rule, financial institutions are no longer required to file SARs for hemp-related customers just because the business involves hemp.<sup>37</sup> By relaxing SAR requirements, financial services will open up for hemp and CBD businesses.<sup>38</sup>

### III. BANKS’ RELUCTANCE TO SERVE CANNABIS INDUSTRY

The cannabis industry is feeling the heat from a severe “banking drought”—lack of banking services—due largely to federal law.<sup>39</sup> Providing banking services to cannabis-related businesses puts banks in

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27, 2018), <https://www.nytimes.com/2018/10/27/style/cbd-benefits.html> [<https://perma.cc/36C5-7UDA>] (explaining how CBD is seen in everything from dog treats to ice cream and has been described as the perfect cure, from treating pain and arthritis to preventing hangovers).

30. 21 U.S.C. § 812 (2018).

31. Hudak, *supra* note 19.

32. *Id.*

33. See Jonathan S. Robbins, *Federal Regulators Provide Much-Needed Banking Relief to Hemp Industry*, AKERMAN (Dec. 9, 2019), <https://www.akerman.com/en/perspectives/feds-provide-some-much-needed-banking-relief-to-hemp-industry.html> [<https://perma.cc/69KH-WSVF>] (“Specifically, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Financial Crimes Enforcement Network, and the Office of the Comptroller of Currency, as well as the Conference of State Bank Supervisors . . .”).

34. See *infra* p. 5 and note 47.

35. 31 U.S.C. § 5311 (2018); Robbins, *supra* note 33.

36. Robbins, *supra* note 33.

37. See *id.* (“[I]n the eyes of federal financial regulators, hemp clients may now be treated the same as those from any other legal industry.”); see also Jodi Avergun, *Agencies Clarify SAR Obligations for Hemp Transactions*, CADWALADER CABINET (Dec. 4, 2019), [https://www.findknowdo.com/news/12/04/2019/agencies-clarify-sar-obligations-hemp-transactions?utm\\_medium=Email&utm\\_campaign=Cabinet+Newsletter&utm\\_source=News+letter](https://www.findknowdo.com/news/12/04/2019/agencies-clarify-sar-obligations-hemp-transactions?utm_medium=Email&utm_campaign=Cabinet+Newsletter&utm_source=News+letter) [<https://perma.cc/N74U-VZUQ>] (explaining the expectation of looser SAR requirements after the 2018 Farm Bill’s removal of hemp from federal controlled substance regulation).

38. Robbins, *supra* note 33.

39. Julie Andersen Hill, Note, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 600 (2015).

clear violation of federal anti-money laundering prohibitions.<sup>40</sup> Current federal money laundering statutes define any transaction involving the proceeds of the manufacture, distribution or sale of cannabis to be illegal, even if the transaction would be permitted under state law.<sup>41</sup> Failure to comply with the federal statutes could result in a fine, imprisonment, or both.<sup>42</sup>

Further, criminal and civil forfeiture laws allow federal officials to seize cannabis-related assets.<sup>43</sup> Banks that service accounts used for illegal cannabis activity not only run the risk of financial loss but also expose themselves to “reputational risk” as a result of such seizures and forfeitures.<sup>44</sup> Banks are advised to provide loans for “legitimate purposes” and are cautioned that loan collateral obtained from illegal activity, such as cannabis, is subject to forfeiture by the government’s seizure of assets.<sup>45</sup>

Under the BSA, U.S. financial institutions are required to aid the federal government in identifying and preventing the laundering or use of money gained illegally.<sup>46</sup> The BSA requires financial institutions to file SARs<sup>47</sup> with the Financial Crimes Enforcement Network (“FinCEN”)<sup>48</sup> for any transaction in possible violation of a law or

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40. See 18 U.S.C. §§ 1956–1957 (2018) (providing that a financial transaction involving funds derived from an unlawful activity such as cannabis constitutes money laundering).

41. *Id.* § 1957 (specifying that the proceeds from cannabis constitute the proceeds derived from a “specified unlawful activity” under the statute).

42. See, e.g., *id.* § 1956 (explaining the possibility of “a fine of not more than \$500,000 or twice the value of property [or the monetary instrument or funds] involved in the transaction [transportation, transmission, or transfer], whichever is greater, or imprisonment for not more than twenty years, or both.”).

43. See 18 U.S.C. §§ 981–982 (clarifying that proceeds derived from or traceable to cannabis activities are considered property in violation of §§ 1956–1957); see Hill, *supra* note 39, at 610 (explaining that marijuana-related bank accounts are subject to forfeiture).

44. See Hill, *supra* note 39, at 626 (“Reputational risk is the risk arising from negative public opinion.”).

45. 21 U.S.C. § 881 (2018); Hill, *supra* note 39, at 626.

46. 31 U.S.C. § 5311 (2018); Valentino Vasi, *INSIGHT: Marijuana Business–State Legalizations vs. Federal Crime*, BLOOMBERG (Feb. 27, 2019, 4:01 AM), <https://news.bloomberglaw.com/corporate-law/insight-marijuana-business-state-legalization-vs-federal-crime-whats-a-financial-services-firm-to-do> [<https://perma.cc/JCX3-LM6B>].

47. See 12 C.F.R. § 21.11 (2012) (stating that all national banks must file SARs when “they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity of a violation of the Bank Secrecy Act”).

48. FinCEN, a bureau within the Treasury Department, is tasked with maintaining a government database with information on financial institutions and determining new methods of financial crimes, including money laundering. 31 U.S.C. § 310 (2018).

regulation.<sup>49</sup> Because cannabis is illegal under the CSA, the BSA effectively requires banks to file SARs for all financial transactions that involve the proceeds of cannabis-related conduct.<sup>50</sup> The filings of SARs extend beyond cannabis companies to other market participants that provide goods and services to cannabis growers and sellers.<sup>51</sup> By failing to identify or report these types of cannabis-related transactions, financial institutions could be held criminally liable under the BSA.<sup>52</sup>

This filing requirement alone has deterred banks from serving cannabis-related businesses and has even steered banks to close existing accounts for clients suspected of having cannabis-generated revenue.<sup>53</sup> For example, the CEO of Premium Produce, a cultivator of cannabis products, had her bank accounts closed after being labeled a “high-risk client.”<sup>54</sup> Because filing requirements apply to any business that the cannabis company transacts with,<sup>55</sup> the risk of a closed bank account reaches well beyond those who are directly part of the cannabis

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49. *Id.* § 5318.

50. *Id.*; see Bricken, *supra* note 5 (providing that the SARs supply the government with information regarding the ownership and leadership of cannabis businesses and the involvement of certain financial institutions).

51. DORSEY & WHITNEY LLP, CLARIFICATION FROM FINCEN—UPDATING MARIJUANA LIMITED SARs (2018), <https://www.dorsey.com/newsresources/publications/client-alerts/2018/06/clarification-from-fincen-updating-marijuana> [https://perma.cc/RK78-UADV]; see Vasi, *supra* note 46 (explaining how those who rent space to or provide cleaning or delivery services to cannabis businesses are implicated).

52. Robert Rowe, *Compliance and the Cannabis Conundrum*, ABA BANKING J. (Sept. 11, 2018), <https://bankingjournal.aba.com/2018/09/compliance-and-the-cannabis-conundrum/> [https://perma.cc/M3SS-QG9F].

53. CADWALADER, CANNABIS FINANCE, (2019), <https://www.cadwalader.com/resources/clients-friends-memos/cannabis-finance—safe-in-the-states-and-maybe-beyond> [https://perma.cc/U3VZ-26YT].

54. See Patrick Walker, *Banks Closes Marijuana CEO’s Accounts*, 8NEWSNOW.COM (Aug. 29, 2018, 7:32 PM), <https://www.8newsnow.com/news/local-news/banks-closes-marijuana-ceos-accounts/> [https://perma.cc/6XKB-ERHS] (providing that the CEO’s bank accounts were closed even though she never deposited any marijuana money into the bank).

55. Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won’t Touch*, FORBES (Sept. 6, 2018, 10:07 AM), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#210d7aec3c68> [https://perma.cc/9XL7-62S6] (explaining how the filing requirements reach to accountants and cleaners who interact with cannabis operators).

industry.<sup>56</sup> In particular, there have been instances of banks closing accounts held by lawyers who represent cannabis companies.<sup>57</sup>

In 2014, FinCEN published guidelines in an effort to clarify how financial institutions can serve businesses within the cannabis sector while staying compliant with their BSA obligations.<sup>58</sup> These guidelines aim to “enhance the availability of financial services for, and the financial transparency of, [cannabis] businesses.”<sup>59</sup> However, the guidance does not state that financial institutions are insulated from liability, nor does it attempt to legalize cannabis.<sup>60</sup> Each financial institution is responsible for deciding whether to open, close, or decline a bank account or client relationship.<sup>61</sup> Client due diligence is a “critical aspect” in making this judgment.<sup>62</sup>

To evaluate the risk associated with cannabis-related businesses, the guidance advises financial institutions to take a number of steps: (i) verify that the business is properly licensed and registered; (ii) review the state license application; (iii) obtain information about the business from appropriate state authorities; (iv) understand the customary business activity, including products offered and customers served;<sup>63</sup> (v) monitor public sources for adverse news about the business; (vi) monitor business for suspicious activity; and (vii) conduct customer due diligence on a periodic basis.<sup>64</sup> An important part of this process is ensuring that none

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56. Aaron Klein, *Op-Ed: An Easy Fix Could Give the Marijuana Industry Access to Banking*, L.A. TIMES (Jan. 30, 2019, 3:05 AM), [https://www.latimes.com/opinion/op-ed/la-oe-klein-marijuana-banking-20190130-story.html?int=lat\\_digitaladshouse\\_bx-modal\\_acquisition-subscriber\\_ngux\\_display-ad-Interstitial\\_bx-bonus-story](https://www.latimes.com/opinion/op-ed/la-oe-klein-marijuana-banking-20190130-story.html?int=lat_digitaladshouse_bx-modal_acquisition-subscriber_ngux_display-ad-Interstitial_bx-bonus-story) [https://perma.cc/R7B5-2QGD].

57. *Id.*

58. FIN. CRIMES ENF'T NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses> [https://perma.cc/MK6H-MQYK] [hereinafter FINCEN GUIDANCE].

59. *Id.*; Hilary Bricken, *Banking in the Cannabis Industry: Navigating the Legal Haze*, CANNABIS L. 100:100, 1 (2019) [hereinafter BANKING IN THE CANNABIS INDUSTRY].

60. Rowe, *supra* note 52.

61. FINCEN GUIDANCE, *supra* note 58 (explaining that the decision should be made based on a number of factors specific to that institution such as its particular business objectives, risk evaluations, and capacity to manage those risks effectively).

62. Rowe, *supra* note 52 (explaining that the risk associated with these businesses means they require enhanced due diligence and close scrutiny by banks).

63. *See id.* (“[E].g., medical versus recreational customers . . .”).

64. FINCEN GUIDANCE, *supra* note 58.



of the Cole Memorandum (“Cole Memo”)<sup>65</sup> priorities are negatively implicated by what the business is doing.<sup>66</sup>

This extensive and continuing due diligence inevitably increases banking costs for financial institutions with cannabis-related business accounts.<sup>67</sup> As a result, most of these costs are passed onto the cannabis-related client, requiring many of them to pay a premium price just to maintain a bank account.<sup>68</sup> Despite the federal government’s effort to improve cannabis-related businesses access to financial services, the guidance does not give banks absolute immunity from prosecution or civil penalties for serving such businesses.<sup>69</sup> Aside from the guideline’s compliance burdens,<sup>70</sup> most financial institutions err on the side of caution and refuse to serve the cannabis industry given the unsettling risk of prosecution.<sup>71</sup> By the end of March 2018, only 411 financial institutions were participating under this FinCEN guidance.<sup>72</sup>

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65. Memorandum from James M. Cole to All United States Attorneys (Aug. 29, 2013) (providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA in all states, specifically directing their focus on those whose conduct interferes with: (1) distribution of marijuana to minors; (2) revenue from the sale of marijuana from going to criminal enterprises; (3) diversion of marijuana from states where it is legal to other states; (4) the use of state-authorized marijuana activity as a cover for the trafficking of other illegal drugs or activity; (5) violence and use of firearms in the cultivation and distribution of marijuana; (6) drugged driving and the worsening of other adverse public health consequences associated with marijuana use; (7) growing of marijuana on public lands and the public safety and environmental dangers posed by marijuana production on public lands; and (8) marijuana use on federal property).

66. See FINCEN GUIDANCE, *supra* note 58 (highlighting the focus being put on the Cole Memo priorities).

67. Bricken, *supra* note 5; see Rachel Zender, Note, *Bud, Bongs & Banks: The Impact of State Legalized Marijuana on Financial Institutions*, 87 UMKC L. REV. 997, 1017 (2019) (“[T]he regulatory constraints imposed on financial institutions to comply with FinCEN MRB guidance has already increased their operational costs.”).

68. BANKING IN THE CANNABIS INDUSTRY, *supra* note 59.

69. Elizabeth Dolan McErlean, Comment, *The Real Green Issue Regarding Recreational Marijuana: Federal Tax and Banking Laws in Need of Reform*, 64 DEPAUL L. REV. 1079, 1096 (2015).

70. McCarthy & Newton, *supra* note 1, at 370 (“The FinCEN Guidance recommends that banks conduct extensive due diligence on their cannabis business customers . . .”).

71. Tyler T. Buckner, Note, *Rocky Mountain High: The Impact of Federal Guidance to Banks on the Marijuana Industry*, 19 N.C. BANKING INST. 165, 175 (2015).

72. Tom Angell, *More Banks Working With Marijuana Businesses, Despite Federal Moves*, FORBES (June 14, 2018, 9:31 AM), <https://www.forbes.com/sites/tomangell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#42c773441b1b> [https://perma.cc/UMM3-QFHP]; see M. Szmigiera, *Number of FDIC-Insured Commercial Banks in the United States from 2002 to 2018*, STATISTA (Nov. 29, 2019), <https://www.statista.com/statistics/184536/number-of-fdic-insured-us-commercial-bank-institutions/> [https://perma.cc/54GZ-S4TU] (“In 2018, there were 4,708 FDIC-insured commercial banks in the United States.”).

Once the financial institution has conducted the appropriate due diligence, it then has to fulfill its BSA reporting requirements.<sup>73</sup> These institutions are obligated to file SARs even if the cannabis-related activity is legal under the relevant state law.<sup>74</sup> Once a relationship has developed with a cannabis-related business, a financial institution must immediately file a “Marijuana Limited Suspicious Activity Report,”<sup>75</sup> even if the cannabis-related business has undergone the scrutiny of due diligence without implicating any of the Cole Memo priorities or violating state law.<sup>76</sup> These Marijuana Limited SARs should include: “(i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; (iv) and the fact that no additional suspicious activity has been identified.”<sup>77</sup>

In addition to the initial SAR, FinCEN instructs participating banks to file continuing activity reports after periodic due diligence.<sup>78</sup> Along with the information contained in the Marijuana Limited SAR, these reports should contain any deposits, withdrawals or account transfers since the filing of the last SAR.<sup>79</sup> The continuing reporting mandate obliges financial institutions to carefully monitor their client’s activity on an ongoing basis.<sup>80</sup> To be exact, financial institutions must file continuing activity reports within 120 days of the previous filing, resulting in three reports per year.<sup>81</sup> Further, financial institutions are required to file detailed “Marijuana Priority SARs” if their due diligence implicates a Cole Memo priority or state law violation.<sup>82</sup> Finally, if a financial institution wishes to discontinue working with a cannabis-related client, it must file a “Marijuana Termination SAR.”<sup>83</sup> A bank

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73. FINCEN GUIDANCE, *supra* note 58.

74. *Id.*; see Rowe, *supra* note 52 (“[N]o matter what state law says, there is a violation of federal law.”).

75. See Vasi, *supra* note 46 (“The ‘Marijuana Limited’ SAR is the only SAR that is used when there is not a determination that a transaction is suspicious.”).

76. FINCEN GUIDANCE, *supra* note 58.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Buckner, *supra* note 71, at 177.

82. FINCEN GUIDANCE, *supra* note 58.

83. *Id.*

must immediately terminate its relationship with the client upon any indication suggesting a violation of a prosecutorial priority.<sup>84</sup>

Any type of slipup during this process could expose the financial institution to significant liabilities, including prosecution.<sup>85</sup> This substantial burden is not ideal for financial institutions, which explains why most avoid the cannabis industry.<sup>86</sup> In addition to federal laws and guidance, both uncertainty and conservative views contribute to the aversion of banks to cannabis-related businesses.<sup>87</sup> As a result, the cannabis industry is in desperate need of financial assistance.<sup>88</sup>

#### IV. ALTERNATIVE FINANCING

Because banks view the cannabis industry as high-risk, a majority of cannabis-related businesses are forced to operate without conventional banking services.<sup>89</sup> First, cannabis entities are left without access to conventional credit.<sup>90</sup> Because cannabis is illegal under the CSA, most cannabis-related businesses are ineligible for Small Business Administration loans<sup>91</sup> and thus do not have access to simple bank loans or revolving lines of credit.<sup>92</sup> Further, banks decline to lend to cannabis-related businesses because the loan collateral obtained from these

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84. *Id.*

85. Buckner, *supra* note 71, at 178.

86. *Id.* at 175.

87. See Vigil, *supra* note 6, at 199–200 (“Many financial institutions have been wary of doing business with the cannabis industry due to uncertainty over which direction federal enforcement will go and the lack of clear, consistent guidance from the federal authorities.”); see also FINCANN, CBD RETAIL AND ECOMMERCE, <https://fincann.com/industries/cbd/> [<https://perma.cc/3QBP-MLPE>] (last visited Aug. 24, 2019) (“The reason why bankers refrain from serving the industry is a result of the mainstream conservative board of directors who generally still consider marijuana to be a disreputable trade with which they do not wish to be associated.”).

88. Annie Nova, *Bitcoin Offers the Cannabis Industry an Alternative to Banks*, CNBC (Dec. 15, 2017, 10:00 AM), <https://www.cnbc.com/2017/12/15/bitcoin-offers-the-cannabis-industry-an-alternative-to-banks.html> [<https://perma.cc/9ZH4-2BUJ>].

89. Gabriel J. Greenbaum, Note, *What to Do with All This Green: Using Casino Regulations as a Model for Cannabis Industry Banking*, 58 WASHBURN L.J. 217, 223 (2019).

90. Frank Robison, Note, *Going Green: Legal Considerations for Marijuana Investors and Entrepreneurs*, 6 AM. U. BUS. L. REV. 57, 62 (2018).

91. The SBA works with lenders to provide loans to small businesses. The agency does not lend to these small businesses directly. Instead, it gives its participating lenders guidelines for making loans. In doing so, the SBA reduces lenders risk and gives them easier access to capital, which ultimately makes it easier for small businesses to get loans. U.S. SMALL BUSINESS ADMINISTRATION (SBA), LOANS <https://www.sba.gov/funding-programs/loans> [<https://perma.cc/5MW9-A8Q4>] (last visited Jan. 28, 2020).

92. Robison, *supra* note 90, at 62.

businesses is illegal under federal law and thus subject to forfeiture by the government.<sup>93</sup> This denies entrepreneurs and business owners in the cannabis sector important business essentials, such as mortgages and loans, which prevent them from establishing credit and building a “financial identity.”<sup>94</sup>

Second, cannabis businesses are forced to operate on an all cash basis.<sup>95</sup> Because banks refuse to accept cannabis-related deposits, cannabis companies are deprived of the opportunity to handle daily transactions electronically.<sup>96</sup> Without a secure means to store and make use of their income, owners of cannabis businesses are vulnerable to criminal threats.<sup>97</sup> Furthermore, handling expenses in cash is both burdensome and problematic.<sup>98</sup> Despite the widespread resistance of banks, cannabis companies continue to grow, in part by implementing financing alternatives.<sup>99</sup>

Cannabis-related businesses are beginning to use private credit firms as a legal financing avenue.<sup>100</sup> Although some private credit firms are intimidated by the cannabis industry’s inherent risks, others are eager

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93. 21 U.S.C. § 881 (2018).

94. Greenbaum, *supra* note 89, at 223; *see* Robison, *supra* note 90.

95. BANKING IN THE CANNABIS INDUSTRY, *supra* note 59; *see also* Greenbaum, *supra* note 89, at 223 (“Cannabis businesses pay wages, taxes, and bills with cash and accept only cash in return from customers because they cannot access traditional banking services.”).

96. Jeremy Berke, *This Could be the No. 1 Problem Facing Legal Weed Businesses in America*, BUS. INSIDER (Apr. 20, 2016), <https://www.businessinsider.com/no-1-problem-facing-legal-weed-businesses-2016-4> [<https://perma.cc/Q9T7-N8VM>] [hereinafter Berke, *Problem*].

97. Buckner, *supra* note 71, at 168; *see, e.g.*, Tom Angell, *Marijuana Banking Bill Approved by Congressional Committee*, FORBES (Mar. 28, 2019, 9:54 AM), <https://www.forbes.com/sites/tomangell/2019/03/28/marijuana-banking-bill-approved-by-congressional-committee/#2c7fa9e82ce1> [<https://perma.cc/TKC6-L46U>] (explaining how cannabis growers, processors, and sellers are more susceptible to robberies as a result of being forced to operate on an all cash basis).

98. Berke, *Problem*, *supra* note 96 (detailing cannabis companies burden of paying staff, utility bills, mortgages, and taxes in cash).

99. *See* Julie Weed, *Legal Weed Entrepreneurs Finding New Funding Options*, FORBES (Sept. 9, 2017, 6:37 PM), <https://www.forbes.com/sites/julieweed/2017/09/09/funding-options-for-cannabusiness-expanding/#7d57f9a57cf3> [<https://perma.cc/33Z4-MBA2>] (highlighting the new funding options being implemented by legal weed entrepreneurs); *see generally* Adrian A. Ohmer, Note, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 97, 110–11 (2013) (detailing the industry’s use of alternative funding sources).

100. *Private Credit Bets Big on Cannabis Companies as Banks Pass*, AM. BANKER (Aug. 26, 2019, 8:43 AM), <https://www.americanbanker.com/articles/private-credit-bets-big-on-cannabis-companies-as-banks-pass> [<https://perma.cc/6289-RSVF>] [hereinafter *Private Credit*].

to partake.<sup>101</sup> For example, Monroe Capital LLC (“Monroe”), a private credit firm, recently entered into a \$50 million financing deal with KushCo Holdings Inc. (“KushCo”), a supplier of cannabis and hemp goods.<sup>102</sup> In exchange for financing, KushCo agreed to give Monroe a profit sharing interest in the company.<sup>103</sup> KushCo also promised to comply with all the relevant laws and to ensure that its cannabis-related business licenses were on file and up to date.<sup>104</sup> Generally, direct lenders are more likely to partner with larger and more established businesses.<sup>105</sup> This allows enormous opportunity for “high-quality”<sup>106</sup> cannabis-related businesses in the more mature growth stage.<sup>107</sup> Accordingly, direct lending deals with cannabis-related businesses are an effective strategy in providing the cannabis industry with the financing it needs.<sup>108</sup>

However, private lending deals present several drawbacks in comparison to bank lending deals.<sup>109</sup> First, banks can offer lower interest rates as a result of their ability to acquire funds at a lower cost.<sup>110</sup> Banks raise funds to be lent out through their depositors, who typically stash large amounts of money in their bank accounts.<sup>111</sup> Because banks usually pay little to no interest on their customers’ deposits, they are able to use the deposited funds at a relatively low cost.<sup>112</sup> Banks also have the advantage of accessing federal funds at a low cost.<sup>113</sup> Private lenders, by contrast, are stuck borrowing funds at higher rates from investors or other

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101. *Id.* (“Despite strong demand, the budding industry still maintains a risk profile that has made some investors reluctant.”).

102. *Id.*

103. *Id.* (“The facility, which matures in August 2024 and is priced around 850 basis points over Libor, according to an SEC filing, also includes warrants that allow Monroe to buy up to 500,000 shares of KushCo.”).

104. *Id.*

105. *See, e.g., id.* (stating that a company’s infrastructure, systems, compliance, and growth pace were all reasons a private credit firm found it appealing to lend to).

106. *Private Credit, supra* note 100.

107. *Id.* (explaining Monroe Capital’s president and CEOs desire to finance the cannabis market leaders).

108. *Id.* (providing another example of MMG Investment Group lending 65,000,000 to Mile High Labs in April 2019).

109. *See* Joseph Lizio, *Bank Loans vs. Private Lender Loans*, BUS. KNOW-HOW, <https://www.businessknowhow.com/money/bankprivate.htm> [<https://perma.cc/3FVX-Z5G7>] (last updated Oct. 15, 2019) (explaining why a business loan from a bank is better than a business loan from a private lender).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.* (providing that the federal funds rate is 2.5% as of October 15, 2019, representing a very cheap borrowing rate for banks considering past rates).

financial institutions.<sup>114</sup> This inevitably raises the interest rates that they must impose.<sup>115</sup> Second, borrowing from a bank is easier and more convenient than borrowing from a private lender.<sup>116</sup> This is because most clients already have a bank account open at a nearby branch, where they can receive personal assistance at any time.<sup>117</sup>

Because business owners in the cannabis sector are foreclosed from obtaining conventional debt financing, they are often forced to finance their business through equity.<sup>118</sup> Equity financing proves to be a viable substitute for debt financing to fund the cannabis sector.<sup>119</sup> For example, cannabis-related businesses are benefiting from a growing number of venture capital firms, which are beginning to invest in the cannabis sector.<sup>120</sup> One leading venture capital firm that focuses exclusively on the cannabis industry is Casa Verde Capital (CVC).<sup>121</sup> CVC, founded and backed by Snoop Dogg, invests in legal, scalable “picks and shovels” that support the maturing cannabis industry.<sup>122</sup> CVC

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114. *Id.*

115. Lizio, *supra* note 109; see Jonathan Schwarzberg, *Banks Pass on Marijuana Loans*, REUTERS (Nov. 2, 2018, 10:40 AM), <https://www.reuters.com/article/marijuana-loans/banks-pass-on-marijuana-loans-for-now-idUSL2N1XD0MN> [<https://perma.cc/N4KM-HJ8Z>] (explaining that other funding sources, including private equity firms, credit unions, and direct lenders can command rates up to 15%).

116. Glenn Curtis, *The Best Ways to Borrow Money*, INVESTOPEDIA, <https://www.investopedia.com/articles/basics/07/financing-options.asp> [<https://perma.cc/3LDH-C282>] (last updated Oct. 19, 2019).

117. *Id.* (providing that personnel at local branches are available to answer questions and assist with the borrowing process).

118. Weed, *supra* note 99.

119. See Catherine Giese, *Starting a Weed Business: What Are Your Financing Options?*, FUNDERA <https://www.fundera.com/blog/weed-business-financing-options> [<https://perma.cc/B9PW-33XK>] (last updated Feb. 12, 2019) (stating the three main ways to obtain equity financing).

120. Jeremy Berke, *Check Out Our Exclusive List of the Top 12 Venture Capital Firms Making Deals in the Booming Marijuana Industry*, BUS. INSIDER (Jan. 2, 2019, 12:47 AM), <https://www.businessinsider.com/cannabis-industry-top-12-venture-capital-firms-2018-10> [<https://perma.cc/7UMF-RZNK>] [hereinafter Berke, *VC Firms*].

121. CASA VERDE CAPITAL, GROWTH STARTS HERE, <https://www.casaverdecapital.com/> [<https://perma.cc/JUE6-N34J>] (last visited Oct. 10, 2019).

122. Casa Verde proved against the misconception among investors that you have to invest in “plant-touching businesses” like cultivators or dispensaries to get involved in the industry. See Andrea Park, *20 Minutes With: Casa Verde Capital’s Karan Wadhera*, PENTA (Aug. 5, 2019, 3:00 PM), <https://www.barrons.com/articles/20-minutes-with-casa-verde-capital-karan-wadhera-01565031641> [<https://perma.cc/KV2D-E7FR>] (providing that CVC issued sixteen investments as of August 2019); see also Mrinalini Krishna, *Top Marijuana Private Equity and Venture Capital Funds*, INVESTOPEDIA <https://www.investopedia.com/news/top-marijuana-private-equity-and-venture-capital-funds/> [<https://perma.cc/HUG3-ZBXX>] (last updated July 6, 2019) (highlighting Snoop Dogg as one of the founders).

raised \$33 million by January 2, 2018.<sup>123</sup> The fund's portfolio includes a variety of companies involved in the cannabis sector, ranging from an on-demand cannabis delivery platform to a leading employment resource for the industry.<sup>124</sup>

In 2018, the cannabis sector received over \$1 billion in financing from venture capitalists.<sup>125</sup> By the middle of 2019, this number grew to \$1.26 billion.<sup>126</sup> Clearly, venture capitalists participating in the cannabis market have a "higher risk appetite" than the usual pension fund or institutional investor.<sup>127</sup> As a result, these firms receive equity interests in promising businesses<sup>128</sup> before private credit firms gain interest.<sup>129</sup> Venture financing provides emerging cannabis businesses with capital to fund research, development, and growth.<sup>130</sup>

Cannabis businesses are also taking advantage of equity financing through angel networks,<sup>131</sup> which are investor groups, comprised of "accredited angel investors."<sup>132</sup> For example, ArcView, a commonly known angel network dealing in the cannabis sector,<sup>133</sup> links its 600 plus investors to top cannabis companies.<sup>134</sup> To date, ArcView's members have invested more than \$270 million in over 200 cannabis ventures.<sup>135</sup>

Crowdfunding is another equity financing alternative that cannabis-related businesses may consider when seeking legal investment funds.<sup>136</sup> This funding platform facilitates the solicitation of capital from

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123. Krishna, *supra* note 122.

124. See CASA VERDE CAPITAL, *supra* note 121 (detailing its portfolio including dutchie and Vangst Talent Network respectively).

125. Alicia McElhaney, *VC Pot Investment Hit Record Highs in 2019*, INSTITUTIONAL INVESTOR (June 11, 2019), <https://www.institutionalinvestor.com/article/b1fsm9gm7qymy/VC-Pot-Investments-Hit-Record-Highs-in-2019> [<https://perma.cc/T3AS-NKZV>].

126. *Id.*

127. Berke, *VC Firms*, *supra* note 120.

128. Ohmer, *supra* note 99, at 112–13 ("Venture capital funds typically take equity stakes in startups [small and medium sized businesses] with strong growth potential.").

129. Berke, *VC Firms*, *supra* note 120.

130. Ohmer, *supra* note 99, at 112–13.

131. *Id.* at 115.

132. See *id.* (defining an angel investor as a private individual who invests debt or equity in a private business based on their investment profiles and who does not seek an active role in the daily business operation); see also ARCVIEW, <https://arcviewgroup.com/about-2/> [<https://perma.cc/L7ZP-9AJA>] (last visited Nov. 7, 2019) (restricting membership to high net-worth accredited investors).

133. Ohmer, *supra* note 99, at 115.

134. ARCVIEW, *supra* note 132.

135. *Id.*

136. Ohmer, *supra* note 99, at 116.

the public, typically through the use of social media sites, where the crowdfunding user individually collects funds from investors or donors at large.<sup>137</sup> The cannabis industry has employed several of these platforms to link their startup businesses with investors all over the world.<sup>138</sup> In particular, Fundable is a popular cannabis crowdfunding platform, which allows both reward and equity campaigns.<sup>139</sup>

Although equity financing has shown to be a successful way to finance the cannabis sector, it presents several drawbacks in comparison to debt financing.<sup>140</sup> In equity financing, where an investor contributes capital in exchange for an ownership interest in the business, the primary fear among cannabis business owners who employ this type of financing is the resulting loss of control.<sup>141</sup> In addition to giving third-parties decision making power regarding daily business operations, this type of funding also cuts cannabis business owners' profit sharing.<sup>142</sup> Further, finding the right investors can be demanding and tedious, which could be easily avoided if cannabis-related businesses could obtain debt financing at their nearest bank.<sup>143</sup> Lastly, equity investors are more likely to invest in higher growth cannabis businesses than in riskier, early-stage cannabis

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137. *Id.*

138. Anna Serio, *Compare Three Top Cannabis Crowdfunding Sites*, FINDER, <https://www.finder.com/cannabis-business-crowdfunding> [https://perma.cc/55JU-YTQ6] (last updated Jan. 14, 2020) (comparing 3 cannabis crowdfunding sites).

139. In equity campaigns, the investor receives equity in the business. In reward campaigns, the investor receives some type of perk. Erica Seppala, *How to Finance a Medical Marijuana Dispensary*, MERCHANT MAVERICK, <https://www.merchantmaverick.com/business-finance-medical-marijuana-dispensary/> [https://perma.cc/MM3T-8H6H] (last updated Dec. 18, 2019) (explaining the difference between rewards and equity crowdfunding campaigns).

140. J.B. Maverick, *Equity Financing vs. Debt Financing: What's the Difference?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/042215/what-are-benefits-company-using-equity-financing-vs-debt-financing.asp> [https://perma.cc/236R-RXRA] (last updated Apr. 19, 2019).

141. See Alejandro Cremandes, *Debt vs. Equity Financing: Pros and Cons for Entrepreneurs*, FORBES (Aug. 19, 2018, 7:27 AM), <https://www.forbes.com/sites/alejandrocremades/2018/08/19/debt-vs-equity-financing-pros-and-cons-for-entrepreneurs/#198bf9069005> [https://perma.cc/L6NK-ARZD] (explaining how decision-making control can be forfeited, which has the potential to affect every micro-factor in the business).

142. See Erica Seppala, *Pros and Cons of Debt vs. Equity Financing*, MERCHANT MAVERICK, <https://www.merchantmaverick.com/debt-vs-equity-financing/> [https://perma.cc/H2WE-XM2K] (last updated May 14, 2019).

143. *Id.*



businesses.<sup>144</sup> Thus, this avenue of financing is typically less accessible for smaller cannabis businesses than larger ones.<sup>145</sup>

These financing alternatives have been effective for the time being, but they are not ideal for the long term, since none of them are as “inherently stable as banks.”<sup>146</sup> If given access to traditional banking services, cannabis businesses’ finances will stabilize and their ability to expand will inevitably increase.<sup>147</sup> However, cannabis businesses are not the only ones that will benefit from this change.<sup>148</sup> The banking industry will finally be able to capitalize on an emerging multibillion-dollar industry.<sup>149</sup> Further, the economy will feel the effects of two suppressed industries finally able to work together.<sup>150</sup>

## V. CANNABIS REFORM LEGISLATION

As long as cannabis is illegal and punishable under federal law, financial institutions will continue to avoid serving state-legal cannabis businesses.<sup>151</sup> However, two cannabis reform bills have been introduced and are currently making their way through Congress.<sup>152</sup> Both bills are designed to open up banking to the cannabis industry.<sup>153</sup> Either federal bill has the potential to not only legitimize the cannabis industry but also to make a new market available to financial institutions.<sup>154</sup>

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144. See Georgia McIntyre, *Equity Financing 101: Pros, Cons, and Everything in Between*, FUNDERA, <https://www.fundera.com/blog/equity-financing> [<https://perma.cc/G5CT-H976>] (last updated Dec. 27, 2019) (explaining that investing in small businesses might not be the safest bet for investors given that “50% of all small businesses fail in their first five years of business”).

145. *Id.*

146. Giese, *supra* note 119.

147. *Why Access to Banking Will Help the Growth of Cannabis Companies*, RISKS AVAGE, <https://medium.com/risksavage/why-access-to-banking-will-help-the-growth-of-cannabis-companies-f316638df1ef> [<https://perma.cc/UL3D-VV2J>] (last visited Oct. 13, 2019).

148. See generally Vigil, *supra* note 6, at 207 (explaining how cannabis legalization would alleviate some adverse consequences that currently exist among several distinct industries).

149. *Id.*

150. See generally Ian Wagemaker, Note, *Professional Ethics—The High Risk of Going Green: Problems Facing Transactional Attorneys and the Growth of the State-Level Legal Marijuana Industries*, 37 W. NEW ENG. L. REV. 371, 382–83 (2015) (highlighting the “economy-stimulating” capability of legalized cannabis).

151. Hill, *supra* note 39, at 647.

152. CADWALADER, *supra* note 53.

153. *Id.*

154. Vigil, *supra* note 6, at 207.

A. *The Secure and Fair Enforcement Banking Act of 2019*

The Secure and Fair Enforcement Banking Act of 2019 (“SAFE Banking Act”) purports to improve public safety by providing cannabis-related legitimate businesses with access to the services offered by financial institutions as a way to eliminate their all cash operations.<sup>155</sup> In turn, the SAFE Banking Act will prevent federal banking regulators from interfering with an institution’s deposit insurance simply because it services a cannabis-related legitimate business, hemp-related business, or service provider.<sup>156</sup> Additionally, the SAFE Banking Act will prohibit regulators from punishing banks for or dissuading them from financially serving cannabis businesses.<sup>157</sup> The SAFE Banking Act will also forbid federal regulators from taking corrective actions on loans to cannabis businesses or service providers of such businesses.<sup>158</sup>

Specifically, section 3 of the SAFE Banking Act will amend federal money laundering statutes as applied to cannabis-related proceeds.<sup>159</sup> The SAFE Banking Act provides that proceeds derived from transactions involving a cannabis-related legitimate business will not constitute proceeds from an unlawful activity just because a cannabis-related business or service provider conducted the transaction.<sup>160</sup> If passed, financial institutions will be permitted to offer loans, credit lines, and checking accounts to cannabis businesses without fearing financial or criminal punishment.<sup>161</sup>

On September 25, 2019, the U.S. House of Representatives passed, with substantial bipartisan support, the SAFE Banking Act by a 321-103 vote.<sup>162</sup> The SAFE Banking Act signified a win for financial institutions and cannabis businesses seeking reforms in federal cannabis law.<sup>163</sup> However, the SAFE Banking Act is still far from the President’s

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155. Secure And Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a) (2019); see DEBEVOISE & PLIMPTON, U.S. HOUSE OF REPRESENTATIVES PASSES THE SAFE BANKING ACT (2019), <https://www.debevoise.com/insights/publications/2019/09/us-house-of-representatives-passes-the-safe> [https://perma.cc/4R4F-C3CJ] (last visited Feb. 9, 2020) (defining cannabis businesses in legal states as cannabis-related legitimate businesses).

156. § 2(a)(1).

157. *Id.* at § 2(a)(2).

158. *Id.* at § 2(a)(4).

159. *Id.* at § 3.

160. *Id.*

161. Secure And Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 4(d) (2019).

162. DEBEVOISE & PLIMPTON, *supra* note 155.

163. *Id.*

desk.<sup>164</sup> The SAFE Banking Act has been moved and now awaits consideration by the Senate Banking Committee, where it is expected to face “heightened scrutiny” and “political resistance.”<sup>165</sup> Despite the challenges that lie ahead, Banking Committee Chairman Mike Crapo expressed his support for legislation authorizing banks to serve cannabis-related legitimate businesses.<sup>166</sup> As of late September 2019, thirty-three senators, including five Republicans, now co-sponsor the Senate version of the SAFE Banking Act.<sup>167</sup> Cannabis business owners are optimistic that the SAFE Banking Act will pass and solve their banking problems.<sup>168</sup> Despite signs of hope, many observers remain skeptical of the passage of a bill in this Congress.<sup>169</sup> In any event, the SAFE Banking Act will serve as a model for following legislation that might have a better chance in the future<sup>170</sup> as more people across the U.S. are beginning to support the

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164. Sean Williams, *The SAFE Banking Act's Big Day is Approaching*, MOTLEY FOOL (Sept. 21, 2019, 10:51 AM), <https://www.fool.com/investing/2019/09/21/the-safe-banking-acts-big-day-is-approaching.aspx> [<https://perma.cc/F5PS-9ZX9>]; see DEBEVOISE & PLIMPTON, *supra* note 155 (“The odds for this bill becoming law in this session of Congress remain long.”).

165. DEBEVOISE & PLIMPTON, *supra* note 155; see Williams, *supra* note 164 (describing the Senate as the place “where cannabis legislation goes to die”); see also CADWALADER, *supra* note 53 (“[T]he Senate, which seems less inclined to pass ... [the] bill.”); see also Eric Sandy & Melissa Schiller, *U.S. House Passes SAFE Banking Act*, CANNABIS BUS. TIMES (Sept. 25, 2019), <https://www.cannabisbusinesstimes.com/article/safe-banking-act-us-house-vote/> [<https://perma.cc/Z5DN-59ZZ>] (explaining Senate Majority Leader Mitch McConnell’s well-known opposition to cannabis).

166. DEBEVOISE & PLIMPTON, *supra* note 155; see *Report: Sen. Crapo to Move Cannabis Banking Bill*, A.B.A. RISK & COMPLIANCE (Sept. 12, 2019), [https://bankingjournal.aba.com/2019/09/report-sen-crapo-to-move-cannabis-banking-bill/?\\_ga=2.74243610.909797207.1569006740-821117539.1568917567](https://bankingjournal.aba.com/2019/09/report-sen-crapo-to-move-cannabis-banking-bill/?_ga=2.74243610.909797207.1569006740-821117539.1568917567) [<https://perma.cc/TFT5-UHSV>] (explaining Crapo’s motivation to move based on the challenges faced by cannabis-related businesses).

167. DEBEVOISE & PLIMPTON, *supra* note 155 (discussing the influence of Senate Majority Leader Mitch McConnell’s potential support after amendments focusing on hemp were added to the House bill).

168. TG Branfalt, *Hemp CBD Companies Struggle With Banking Services*, GANJAPRENEUR (June 12, 2019), <https://www.ganjapreneur.com/hemp-cbd-banking-struggle/> [<https://perma.cc/2MPX-AU5G>]; see Melissa Quinn, *With Sessions no Longer AG, Marijuana Banking Bill Gains Momentum*, WASH. EXAM’R (Apr. 30, 2019, 12:00 AM), <https://www.washingtonexaminer.com/news/with-jeff-sessions-no-longer-ag-marijuana-banking-bill-gains-momentum> [<https://perma.cc/GR42-MGG5>] (explaining a medical marijuana dispensary owner’s optimism that his business will be given the same access to banking services as other firms after both the recent comments from top Trump administration officials and the efforts in Congress).

169. DEBEVOISE & PLIMPTON, *supra* note 155 (explaining how approaching debate in the Senate could lead to revisions that either “endanger the likelihood of enactment” or “make the bill less attractive to its current proponents”).

170. *Id.*; see Deborah Dsouza, *The Future of the Marijuana Industry in America*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/111015/future-marijuana-industry-america.asp> [<https://perma.cc/R79L-AFB4>] (last updated Oct. 3, 2019) (explaining

legalization of cannabis.<sup>171</sup> While the SAFE Banking Act aims to directly remedy the issues surrounding cannabis and banking, another Act aims higher.<sup>172</sup>

*B. The Strengthening the Tenth Amendment Through Entrusting States Act*

The Strengthening the Tenth Amendment Through Entrusting States Act (“The STATES Act”) purports to amend the CSA to create a new standard regarding the CSA’s application to cannabis.<sup>173</sup> In doing so, the STATES Act will make the CSA generally inapplicable to cannabis-related conduct that is legal under state law.<sup>174</sup> Thus, the STATES Act will restrict federal enforcement against state-legal cannabis activity.<sup>175</sup> The STATES Act purports to protect cannabis-related businesses and their investors by providing that (1) state-legal, cannabis-related conduct will not constitute the basis for criminal or civil forfeiture of assets<sup>176</sup> and (2) the proceeds from any state-legal cannabis transaction will not be deemed the proceeds of an unlawful transaction under money laundering laws.<sup>177</sup> The STATES Act will eliminate a great deal of obstacles that cannabis-related legitimate businesses currently endure by making them more attractive banking customers and protecting their assets against government interference.<sup>178</sup> The Act will also remove a number of deterrents that exist for financial institutions eager to serve the cannabis industry by permitting them to handle proceeds from

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that more than half of Americans believe marijuana should be legalized and that number may continue to rise as more people accept the idea of legalizing marijuana across the US); see also PYMNTS, *Why the SAFE Banking Act Won’t Solve All Cannabis’ Payment Problems*, PYMNTS.COM (Oct. 7, 2019), <https://www.pymnts.com/news/regulation/2019/why-the-safe-banking-act-wont-solve-all-cannabis-payment-problems/> [<https://perma.cc/2TKE-9QVN>] (explaining that the SAFE Banking Act itself might not be the ultimate answer, but is still significant because it symbolizes the beginning of a conversation that is long overdue).

171. Dsouza, *supra* note 170 (“[T]he stigma [of marijuana] is being shed at a breathtaking speed, and it appears marijuana is on its way to the mainstream.”).

172. Vigil, *supra* note 6, at 205.

173. Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. § 2 (2019); *Proposed U.S. Federal Cannabis Legislation: Three Different Paths Before Congress*, DAVIS POLK (Sept. 24, 2019), [https://www.davispolk.com/files/2019-09-24\\_proposed\\_cannabis\\_legislation\\_three\\_different\\_paths\\_before\\_congress.pdf](https://www.davispolk.com/files/2019-09-24_proposed_cannabis_legislation_three_different_paths_before_congress.pdf) [<https://perma.cc/2DGN-VRTS>].

174. H.R. 2093 at § 2(a); DAVIS POLK, *supra* note 173.

175. H.R. 2093 at § 2(a); CADWALADER, *supra* note 53.

176. H.R. 2093 at § 6(a)(3).

177. H.R. 2093 at § 6(b).

178. H.R. 2093 at § 6; CADWALADER, *supra* note 53.

cannabis-related legitimate businesses without fearing prosecution under money laundering laws.<sup>179</sup>

On April 4, 2019, revised versions of the STATES Act were reintroduced into both houses of Congress.<sup>180</sup> Senators Elizabeth Warren and Cory Gardner introduced the Act in the Senate while Representatives Earl Blumenauer and David Joyce introduced the Act in the House.<sup>181</sup> Unlike the SAFE Banking Act, the STATES Act still awaits scheduling for a hearing in both Senate and House judiciary committees.<sup>182</sup> Despite bipartisan support in both houses of Congress, support from many state governors, and outward approval from President Trump, the STATES Act still faces big challenges ahead.<sup>183</sup> The reform is expected to face opposition in the Republican-controlled Senate, where Majority Leader Mitch McConnell has made it publicly known that he has no intention of legalizing marijuana.<sup>184</sup>

The SAFE Banking Act and the STATES Act take very different approaches to cannabis legalization.<sup>185</sup> The SAFE Banking Act centers primarily on correcting the financing issues within the cannabis sector while the STATES Act seeks to confront the cannabis-banking issue more generally by deferring to state law.<sup>186</sup> If enacted, both bills will effectively open up banking to the cannabis industry, but each will do so

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179. Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. §6(b) (2019); CADWALADER, *supra* note 53.

180. CADWALADER, *supra* note 53.

181. DAVIS POLK, *supra* note 173.

182. Kevin Young & Jack Jacobson, *STATES Act Reintroduced in Congress to Harmonize Federal, State Cannabis Law*, THOMPSON COBURN LLP (Apr. 24, 2019), <https://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2019-04-24/states-act-reintroduced-in-congress-to-harmonize-federal-state-cannabis-law> [<https://perma.cc/ZS7V-G5CL>].

183. Barry A. Abbott & James B. Zack, *Current Banking Issues in the Cannabis Industry*, 72 CONSUMER FIN. L.Q. REP. 390, 394 (2018); *see also* Vigil, *supra* note 6, at 206 (“[P]resident Donald Trump indicated that he will ‘probably support the bill.’”).

184. Angelica LaVito, *US Lawmakers Look to Legalize Pot in ‘Historic’ Marijuana Reform Hearing*, CNBC, <https://www.cnbc.com/2019/07/10/us-lawmakers-look-to-legalize-pot-in-historic-marijuana-reform-hearing.html> [<https://perma.cc/KYY2-RE5S>] (last updated July 11, 2019, 9:54 AM); *see also* Young & Jacobson, *supra* note 182 (detailing conservatives opposition to the STATES Act after viewing it as a “slippery slope” leading directly to marijuana legalization). *But see* Jacqueline Thomsen, *McConnell: I won’t Support Legalizing Marijuana*, HILL (May 8, 2018, 4:54 PM), <https://thehill.com/homenews/senate/386791-mcconnell-i-wont-support-legalizing-marijuana> [<https://perma.cc/4HWZ-TSH9>] (explaining Mitch McConnell’s efforts to legalize hemp).

185. DAVIS POLK, *supra* note 173.

186. *Id.*

in a different manner, eliciting slightly different results.<sup>187</sup> In the particular context of opening up banking to the cannabis industry, the enactment of both bills would be unnecessary.<sup>188</sup> Although either bill would solve the cannabis banking problem, their different approaches offer unique benefits.<sup>189</sup>

The SAFE Banking Act takes a more tailored approach to the problem of cannabis and banking.<sup>190</sup> The bill does not purport to amend the CSA, but simply aims to protect depository institutions that serve cannabis-related businesses and their service providers.<sup>191</sup> Much of the SAFE Banking Act's success is owed to its narrow approach to legalization.<sup>192</sup> Through its controlled approach, the SAFE Banking Act is more likely to be passed by appropriations or by being incorporated into a broader bill.<sup>193</sup> Further, the SAFE Banking Act's moderate approach to legalization is likely to appeal to more members of Congress.<sup>194</sup> Thus, the SAFE Banking Act's approach to the issue of cannabis and banking may allow it to pass more quickly and solve the banking issue sooner.<sup>195</sup>

The STATES Act takes a much broader approach to the problem of cannabis and banking.<sup>196</sup> By amending the CSA, the STATES Act prevents its application to individuals or companies acting in compliance with state law regarding the manufacture, production, possession, and

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187. See CADWALADER, *supra* note 53 (highlighting the different approaches taken by each bill to meet the common goal of making financial services available to the cannabis sector).

188. See *id.* (explaining how both bills would offer a solution to the cannabis banking problem).

189. See DAVIS POLK, *supra* note 173 (comparing the STATES Act and SAFE Banking Act).

190. See *id.* (providing that the STATES Act focuses primarily on banking and payments).

191. Secure And Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 1(b) (2019).

192. Neil Haggerty, *House Likely to Pass Pot Banking Bill, but is that as far as it Goes?*, AM. BANKER (Mar. 24, 2019, 9:00 PM), <https://www.americanbanker.com/news/house-likely-to-pass-marijuana-banking-bill-but-will-it-go-further> [https://perma.cc/SL5D-Y93N]; see Claire Hansen, *Marijuana Banking Bill Passes House in Historic Vote*, U.S. NEWS (Sept. 25, 2019, 5:55 PM), <https://www.usnews.com/news/national-news/articles/2019-09-25/marijuana-banking-bill-passes-house-in-historic-vote> [https://perma.cc/LL9Z-QLTW] (reporting that the SAFE Banking Act is the first standalone marijuana reform bill to ever clear a chamber of Congress).

193. Haggerty, *supra* note 192.

194. See Young & Jacobson, *supra* note 182 (detailing the conservatives' opposition to marijuana legalization).

195. Haggerty, *supra* note 192.

196. See CADWALADER, *supra* note 53 (detailing the STATES Act's broader reach).

distribution of cannabis.<sup>197</sup> Because the STATES Act aims closer to legalization, it is going to be more difficult to slip into another appropriations package.<sup>198</sup>

Although it might be more difficult to pass, the expansive nature of the STATES Act allows it to go further in helping cannabis businesses and financial institutions.<sup>199</sup> First, compliance under the STATES Act will not constitute trafficking in a controlled substance under the CSA or any other provision of law.<sup>200</sup> By doing this, the STATES Act offers an additional benefit in the area of tax deductions that the SAFE Banking Act cannot.<sup>201</sup> Cannabis businesses are required to pay federal income taxes.<sup>202</sup> Currently, § 280E of the Internal Revenue Code (“IRC”) prohibits deductions and credit to a business trafficking in a controlled substance.<sup>203</sup> Therefore, deductions for all expenses incurred in the business of producing or selling cannabis are currently forbidden under § 280E of the IRC.<sup>204</sup> For example, expenses such as wages, rent, equipment, and utility costs, which would constitute deductions for non-cannabis businesses, are not deductible for cannabis businesses and negatively affect their taxable profits.<sup>205</sup> Because the IRC applies to a trade or business that constitutes trafficking, the STATES Act would eliminate the harsh impact that § 280E has on the cannabis industry.<sup>206</sup> Thus, if the STATES Act were to pass, cannabis businesses would be able to claim deductions against their gross income, allowing them to arrive at their respective taxable net income.<sup>207</sup>

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197. Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. § 2(a) (2019).

198. Haggerty, *supra* note 192.

199. See CADWALADER, *supra* note 53 (“If enacted, this law would go further than any other bill introduced to date, including the SAFE Act, to remove the significant hurdles that exist for state-compliant businesses and individuals to expand their cannabis businesses.”).

200. H.R. 2093 at § 6(a)(2).

201. See CANNA L. BLOG, *Cannabis Taxation: Another Day, Another 280E Case (or Two)*, HARRIS BRICKEN (June 25, 2018), <https://www.cannalawblog.com/cannabis-taxation-another-day-another-280e-case-or-two/> [<https://perma.cc/36SA-N4ED>] (describing how the STATES Act could act as a legislative fix to IRC § 280E).

202. Jack Fersko et al., *‘Legal’ Marijuana: The Implications for Commercial Real Estate*, N.J. L. (Oct. 2018), at 54, 55.

203. See 26 I.R.C. § 280E (2018) (clarifying that controlled substance is within the meaning of schedule I and II of the CSA).

204. See *id.*; see also Fersko et al., *supra* note 202, at 55 (explaining how rent is not deductible under § 280E of the IRS).

205. McErlean, *supra* note 69, at 1097.

206. HARRIS BRICKEN, *supra* note 201.

207. Fersko et al., *supra* note 202, at 55; see also Sean Williams, *You Want Marijuana Businesses to be Taxed Fairly? Think Again!*, MOTLEY FOOL (Dec. 9, 2017),

Further, the STATES Act's expansive nature may also provide a significant benefit to financial institutions that the SAFE Banking Act will not.<sup>208</sup> If the STATES Act becomes law, financial institutions will likely be able to avoid the dreaded SAR filing requirements, which are currently imposed on them when serving cannabis business clients.<sup>209</sup> If the STATES Act is enacted, it is reasonable to assume that these SAR burdens will lessen, in that they will only be required when cannabis business schemes violate state law.<sup>210</sup> This will reduce both the compliance burdens and costs of the current SAR requirements.<sup>211</sup> In contrast, section 6 of the SAFE Banking Act seeks to continue the current SAR filing requirements for cannabis-related legitimate businesses.<sup>212</sup> However, the SAFE Banking Act does amend the BSA's SAR filing requirements so that banks' compliance with FinCEN guidance corresponds with the main objectives of the SAFE Banking Act and does not significantly interfere with the conveyance of financial services to cannabis-related clients.<sup>213</sup>

## VI. THE ANTICIPATED IMPACTS

Numerous opportunities await the industries influenced by cannabis upon passage of the proposed legislations.<sup>214</sup> If financial institutions were able to freely serve cannabis-related businesses, the

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<https://www.fool.com/investing/2017/12/09/you-want-marijuana-businesses-to-be-taxed-fairly-t.aspx> [<https://perma.cc/C2RY-A7HV>] (“Some estimates suggest that weed companies are paying an effective tax rate of 70% to 90% on their income, compared to 15% to 30% for a ‘normal’ company.”).

208. See generally CADWALADER, *supra* note 53 (highlighting the STATES Act's ability to ease the burdens on banks when serving cannabis businesses).

209. See *id.* (explaining that although the STATES Act makes no reference to the BSA, SAR filing requirements will likely become “moot” in light of the Act's overall purpose).

210. *Id.*

211. See Buckner, *supra* note 71, at 175 (highlighting the extensive burdens of SAR filings).

212. Secure And Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 6(5)(a) (2019) (“[I]f the reason for [suspicious activity report] related to a cannabis-related legitimate business or service provider, the report shall comply with appropriate guidance issued by the Financial Crimes Enforcement Network.”).

213. See *id.* (providing no indication of what constitutes a significant inhibition to the provision of financial services).

214. CADWALADER, *supra* note 53.



impact would be far-reaching across the cannabis industry,<sup>215</sup> banking industry,<sup>216</sup> and national economy at large.<sup>217</sup>

### A. The Cannabis Industry

The cannabis industry will reap major benefits if given the chance to obtain traditional financial services from banks.<sup>218</sup> First, the federal reform will eliminate barriers to marketplace entry, which inevitably occur from the inability to obtain capital through conventional loans.<sup>219</sup> The lack of banking services makes it almost impossible for entrepreneurs to enter the cannabis sector.<sup>220</sup> Second, federal legislative reform will reduce the high operating costs that cannabis businesses endure, which materialize from third party businesses interacting with the illegal cannabis industry.<sup>221</sup> Third, proposed federal legislation will allow cannabis businesses to open deposit accounts, resolving the risks and complications of all cash operations.<sup>222</sup> A bank account will also give cannabis-related businesses the opportunity to earn interest on their deposits.<sup>223</sup> Moreover, a deposit account will facilitate payments by giving cannabis businesses the option to pay bills and taxes by check,

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215. Minho Kim, *Are Pot Businesses Finally Getting Access to Banking Services?*, CRAIN'S CHI. BUS. (Sept. 25, 2019, 2:37 PM), <https://www.chicagobusiness.com/marijuanacannabis/are-pot-businesses-finally-getting-access-banking-services> [<https://perma.cc/HSA8-3SRA>].

216. Vigil, *supra* note 6, at 207.

217. Wagemaker, *supra* note 150, at 382–83.

218. See Kim, *supra* note 215 (“The SAFE bill, upon becoming law, would alleviate uncertainties and risks surrounding the marijuana industry and help cannabis entrepreneurs bring in investments and capital they desperately need.”).

219. Fersko et al., *supra* note 202, at 58 (discussing Small Business Association (SBA) guidelines that prohibit banks from making SBA-backed loans to any company that has a direct business relationship with cannabis); see Vigil, *supra* note 6, at 196–97 (explaining the unsuccessful attempts of cannabis businesses in trying to bypass the lack of financial services by using personal bank accounts to mask the source of income).

220. Kim, *supra* note 215 (“‘People who are looking to get in have a lack of access to capital,’ said Avis Bulbulyan, CEO of Siva Enterprise, a cannabis consulting firm.”).

221. Fersko et al., *supra* note 202, at 54 (“It is not uncommon for marijuana dispensaries to pay a substantial premium for rental space, sometimes as much as ‘four times the going rental rate,’ because of the federal illegality of marijuana.”).

222. Bricken, *supra* note 5; see Rowe, *supra* note 52 (explaining how operating on an all cash basis creates a risk to the public’s safety); see also Angell, *supra* note 97 (detailing how operating on an all cash basis makes cannabis businesses more susceptible to robberies).

223. See Randa Kriss, *Business Savings Accounts: The 7 Best High Yield Business Savings Accounts*, FUNDERA (Oct. 28, 2019), <https://www.fundera.com/business-bank-accounts/savings> [<https://perma.cc/4CCX-9763>] (explaining that a business savings account will grow the funds deposited).

wire transfer, electronic deposit, or credit card instead of with masses of cash.<sup>224</sup> Overall, cannabis businesses would greatly benefit from the passage of cannabis reform legislation.<sup>225</sup>

### *B. The Banking Industry*

The banking industry will also benefit from cannabis reform legislation.<sup>226</sup> Under current federal law, the banking industry is denied access to the multibillion-dollar cannabis industry that is projected to grow more in the next decade.<sup>227</sup> By refusing to accept deposits from cannabis businesses, banks are being deprived of funds that could be circulating within the banking system.<sup>228</sup> Cannabis activities are producing billions of dollars of revenue annually, almost none of which is being put to constructive use in the U.S. banking system.<sup>229</sup> As a result, billions of dollars are left circulating in the untraceable “cash economy.”<sup>230</sup> Currently, the Federal Reserve Board requires banks to maintain 10% of deposits on reserve, allowing them to loan out the remaining 90%.<sup>231</sup> If banks could accept the billions of dollars that cannabis businesses want to deposit with them, 90% of each deposit would be lent back out, helping to increase the U.S. money supply.<sup>232</sup> By issuing more loans, banks would earn more interest and increase their assets.<sup>233</sup> Banks are also denied potential lucrative fees from not being

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224. See Vigil, *supra* note 6, at 201 (explaining the issues and burdens that arise for cannabis companies when handling payments to employees, utility providers, suppliers, and landlords all in cash).

225. Fersko et al., *supra* note 202, at 54.

226. Vigil, *supra* note 6, at 207.

227. *Id.* (“Economic output from cannabis was estimated to be over \$16 billion in 2017. This number is expected to grow to \$40 billion by 2021.”).

228. W. Gregory Guedel & J.D. Colbert, *Capital, Inequality, and Self-determination: Creating a Sovereign Financial System for Native American Nations*, 41 AM. INDIAN L. REV. 1, 11 (2016).

229. *Id.*

230. See *id.* (defining cash economy as an unregulated realm of finance that is highly inconvenient for legitimate commercial actors).

231. Murphy, *supra* note 55.

232. *Id.*

233. Banks enhance their profits by collecting interest on the more loans they make. See Miranda Marquit, *How Banks Make Money*, DEPOSITACCOUNTS, <https://www.depositaccounts.com/blog/how-banks-make-money.html> [<https://perma.cc/Q45H-M852>] (last visited Sept. 22, 2019).

able to service a rapidly growing sector.<sup>234</sup> Maintenance fees, transfer fees, service fees and early account closure fees are just a few examples of additional ways that banks would profit from cannabis business accounts.<sup>235</sup>

### C. The Economy

There is much to be said about the “economy-stimulating, revenue-generating potential” of legalized cannabis.<sup>236</sup> Although neither the SAFE Banking Act nor the STATES Act will fully legalize cannabis, each Act purports to give cannabis-related businesses the ability to obtain financial resources.<sup>237</sup> If either Act becomes law, there will be a lasting impact on the nation’s economy.<sup>238</sup> For any economy to grow, banks must be available to provide small businesses and industries with credit to pay for wages, resources, and other costs.<sup>239</sup> Aside from this general understanding, there are some specific instances of how the economy will grow if banks are able to serve cannabis businesses.<sup>240</sup>

First, it is possible that tax revenue will increase.<sup>241</sup> Although cannabis businesses are already subject to federal income tax, it is impossible to determine whether all the revenue in these cash businesses is being reported.<sup>242</sup> Not to mention, these cash-only businesses have opportunities and incentives to underreport taxes.<sup>243</sup> For example, the

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234. Julia Horowitz, *Cannabis in Canada: Big Banks are Missing a Boom*, CNN BUS. (Oct. 30, 2018), <https://www.cnn.com/2018/10/30/business/cannabis-canada-banks/index.html> [<https://perma.cc/637H-YM8A>].

235. See Shane Steele, *How Big Banks Make Money and Why it’s Costing You*, CHIME (Feb. 28, 2017), <https://www.chimebank.com/2017/02/28/the-truth-about-how-big-banks-make-money-and-it-costs-you/> [<https://perma.cc/84DN-CSGS>] (explaining that banks use fees to maximize their profits).

236. Wagemaker, *supra* note 150, at 382–83.

237. CADWALADER, *supra* note 53.

238. See, e.g., David W. Wensley & Amir Sadr, *Space to Grow*, L.A. L. at 20, 24 (Feb. 2018) (highlighting legal cannabis operations significant impact on California’s economy).

239. Guedel & Colbert, *supra* note 228.

240. See *infra* pp. 17–18.

241. Wagemaker, *supra* note 150, at 382–83.

242. CADWALADER, *supra* note 53; see also Hill, *supra* note 39, at 602 (explaining why cannabis businesses are harder to tax and regulate).

243. Hill, *supra* note 39, at 603; see, e.g., *The Public Benefits of Banking Cannabis Businesses*, AM. BANKERS ASS’N (July 2019), <https://www.aba.com/advocacy/policy-analysis/public-benefits-banking-cannabis-businesses> [<https://perma.cc/DS66-PJWE>] [hereinafter *Public Benefits*] (“Although compliance rates are difficult to estimate, researchers at Stanford University suggest that cash-based businesses underreport their income by at least 50%.”).

City of Sacramento approximated that cannabis dispensaries accumulated \$9 million per year in underpaid taxes due to the poor record keeping and the flawed filing of statements that are inevitable in all cash operations.<sup>244</sup> As a result, legalized states are losing out on the full, substantial tax revenue that should be collected from these businesses.<sup>245</sup> Parts of cannabis state tax revenues are often earmarked for education and public health plans, which explains why compliance is crucial.<sup>246</sup> Further, tax authorities prefer to be paid by check, credit card, or electronic deposit, rather than with bundles of dollar bills.<sup>247</sup> If given the ability to obtain banking services, it is possible that some cannabis businesses will forego depositing their cash as a way to avoid taxes.<sup>248</sup> However, being banked will likely discourage this behavior since cannabis businesses would be permitted to accept payment by credit and debit cards.<sup>249</sup> Allowing these types of payments as opposed to cash will result in higher business sales, which most businesses are doubtful to turn down.<sup>250</sup>

A second benefit to the economy is a substantial decline in banking regulatory costs.<sup>251</sup> Generally, enforcement of cannabis laws comes at a tremendous cost.<sup>252</sup> It is estimated that the U.S. spends \$13.7 billion a year enforcing cannabis laws alone.<sup>253</sup> Eliminating some of these expenses, even if only in the banking sector, is a potential economic

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244. *Public Benefits*, *supra* note 243 (explaining that this tax evasion amounts to nearly double the revenue collected by the city through taxes and fees on annual reported cannabis sales).

245. Hill, *supra* note 39, at 603; *see also* Elizabeth Smiley, Note, *Marijuana & Other Drugs: Legalize or Decriminalize?*, 33 ARIZ. J. INT'L & COMP. L. 825, 845 (2016) (describing the significant tax revenues generated from marijuana sales in Colorado).

246. *Public Benefits*, *supra* note 243; *see, e.g.*, COLO. CONST. art. XVIII, § 16 (“[R]equiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund.”).

247. Hill, *supra* note 39, at 603.

248. *See* Jean Murray, *Important Facts You Need to Know About a Cash Business*, SMALL BUS., <https://www.thebalancesmb.com/got-a-cash-business-important-facts-you-need-to-know-398166> [<https://perma.cc/EJN7-EFRR>] (last updated July 18, 2019) (highlighting some incentives to deal in all cash).

249. *Id.*

250. *See id.* (providing that many people don’t carry large amounts of cash with them and noting that allowing customers to pay with cash encourages them to buy more).

251. Carol Goforth & Robyn Goforth, *Medical Marijuana in Arkansas: The Risks of Rushed Drafting*, 71 ARK. L. REV. 647, 650–51 (2019).

252. *Id.*

253. Ohmer, *supra* note 99, at 98.

benefit associated with the passage of the SAFE Banking or STATES Acts.<sup>254</sup>

A third economic benefit is the facilitation of businesses that are incidental to the cannabis industry.<sup>255</sup> The effects of current banking drought extend well beyond business that grow or sell cannabis at retail.<sup>256</sup> Several businesses that deal indirectly with the cannabis industry have been denied banking or lending services because their profits have been derived from the cannabis industry.<sup>257</sup> For example, Wells Fargo closed the account of a magazine targeted towards cannabis growers and vendors.<sup>258</sup> These risks even extend to ancillary businesses that simply service the cannabis industry.<sup>259</sup> Businesses that provide marketing, title insurance, real estate and legal services to the cannabis industry<sup>260</sup> are discriminated against because of their indirect association with cannabis-related businesses.<sup>261</sup> As a result, numerous industries within the U.S. are missing out on potential revenue with cannabis-related businesses.<sup>262</sup> Reforms in federal cannabis law will enable these foreclosed industries to freely serve the cannabis sector, thereby allowing them to capitalize on lucrative opportunities.<sup>263</sup>

Furthermore, federal reform legislation would indirectly help all small businesses that have no connection with the cannabis industry whatsoever.<sup>264</sup> Because the cannabis industry is prohibited from making

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254. See generally Goforth & Goforth, *supra* note 251 at 650–51 (explaining that the enforcement of cannabis which includes “police time, court expenses, and the cost of incarceration” comes at a very high cost).

255. Hill, *supra* note 39, at 600.

256. *Id.* (“For example, Wells Fargo Bank closed the account of Marijuana Ventures, a magazine aimed at cannabis growers and retailers.”).

257. Vigil, *supra* note 6, at 201.

258. Hill, *supra* note 39, at 600 (describing how Wells Fargo closed the account of Marijuana Ventures).

259. Todd Kleperis & Dana Chaves, *Investigating the Role of Financial Institutions in the Legal Cannabis Industry*, NAT’L CANNABIS INDUS. ASS’N LEGAL & BANKING COMM. (Oct. 2017),

<http://3h13hg1lvfpa2qxgq62uw69x-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/NCIA-LBC-Banking-White-Paper-Final-Draft.pdf> [https://perma.cc/PAD8-593B].

260. *Id.*

261. *Id.*; see CADWALADER, *supra* note 53 (“This would protect. . .real estate finance of marijuana properties, broker-dealer custody of cannabis related stocks and their receipt of dividends paid on those stocks.”).

262. Fersko et al., *supra* note 202, at 56 (“[T]he title insurance industry has not embraced the field. In fact, currently, most title companies will not insure title in a transaction in which the property will be used for a marijuana-related operation.”).

263. See Kleperis & Chaves, *supra* note 259 (providing that ancillary businesses have a lot to benefit from within the cannabis industry).

264. Murphy, *supra* note 55.

deposits, banks lose the opportunity to make loans with those assets.<sup>265</sup> Global cannabis sales are expected to reach \$14.9 billion in 2019,<sup>266</sup> if the industry were able to deposit that money with banks, the banking system would have billions of dollars to loan out to other businesses.<sup>267</sup> This would enhance the quantity and quality of loans being issued to small businesses around the U.S.<sup>268</sup> Because the cannabis industry shows no signs of slowing down, these incidental problems and missed opportunities will persist if no solution becomes available.<sup>269</sup>

## VII. CONCLUSION

Despite growing legalization among the states, cannabis remains illegal under federal law.<sup>270</sup> Cannabis-related businesses continue to develop within the thirty-three states that have legalized cannabis in some manner.<sup>271</sup> However, federal enforcement action under the CSA has prevented the financial sector from fully serving the industry.<sup>272</sup> As a result, the multi-billion dollar cannabis industry has been deprived of a legal avenue to traditional financial services.<sup>273</sup> Concurrently, the financial sector is missing out on a major opportunity to serve a growing multi-billion dollar industry.<sup>274</sup> Cannabis reform legislation represents an enormous opportunity, and not just for cannabis-related businesses and financial institutions.<sup>275</sup> Entrepreneurs, attorneys, real estate brokers, and other professions are faced with a once-in-a-lifetime opportunity to help shape a massive new industry, one that has the potential to generate a wealth of market opportunities and enormous financial returns.<sup>276</sup> Recent estimates indicate that the domestic legal cannabis industry could

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265. *Id.*

266. Alicia Wallace, *Cannabis Sales Could Hit \$15 Billion Globally this Year*, CNN BUS., <https://www.cnn.com/2019/06/20/tech/cannabis-industry-15-billion/index.html> [<https://perma.cc/E8K9-XPQX>] (last updated June 20, 2019, 8:31 AM).

267. Murphy, *supra* note 55.

268. *See id.* (“When you stop an entire economic sector from depositing its revenues in banks, you deprive countless small businesses of valuable loans.”).

269. Vigil, *supra* note 6, at 201–02.

270. Bricken, *supra* note 5.

271. *Id.*

272. McCarthy & Newton, *supra* note 1.

273. Vigil, *supra* note 6, at 207.

274. *Id.*

275. Patrick Moen, *Navigating Contradictory Cannabis Laws*, ASS’N OF CORP. COUNS. 74, 84 (2015).

276. *Id.* at 84.

generate tens of billions of dollars in annual revenue within the next few years.<sup>277</sup> If banks were able to freely serve this rapidly growing market, the impacts would be widespread across the entire U.S. economy.<sup>278</sup>

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277. CADWALADER, *supra* note 53; *see* Vigil, *supra* note 6, at 199 (explaining that economic output from cannabis is expected to grow to \$40 billion by 2021).

278. *See, e.g.*, Wensley & Sadr, *supra* note 238 (providing examples of the legal cannabis industry's significant impact on California's economy).

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