

Despite Legislative Progress U.S. Cannabis Banking Plan Far From SAFE

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Further legislative and regulatory action is needed to clear the lingering haze around the banking issue facing the U.S.' legalized cannabis industry, despite the recent passage of a landmark bill by the House of Representatives.

The House's landslide 321-103 passage of the Secure and Fair Enforcement (SAFE) Banking Act marked definitive progress in creating a safe harbor for banks serving cannabis sector companies in states that have legalized recreational and/or medicinal use.

The SAFE Banking Act's progress came as little surprise; it had more than 200 co-sponsors in the lower congressional chamber and received bipartisan support from both Democrats and Republicans.

But the bill now moves to the Senate, where approval promises to be a significantly dicier proposition. The Republican-controlled upper chamber is generally seen as being less open overall to cannabis, and majority leader Mitch McConnell of Kentucky has long been a staunch opponent of marijuana legalization.

Other key Senate Republicans, including banking committee chair Mike Crapo of Idaho and judiciary committee head Lindsey Graham of South Carolina, also have expressed opposition to loosening restrictions on cannabis.

However, Crapo has shown a willingness to at least consider the issue, holding a surprise [banking committee hearing](#) in July after previously indicating the committee was unlikely to take up the matter as long as cannabis remained prohibited by federal law.

The timing of the SAFE Banking Act also could help spark support for the bill from lawmakers who are facing challenges to their seats, according to Joann Needleman, partner at Clark Hill.

"This is an election year, and anything can happen," said Needleman, who also serves as chairperson of the banking subcommittee for the Philadelphia Bar Association's medical marijuana and hemp committee.

However, even if the SAFE Banking Act does clear Congress and earns President Donald Trump's sign-off, Needleman said that additional regulatory kinks would still need to be worked out to entice a significant number of mainstream banks to overcome jitters about serving the legal cannabis industry.

That is despite the potential financial windfall the industry represents to financial institutions facilitating transactions.

Chief among those potential buzzkills is the guidance and examination procedures for legal cannabis businesses set forth by the Federal Financial Institutions Examination Council (FFIEC), which would be developed and instituted as a requirement of the new bill.

"My guess is they will be comprehensive, which may force smaller banks out of the process," Needleman said of the FFIEC guidelines and examination procedures.

"Bank examinations are costly even when not serving cannabis businesses, and I expect those costs to significantly increase [when banks serve the cannabis sector.]"

How the FFIEC requirements are harmonized with suspicious activity report (SAR) rules established in 2014 by the Treasury Department's Financial Crimes Enforcement Network (FinCEN) presents an additional challenge, Needleman added.

"The FinCEN guidance which governs SAR filings will remain the same, so the SAR filing rules and the new FFIEC examination procedures will need to be reconciled," the lawyer said.

As to what types of financial institutions might be the first to test the waters in a post-SAFE Banking Act regulatory environment, Needleman cited mid-level regional banks.

Such banks would have greater resources than small banks to devote to compliance efforts, combined with a higher risk tolerance for serving the cannabis sector compared with major national and international institutions.

"I think the larger banks will wait several years to get the kinks out of the system," the attorney predicted.

Meanwhile, as the legislative process slowly unfolds on the federal level, state efforts to cultivate cannabis banking services could be more fertile in the short term, according to Needleman.

"There has been some interesting activity at the state level," noted Needleman. "I think state programs may be the way to go, since

cannabis businesses are very state-specific and at this time do not [transact] cross-border."

A California proposal to establish a safe harbor for banks to serve cannabis companies in the state was withdrawn from consideration in the state's Senate last month by its sponsor, Senator Bob Hertzberg. However, Hertzberg said he plans to re-introduce a revamped version of the bill next year.

Meanwhile, some more novel approaches to helping increase cannabis companies' access to financial services have cropped up in various states, including a Nevada pilot that will allow cannabis businesses and consumers to transact using electronic tokens, akin to casino chips.

A similar program is being tested in Arizona, where medicinal marijuana was legalized earlier this year.

"States, in my opinion, are a good testing ground for ways to safely and effectively bank cannabis businesses and can be a good complement to the federal system," said Needleman.

Ultimately, establishing widespread banking access for the cannabis industry likely will require the combined efforts of various jurisdictions and officials working in concert and separately, the attorney said.

"Getting a fully functional cannabis banking regime is going to take a multifaceted approach. It will take legislation as well as regulations from both the Department of Justice and federal banking regulators," Needleman predicted.

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