

**CHALLENGES AND SOLUTIONS: ACCESS  
TO BANKING SERVICES FOR  
CANNABIS-RELATED BUSINESSES**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CONSUMER PROTECTION  
AND FINANCIAL INSTITUTIONS  
OF THE  
COMMITTEE ON FINANCIAL SERVICES  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED SIXTEENTH CONGRESS  
FIRST SESSION

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FEBRUARY 13, 2019

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Printed for the use of the Committee on Financial Services

**Serial No. 116-2**



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## **Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses**

**Wednesday, February 13, 2019**

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CONSUMER PROTECTION  
AND FINANCIAL INSTITUTIONS,  
COMMITTEE ON FINANCIAL SERVICES,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 2:15 p.m., in room 2128, Rayburn House Office Building, Hon. Gregory W. Meeks [chairman of the subcommittee] presiding.

Members present: Representatives Meeks, Scott, Velazquez, Clay, Heck, Foster, Lawson, Tlaib, Porter, Pressley, McAdams, Ocasio-Cortez, Wexton; Luetkemeyer, Lucas, Posey, Barr, Tipton, Williams, Loudermilk, Budd, and Riggleman.

Ex officio present: Representatives Waters and McHenry.

Also present: Representatives San Nicolas and Davidson.

Chairman MEEKS. The Subcommittee on Consumer Protection and Financial Institutions will come to order.

Without objection, the Chair is authorized to declare a recess of the subcommittee at any time.

Also, without objection, members of the full Financial Services Committee who are not members of this subcommittee are authorized to participate in today's hearing.

Today's hearing is entitled, "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses."

I now recognize myself for 5 minutes to give an opening statement.

Let me just say to Ranking Member Luetkemeyer and members of this subcommittee, welcome to the first hearing of the Consumer Protection and Financial Institutions Subcommittee.

Chairwoman Waters has set an ambitious agenda for the Financial Services Committee, which I look forward to working on and advancing. Our subcommittee has much work to do, and I look forward to working with all of you in a productive and bipartisan way to do the work we were sent here to do by the American people.

Our committee is powerful not only because it touches our country's largest companies and Wall Street financial institutions but because its focus is to promote the economic well-being of Main Street, consumers, and investors.

This subcommittee, in particular, has jurisdiction over important issues that directly impact every one of our constituents—issues

that keep many parents up at night as they consider their family's finances. And, as is the case with today's hearing, these are issues that directly impact businesses of all sizes across the country.

As we saw during the financial crisis, when financial institutions fail or fail in their responsibilities, Main Street suffers. However, when financial institutions are successful while being responsible and true stakeholders in their communities, Main Street and the American economy wins.

Turning now to the subject of today's hearing, I welcome our witnesses and thank them for taking the time to provide valuable testimony on an important issue that has received far too little attention.

There has been a rapid and dramatic shift in the legal treatment of cannabis, led by voters at the local and State level. Nearly every American now lives in a State where cannabis has been decriminalized to some extent and legal business activity is permitted to varying degrees.

In New York, for example, Governor Andrew Cuomo is on the verge of enacting legislation to legalize recreational marijuana, which would have many benefits for the State of New York and its economy and law enforcement.

But Federal drug laws and bank regulations have not evolved to reflect this new reality at the State and City level. Indeed, while the Justice Department's Cole Memo provided some guidance on the DOJ's focus on organized-crime aspects of the cannabis trade, Attorney General Sessions' reversal on this practice led to major disruption and uncertainty. It was encouraging to hear Attorney General-nominee Barr state that, if confirmed, he intended to follow the guidance of the Cole Memo.

Similarly, the FinCEN guidance on banking activity as it relates to cannabis helped provide a beginning of clarity for banks. The absence of a broader, permanent regulatory framework continues to keep nearly all banks out of this growing industry, despite a clear interest. As a result, entrepreneurs operating legally within the bounds of State and local laws bear the burden of a punitive Tax Code, high compliance hurdles, the lack of basic financial services, and significant security risk.

Today's hearing will allow us to begin consideration of draft legislation to bring transparency and accountability, and to address a major driver of violent crime in this space.

As we do so, I wish to recognize the work of our colleagues Mr. Perlmutter from Colorado, Mr. Heck from Washington, Mr. Stivers from Ohio, and Mr. Davidson from Ohio, who have worked on a bipartisan basis on legislation which I believe can pass and get to the President's desk for signature.

This bill, the SAFE Banking Act, is one of several opportunities we will have in this committee to pass meaningful legislation to allow financial institutions to better serve our constituents and address important matters of consumer protection.

Before I close, I want to remind all of my colleagues as well as the witnesses that this hearing is specifically about banking and financial services for cannabis-related businesses. We will not litigate the Controlled Substances Act, the benefits of medicinal can-

nabis, or any other issues that are outside of the jurisdiction of this committee.

I now recognize Ranking Member Luetkemeyer for his opening statement.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

Before I begin, I would like congratulate Mr. Meeks on his role as our chairman of this subcommittee. We have served together on this committee for nearly a decade, and while we may not always agree on everything, I am confident we will be able to find common ground in many instances.

And I look forward to working with you, sir.

Today we are discussing an issue that we can all agree must be addressed. As changing State laws spur the formation of thousands of cannabis-related businesses across the country, I have heard from many banks and credit unions who are facing the decision of whether they can or cannot get involved with these businesses.

For the last 6 years, I have fought alongside my colleagues on this committee to ensure all legal businesses in the United States have access to financial services. Operation Choke Point, which sought to deprive legal businesses of the services they need to survive, has seen bipartisan opposition over the years. Today, however, we are having a very different conversation. Today we are discussing the merits of allowing federally illegal businesses to access banking services.

First and foremost, we must remember we are dealing with an illegal industry at the Federal level. As far as I know, the House Financial Services Committee does not have jurisdiction over descheduling a drug. And, in my opinion, we are putting the cart before the horse by addressing this issue here in the Consumer Protection and Financial Institutions Subcommittee before the drug is descheduled.

But I do welcome the broader conversation.

The biggest question we face is what would happen if this proposed legislation was actually signed into law. How do we separate legal growers from bad actors attempting to access financial services?

Our current anti-money-laundering regime is already woefully inadequate, and until we modernize the Bank Secrecy Act and anti-money-laundering regulations, it would be irresponsible to open up our financial institutions to another major challenge.

Similar questions arise regarding FDIC insurance and the movement of money between States that have not legalized marijuana.

In this committee, the question of when to allow States the prerogative to make decisions for themselves seems to be on a case-by-case basis. My colleagues who are morally opposed to a legal service, such as small-dollar loans, will fight tooth and nail to ensure the States have no leeway to make their own decision. Yet, here we are acquiescing to the decision of some States fighting to provide banking services to a federally illegal industry.

The bottom line is that the law, not personal preferences, must dictate the accessibility of financial services. And as long as marijuana is illegal at the Federal level, attempts by this committee to legalize the banking of it will create more confusion than clarity.

There is a solution to this. The hemp industry solved this problem last fall. They descheduled the drug, and now they can grow, manufacture, and distribute their drug. Opioids is a grown chemical that we now allow for medicinal purposes but we do not allow for recreational purposes.

The DOJ has confused this situation by being unwilling to support descheduling and yet not being willing to enforce the Federal law. This is like having a stoplight at a major intersection right out here on Pennsylvania Avenue and the light gets turned off. What do you have? Confusion and chaos. And that is what we have today in the banking industry.

And while Mr. Perlmutter has a solution, I am concerned that it is going to create more confusion than it solves. The reason for the light, just like the reason for laws, is to put structure in our society so things can take place, so that businesses can operate. And yet here we are because enforcement is not in place to make this happen.

Now, throughout my life, as I have gone through the educational system, civics classes have always said that Federal law trumps State law. And until that changes, until the Supreme Court says that the Constitution is a list of suggestions instead of the law, I believe that we probably can't do much today other than realize that we have a problem and that we can solve it by descheduling the drug. Then we can, I think, go on to Mr. Perlmutter's solution.

With that, I do have another—if the chairman will permit me just 1 minute here, I would like to thank the witnesses who are coming later on today for taking the time to testify, and I look forward to a very robust discussion.

Unfortunately, we are missing an important voice on the matter today.

Mr. Chairman, it has been a longstanding practice of this committee to allow the Minority a second witness when the Majority has five or more witnesses. Today, the new Majority has decided to deviate from this practice, which has been in place since Barney Frank's chairmanship.

The Minority identified two well-qualified experts who were willing to testify today. It is unfortunate that this committee will miss the opportunity to hear testimony from and question one of our nonpartisan expert attorneys from the Congressional Research Service (CRS).

David Carpenter has prepared testimony which addresses the impact of the SAFE Banking Act, and what impact it could have on Federal law, and Mr. Carpenter's testimony gives an overview of the existing landscape as it relates to marijuana banking. It also highlights the regulatory and supervisory uncertainty that could result from passage of the SAFE Banking Act.

Mr. Carpenter's role with CRS is to take a middle-ground, non-partisan stance and provide nonbiased, factual answers to any of the committee's financial banking concerns.

Without objection, I ask unanimous consent that Mr. Carpenter's testimony be entered into the record.

With that, I will yield back.

Chairman MEEKS. Without objection, it is so ordered.



[The prepared statement of Mr. Carpenter can be found on page 313 of the appendix.]

Chairman MEEKS. I now acknowledge Mr. Heck for 2 minutes for an opening statement.

Mr. HECK. Thank you, Chairman Meeks.

To my colleagues, the witnesses, and guests in the audience, I want to thank you all for coming to this vitally important hearing.

I want to take note, however, that you are late. We are all late. It has been 6 years since, under the leadership of Congressman Perlmutter—and I am very grateful to be joined in this effort by Congressmen Stivers and Davidson—that we have introduced this bill and pounded the table and warned about the risk to public safety from all-cash businesses. We asked for hearings, and we were met with silence.

And in the time since, we have reintroduced the bill every year. We have renewed our warnings. We have sent letters. We have held rallies. And, yes, we have even disrupted markups.

But today, after 6 years, we finally have a hearing. And it comes too late—too late to prevent dozens of armed robberies in my home State of Washington; too late for Travis Mason, whose picture you see before you, a 24-year-old Marine veteran in Aurora, Colorado, who reported for work as a security guard at the Green Heart Dispensary on June 18, 2016, and was shot dead that night by an armed robber; too late for his widow, Samantha; too late for his three small children—the twins, Aidyn and Daisy, and their baby brother, Julian.

Travis reported to work that day, I want you to know, full of excitement, because he had recently learned he was going to be able to take the test for which he had been studying hard, for the Denver Police Department at the upcoming July 12th exam.

Nearly every witness today has testimony about the dangerous position we put store owners and their employees in by forcing them to do all of their business in cash. But we, right here, today, this committee, can fix this.

And so I look forward to hearing from the witnesses and taking their comments to refine our discussion draft and then moving swiftly to markup and to the House Floor. We have the power in this committee to prevent murders and armed robberies, and we must use it. We must use it now, because we are already late.

Thank you, Mr. Chairman. I yield back.

Chairman MEEKS. I now yield 2 minutes to the ranking member of the full Financial Services Committee, the gentleman from North Carolina, Mr. McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman. And thanks for holding this hearing today.

I consider Representative Perlmutter to be a person of goodwill, a serious legislator who wants to fix problems.

Ed, congratulations on this hearing today. I know you have worked hard on this.

But regardless of where you fall in this cannabis debate, on the issue of marijuana, we have conflicting State and Federal law that we have to resolve. And that conflict between State and Federal laws creates enormous confusion, especially for financial institutions.

For any statute to work, we have to look at current Bank Secrecy Act statutes as well as anti-money-laundering rules, know-your-customer requirements, and suspicious activity report filing requirements. At a minimum, they have to be adapted in order for this proposed statute to work. There is an enormous amount of work that has to go into making this achieve the outcome that it seeks.

If we want to engage in that process, I think you will find folks of goodwill on both sides of the aisle. This includes law enforcement, those people who are enforcing and going through suspicious activity reports and analyzing the data on money laundering. I think those folks have to be included in this process as well.

But we need to have wider inputs, not a limited, one-panel conversation, in order to move to a markup that will come to a good result for the 33 States that have undertaken something that is expressly counter to what is current Federal law.

And we have to understand this is a wider discussion than just our Financial Services discussion, that this is a larger societal discussion, in order to achieve the outcome that Congressman Perlmutter and many others want to see result from legislation.

I yield back.

Chairman MEEKS. We will now turn to our witnesses. For our first panel, I welcome the testimony of Representative Perlmutter of Colorado.

Representative Perlmutter has been one of the earliest champions in Congress for addressing the issue we are considering today. And as a Colorado Member of the House, and longstanding member of the Financial Services Committee, Mr. Perlmutter has an excellent grasp of the issues at play and has worked diligently to build a bipartisan coalition, in partnership with our colleagues here today—Mr. Heck, Mr. Stivers, and Mr. Davidson—in drafting the SAFE Banking Act. He is now recognized for 5 minutes to testify.

**STATEMENT OF THE HONORABLE ED PERLMUTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO**

Mr. PERLMUTTER. Thank you, Mr. Chairman, Ranking Member Luetkemeyer, and members of the subcommittee.

Today's hearing is a big deal. It is a big deal for thousands of employees and businesses across this country who have been put at risk because they have been forced to deal in piles of cash while Congress stuck its head in the sand for the last 20 years.

Forty-seven States plus the District of Columbia have spoken and have legalized some form of recreational or medical marijuana, including cannabinoid oil; 318.2 million people live in these 47 States. That is 97.7 percent of the population, including every State represented by every member of this Financial Services Committee.

Colorado and Washington voters were among the first States to legalize medical and recreational marijuana. And I want to thank Representative Heck for his partnership through the years on this. And I also want to thank my friends, Steve Stivers and Warren Davidson, for their support and cosponsorship of the SAFE Banking Act.

Our Federal laws were designed to prevent illicit activity and help law enforcement do their jobs. The fact is the people, the voters in States and localities all across the country are legalizing some level of marijuana use, and we need these marijuana-related businesses and employees to have access to our banking system.

It will improve transparency and accountability and help law enforcement root out illegal transactions to prevent tax evasion, money laundering, and other white-collar crime. Most importantly, though, it will help reduce the risk of violent crime in our communities. These businesses and their employees become targets for crime, robbery, assault, and more by dealing in all cash.

Mr. Heck mentioned Travis Mason, a young security guard and former Marine who was killed in a robbery in Aurora, Colorado. Another recent robbery in Denver saw the assailant put a gun into the employee's mouth and walk out with over \$20,000 in cash. We have received dozens of other stories from marijuana businesses all across the country who have faced similar crimes and have had their bank accounts closed and have had to deal in cash only.

These stories are why we have drafted the SAFE Banking Act. This bill would create a safe harbor for financial institutions and their employees who choose to do business with a marijuana company.

It would protect ancillary businesses, like real estate owners, accountants, vendors, and contractors, by clarifying that the proceeds from legitimate cannabis businesses are not unlawful under money-laundering laws or any other banking law. And it maintains the flexibility of the Financial Crimes Enforcement Network (FinCEN) by requiring continued filing of suspicious activity reports.

Our bill helps put these transactions into the system, which helps law enforcement do their job to catch the real bad guys.

In summary, Mr. Chairman, if someone wants to oppose the legalization of marijuana, that is their business. But the American voters have spoken and continue to speak, and the fact is you can't put the genie back in the bottle. Prohibition is over.

Our bill is focused solely on taking cash off the streets and making our communities safer. And only Congress can take these steps to provide this certainty for businesses and financial institutions across the country.

And, with that, I yield back.

Chairman MEEKS. Thank you, Mr. Perlmutter.

I now will empanel panel number two.

But first, I yield to the chairwoman of the full Financial Services Committee, the gentlewoman from California, Ms. Waters, for 1 minute.

Chairwoman WATERS. Thank you very much.

Mr. Chairman and members, I am prepared to raise a few questions. But, actually, I want Mr. Perlmutter to know that the real reason that I came to this hearing today is I just wanted to witness his moment in the sun on this issue based on all of the time and effort that he has put into dealing with the cannabis issue and the way that he has educated all of us and everything that he has done in Colorado that gives him the experience to be able to lead on this issue.

So to Mr. Perlmutter in particular, and Mr. Heck, and others, thank you so very much.

I want to address a question to the Honorable Fiona Ma, California State Treasurer.

Ms. Ma, thank you for coming today.

And I want to know if it is okay at this point in time or do you want to wait until after they actually make their statements and—

Chairman MEEKS. Yes, let them testify, and—

Chairwoman WATERS. Thank you very much.

Chairman MEEKS. —then we will open for questions.

Let me introduce and welcome the witnesses today. And I will introduce them all now, and then we will go one by one.

Our first panelist is the Honorable Fiona Ma, who is the Treasurer of the State of California.

Ms. Ma has a distinguished career in politics and in public service. Among her many achievements, she has served as majority whip and speaker pro tem in the California State Assembly. And as State Treasurer, she is responsible for the stewardship of the State of California's finances.

As State Treasurer and a member of the State Board of Equalization, Ms. Ma has had a unique vantage point to understand firsthand the challenges to State governments and to businesses of addressing the lack of banking services for cannabis-related businesses and the difficulty in addressing this issue at the local and State level without Federal action.

Next, is Major Neill Franklin, who is the executive director of the Law Enforcement Action Partnership (LEAP).

Mr. Franklin retired as a 34-veteran of both the Maryland State Police and the Baltimore Police Department, where he oversaw 17 separate drug task forces. He has served as an official representative for the Law Enforcement Action Partnership since 2007 and as executive director since 2010.

Mr. Franklin's testimony is especially important as we consider the serious safety and security risks that emerge from the absence of banking services to cannabis businesses, effectively making them an all-cash business.

And I will yield to Mr. Heck to introduce our next witness.

Mr. HECK. It is my pleasure, Mr. Chairman—thank you—to introduce Greg Deckard, who is the president, CEO, and chairman of State Bank Northwest in Spokane, Washington. He is also the past chair of the Independent Community Bankers of America's (ICBA's) Policy Development Committee and currently chairs the Legislative Issues Committee. He is, in addition to all of that, the past chairman of the Community Bankers of Washington State.

I want you to know three quick things about him. Number one, he braved incredible weather to get here. We are calling it the "Northwest Snowmageddon." Number two, he has the phenomenally good taste to share my particular support and obsession with Gonzaga basketball. And, number three, he is not just a friend of mine, he is a good friend.

We are honored to have him here. He is everything you would hope and think a community banker would be.

Thank you, Mr. Chairman.

Chairman MEEKS. I would also like to introduce Ms. Rachel Pross, who is the chief risk officer for Maps Credit Union of Oregon and is speaking today on behalf of the Credit Union National Association (CUNA).

Ms. Pross has an accomplished career in credit unions and was a Credit Union Times Woman to Watch honoree in 2014 and was awarded the NWCUA's Young Credit Union Professional of the Year in 2015.

Ms. Pross brings a unique perspective to this hearing, representing one of the very few banks willing to provide financial services to cannabis businesses, and, therefore, speaking firsthand of the challenges of navigating and complying with the existing regulatory and oversight framework.

Then, we have Mr. Corey Barnette, the owner of District Growers Cultivation Center and Metropolitan Wellness Center.

Mr. Barnette is, as I said, the owner of the District Growers Cultivation Center and Metropolitan Wellness Center. And, by his own description, Mr. Barnette is an engineer-turned-investment-banker-turned-venture-capitalist.

In 2008, he participated in the acquisition of the San Diego Medical Collective, a dispensary in San Diego, California, which they grew to become one of the largest in San Diego, serving over 16,000 patients and producing a third of the medicine provided.

Mr. Barnette sold the California business and founded District Growers in Washington, D.C., and also acquired the Metropolitan Wellness Center, becoming the largest dispensary operator in Washington, D.C.

And as a small-business owner and one of the few minority business owners of cannabis businesses, Mr. Barnette brings a unique perspective as an operator dealing with the realities of lack of access to financial services.

And, finally, we have Mr. Jonathan H. Talcott, who is a partner at Nelson Mullins, where he is the chair of the Securities Practice Group. He previously chaired the Corporate and Transactional Group and served as managing partner of the Washington, D.C., office.

He has worked on a variety of public and private security offerings, including initial public offerings, secondary offerings of common stock, senior subordinated and high-yield debt offerings, and trust preferred securities offerings, and has worked on more than 100 offerings, raising in excess of \$10 billion during the course of his career.

Mr. Talcott is also chairman of the NGO Smart Approaches to Marijuana, which advocates against the use of marijuana.

Each of you will be recognized for 5 minutes. And, without objection, your written statements will be made a part of the record.

Now, I welcome the testimony of Ms. Ma.

#### **STATEMENT OF THE HONORABLE FIONA MA, CALIFORNIA STATE TREASURER**

Ms. MA. Thank you very much, Chairman Meeks, Chairwoman Waters, and members of this subcommittee. Thank you for offering me this opportunity to appear here before you today.

My name is Fiona Ma. I am a licensed CPA who is proud to serve as California's 34th State Treasurer. As the State's banker, \$2.3 trillion goes through my office. I oversee \$85 billion in bonds and \$92 billion in short-term investments for the State as well as local governments.

In addition, I chair 16 boards, commissions, and authorities that provide financing for our schools, roads, housing, levies, public facilities, and other crucial infrastructure projects that help better the lives of Californians.

I began serving in government in 1995 as a staff member to the former California State Senator John Burton, who also served in the U.S. Congress. In 2002, I got elected to the San Francisco Board of Supervisors and moved on to serve as majority whip and speaker pro tem in the California State Assembly, passing 60 pieces of legislation under 2 Governors, and 3 speakers, during the Great Recession from 2006 to 2012.

In 2014, I was elected to the State Board of Equalization, one of the two principal tax collection agencies in our State where cannabis dispensaries are supposed to collect and remit sales taxes. Duffel bags and sometimes suitcases of cash would arrive quarterly at some of our designated offices, and some folks had to drive 350 miles just to pay their taxes. I asked how much we collected from the cannabis industry, and my agency really didn't know since tax revenues are commingled and deposited with other cash tax payments.

I participated in educational tours in Humboldt, Mendocino, and Trinity Counties in California, also known as the Emerald Triangle, where legal outdoor harvest can generate up to \$474 million annually in revenue. To better educate myself and my staff about barriers and challenges, we held public stakeholder meetings about transportation, track and trace, and banking. Many business owners didn't know the local and State filing requirements, and many didn't even file their tax returns. We were concerned with the public safety surrounding all-cash businesses and we heard many off-the-record stories.

Eventually, it became starkly clear that the big elephant in the room was lack of banking access.

Additionally, we traveled to Colorado, Washington, and Canada and met with executives of their respective tax collection departments to discuss their experience with this emerging industry around banking.

According to the Colorado Department of Revenue, overall cannabis revenue has increased dramatically, from approximately \$68 million in 2014 to over \$266 million in 2018.

Additionally, Washington State has also seen a significant tax collection increase of \$130 million from 2016 to 2017, when the State collected \$319 million in excise taxes. Sales of legal cannabis in Washington have skyrocketed, from \$259 million in Fiscal Year 2015 to \$1.3 billion in Fiscal Year 2017. To put that in perspective, that is a 500-percent growth in 2 years.

Now, we get to California. With nearly 40 million residents and more than a million medical cannabis patients, California's market represents about a third of the North American cannabis market.

In the first three quarters after legalizing adult-use cannabis in November 2016, we collected approximately \$228 million in tax revenue. The cannabis market in California alone is expected to exceed \$5.1 billion in overall revenue in 2020, according to an Archive Market Research and BDS Analytics report.

This same report highlighted that the legal cannabis market could triple over the next 4 years, being worth as much as \$32 billion globally. The U.S. will fuel a majority of this revenue, and it is critical that we accommodate the magnitude of this economic up-take with access to banking for this new State-regulated industry.

And since I only have 5 minutes, I was going to talk about the medicinal industry starting in San Francisco, but I see that my time is short, so I would like to just say that we are here in support of some sort of safe harbor for banks engaged in this industry, which we strongly support.

And as one of the Members mentioned, the Cole Memo was suspended, and it is and has been creating a lot of confusion.

So, again, we supported the SAFE Banking Act, which was originally introduced in 2017 by Congressman Perlmutter. The SAFE Banking Act would provide a safe harbor for those federally regulated or federally insured banks and credit unions wishing to accommodate cannabis businesses in my State and 32 others which have approved the use of cannabis in some form or another. This is a necessary step, represents a positive evolution of public policy, and exhibits a commonsense approach to the problems I have described.

So I would be happy to answer any questions. And we have submitted my testimony for the record. Thank you very much.

[The prepared statement of Ms. Ma can be found on page 71 of the appendix.]

Chairman MEEKS. I now recognize Major Franklin for 5 minutes.

**STATEMENT OF MAJOR NEILL FRANKLIN (RET.), BALTIMORE CITY AND MARYLAND STATE POLICE DEPARTMENTS; AND EXECUTIVE DIRECTOR, LAW ENFORCEMENT ACTION PARTNERSHIP (LEAP)**

Major FRANKLIN. Chairman Meeks, Chairwoman Waters, distinguished members of the committee, thank you very much for the opportunity to present the views of the Law Enforcement Action Partnership (LEAP) in support of this legislation.

LEAP's mission is to unite and mobilize the voice of law enforcement in support of drug policy and criminal justice reforms that will make our communities safer. "LEAP envisions a world in which criminal justice and drug policies keep our communities safer." This is a quote directly from our website, and that quote is exactly what this hearing is about. It is about enacting policy that will dramatically enhance public safety within our communities.

Representative Perlmutter addressed the wishes of the people, so I will move beyond that. I think we know what that is.

This is not a niche business market. It is a significant part of our economy. Licensed marijuana businesses are legitimate contributors to our economy. It follows that regulated banking, vendor relations, payroll, and tax payments should be permitted as part of that legitimacy—a condition that will further serve to dismantle

the illicit market's influence in this growing industry and help local economies.

Current conditions, which require all-cash transactions, for the most part, in every aspect of the business encourage tax fraud, money laundering, and, most importantly, leave legitimate businesses vulnerable to theft, robbery, and the violence that accompanies those crimes. The SAFE Banking Act presents us with an opportunity to greatly assist in stabilizing the industry and enhancing public safety.

As more legitimate businesses are established, opportunities for cash robberies will increase. As more dispensaries come online, securing cash onsite, transporting cash to secure locations and managing cash payrolls are necessities for this business.

And criminal entities are quite adept at conducting high-level reconnaissance of businesses and their security protocols when they know that businesses will have tens of thousands and, in some cases, hundreds of thousands of dollars on hand.

Although extremely important for business owners and the people they employ, my greatest fear is not the loss of profit due to theft. It is the potential for serious assaults and death to the people attempting to protect that cash who are merely responsible for it. I fear dispensary employees being at great risk.

I fear for the safety of those transporting the cash, and I fear for the well-being of employees on payday. Two weeks of pay for one employee can easily exceed a couple or a few thousand dollars. That one employee trying to get home safely from work is an attractive soft-target score for any criminal, and it is a very easy target for those who know what to look for.

Beyond any concern for protecting profit, we have a duty to protect the lives of community members working to earn a living. In 2012, Melinda Haag, the U.S. Attorney for northern California, said this, "Marijuana dispensaries are full of cash and they're full of marijuana and everybody knows that. They are at risk of being robbed, and many of them are—"

Here's an example. In October 2012, three people kidnapped the owner of a lucrative dispensary in Orange County, California. According to court documents, the assailants zip-tied the victim, tortured him, and drove him to a patch of desert where they believed that he buried large sums of money. When the kidnappers couldn't find it, they burned him with a blowtorch, cut off his penis, and doused him with bleach before dumping him along the roadside.

And, yes, there is Travis Mason, as well, from Colorado.

Casing the next target is about finding the softest target. And I know this. Four of my years in policing I spent interviewing hundreds of career criminals in our Division of Corrections in the State of Maryland, and I know what they look for. They look for that soft target, and the current conditions of this industry have created many soft targets.

We, the police, teach target hardening when we conduct security assessments for businesses. Our advice to them is not to have large amounts of cash on hand, to make use of credit and debit card services, avoid routine trips to the bank, and to make use of armored car services. This valuable crime prevention 101 advice is



literally useless to many marijuana business owners, making them attractive soft targets.

What I testify to here today is rooted in experience and research. Any police officer who has worked the street or investigated enough robberies will testify to the same regarding any businesses forced to handle large amounts of cash.

As I conclude, members of the committee, it is up to you and other Members of Congress to act upon this legislation establishing access to banking for legitimate marijuana businesses. The safety of thousands of employees, business owners, security personnel and police officers, and community members is in your hands.

On behalf of myself and the Law Enforcement Action Partnership, I thank you for this opportunity. And, obviously, we support the SAFE Banking Act.

Thank you.

[The prepared statement of Major Franklin can be found on page 68 of the appendix.]

Chairman MEEKS. Thank you for your testimony.

Ms. Pross?

**STATEMENT OF RACHEL PROSS, CHIEF RISK OFFICER, MAPS CREDIT UNION, ON BEHALF OF THE CREDIT UNION NATIONAL ASSOCIATION (CUNA)**

Ms. PROSS. Chairman Meeks, Ranking Member Luetkemeyer, members of the subcommittee, thank you for this opportunity to testify.

My name is Rachel Pross, and I am the chief risk officer of Maps Credit Union. Maps is a mid-sized financial cooperative in Salem, Oregon. I am testifying on behalf of CUNA, the Credit Union National Association. CUNA represents both State and Federal credit unions and their 115 million members in America.

Maps has approximately \$750 million in assets and serves over 65,000 member owners in the Willamette Valley of Oregon. As a community-focused organization, we have experienced firsthand the many challenges facing both financial institutions and State-sanctioned cannabis businesses seeking to operate within the financial mainstream.

Though Maps has no position on cannabis legalization, we acknowledge that the Oregon voters have already spoken on that issue.

Accordingly, after extensive research and risk analysis in 2014, our member-elected volunteer board of directors voted to serve cannabis businesses for two primary reasons: first, to serve the underserved, which speaks to the credit union mission and philosophy as a not-for-profit financial cooperative; and, second, to enhance the safety of our community by removing large amounts of cash from the streets.

To our knowledge, Maps is the only financial institution in Oregon that has continuously served the cannabis industry since 2014. Today, we bank approximately 500 State-sanctioned cannabis businesses. That makes our program one of the largest in the United States.

In terms of safety, statistics show that cash-only business only increases the risk of crime. This is especially true in the cannabis sector given the lack of access to just basic financial services.

A 2015 study found that, in the absence of being banked, one in every two cannabis dispensaries were robbed or burglarized. Compare that to Maps Credit Union. In the past 2 years, we have received over \$500 million in cash deposits from cannabis businesses. And that is \$500 million removed from Oregon's sidewalks that used to be carried around in backpacks and shoeboxes by legitimate, legal business owners in our State.

Cannabis banking can be done safely and effectively. Maps Credit Union is the perfect example. As part of our initial evaluation and ongoing monitoring of cannabis-related accounts, we collect extensive corporate and financial records and conduct criminal background checks on all account signers. That information is scrutinized to ensure the activity on the account is completed in accordance with State laws and the FinCEN guidance.

Maps has established a rigorous screening and compliance protocol and has invested considerably in the robust infrastructure required to appropriately monitor and maintain these high-risk accounts. Our team of dedicated professionals averages 1 employee for every 40 cannabis business accounts.

Our Bank Secrecy Act and anti-money-laundering compliance program has been repeatedly reviewed by financial regulators. And we also obtain an independent external compliance audit of our program annually.

Most importantly, Maps files quarterly suspicious activity reports, or SARs, on every cannabis-related business account. Today, over 90 percent of our SAR filings are related to cannabis businesses. We prioritize those SARs to identify any accounts we suspect could be engaged in illegal activities.

Even financial institutions who choose not to bank the cannabis industry still risk unknowingly serving those businesses in States where cannabis is legal. Indirect connections are often difficult to identify and avoid because growers and retailers don't operate in a vacuum. Like every other industry, they work hand-in-hand with vendors and suppliers. These are Main Street businesses, like the printing company that makes a business card, the landlord that rents office space, and even the utility company that provides water or electricity.

Under the existing status quo, a credit union that does business with any one of these indirectly affiliated entities could unknowingly risk violating Federal law.

The SAFE Banking Act would protect financial institutions and the community. In the absence of a Federal law providing explicit legal clearance for financial institutions to provide banking services to the cannabis industry, it is highly likely that many of these businesses will be forced to operate in the underground economy. That increases the potential of lost tax revenue and crime. It also deprives law enforcement of important information about cannabis-related financial activity.

In conclusion, we strongly believe that financial institutions should be permitted to lawfully serve businesses that engage in ac-

tivities that are authorized under their State laws, even when such activity may be inconsistent with Federal law.

We need Congress to provide financial institutions who choose to serve State-sanctioned cannabis businesses with a safe harbor. For that reason, credit unions support the SAFE Banking Act.

Thank you for the opportunity to testify today.

[The prepared statement of Ms. Pross can be found on page 77 of the appendix.]

Chairman MEEKS. Thank you.

Mr. Deckard?

**STATEMENT OF GREGORY S. DECKARD, PRESIDENT, CEO, AND CHAIRMAN, STATE BANK NORTHWEST, ON BEHALF OF THE INDEPENDENT COMMUNITY BANKERS OF AMERICA (ICBA)**

Mr. DECKARD. Thank you, Congressman Heck, for the very kind introduction. It is very good to see you, Denny.

Chairman Meeks, Ranking Member Luetkemeyer, and members of the subcommittee, I am Greg Deckard, president, CEO, and chairman of State Bank Northwest, a local community bank in Spokane, Washington, with \$145 million in assets.

I am testifying today on behalf of the Independent Community Bankers of America. I am pleased to provide the perspective of thousands of community banks, such as mine, that operate in the majority of States that have legalized some form of cannabis use.

The current conflict between State and Federal law has created a cloud of legal uncertainty for community banks, inhibited access to the banking system for cannabis-related businesses, or CRBs, and created a serious public safety hazard.

As you know, Washington and Colorado were the first States to legalize cannabis for recreational use in 2011. Today, Washington State has issued licenses for well over 500 cannabis retailers and over 1,000 growers.

Every one of these businesses remains illegal under the Federal Controlled Substances Act, which puts cannabis in the same category as heroin or LSD.

At this time, my bank has chosen not to serve CRBs. While this issue is complex, we have determined that the legal, compliance, and regulatory risks are simply too great for my bank. We owe it to our community to ensure that our bank remains solid and stable and that we remain in good standing with our Federal regulators.

With regard to a bank providing cannabis-related financial services, FinCEN guidance does provide some assurances for banks that follow the agency's heightened suspicious activity reports, or SAR, guidelines. These SARs effectively charge banks with the ongoing monitors of the CRBs for law enforcement. Banking the cannabis industry is complex and goes well beyond the compliance associated with any other type of banking relationships.

ICBA supports the SAFE Banking Act, a bipartisan bill sponsored by Representatives Perlmutter, Heck, Stivers, and Davidson, which would provide that, in States where cannabis is legal, Federal banking regulators may not threaten or limit a bank's deposit insurance, downgrade a loan, prohibit or discourage the provision of banking services, or take any other prejudicial action solely be-

cause a bank customer is a CRB, direct or indirect, as we have seen with Operation Choke Point.

Without a statutory safe harbor for banks that serve legal CRBs, bankers feel the politics could shift against cannabis. The Justice Department's rescission of the Cole Memo in 2018, for example, signaled abrupt disfavor of the legal cannabis industry and the banks that serve it.

It is telling that banks that choose to serve CRBs are required to have an exit plan to unwind those relationships, a requirement that does not exist for any other category or service or industry.

For community bankers, the risk extends beyond direct cannabis businesses to the licensed growers, processors, and retailers. Any vendor of a direct CRB is effectively an indirect CRB, which also presents a risk to banks. This could even include plumbers, landlords, or bookkeepers who offer their services to the broader public and whose customer base, knowingly or unknowingly, includes CRBs.

For example, my bank cannot, without incurring additional risk and heightened compliance burden, serve our regional utility provider because it provides power to the CRBs, which raises a question: How many degrees of separation from cannabis do I as a banker have to investigate and monitor to ensure compliance with Federal law? Many bankers may not know that they are even involved with cannabis.

I hope that I have given you a sense of the full scope of the legal and regulatory compliance quagmire faced by communities banks in States that have legalized cannabis. While a small number of institutions have chosen to assume the risk of serving CRBs, the cannabis industry remains cash-intensive and creates a potentially grave public service hazard.

We recognize this is a complex issue for all stakeholders. However, an effective statutory safe harbor for banks that offer services to CRBs that comply with State law would offer the needed clarity for those banks that choose to bank CRBs, as well as for their examiners, and will serve the goal of enhancing public safety.

ICBA urges this committee to consider the SAFE Banking Act, which would create such a safe harbor. ICBA supported this legislation in the last Congress and plans to support it again upon re-introduction.

I would like to clarify, however, that our support for the SAFE Banking Act should not be viewed as support for legalization. ICBA, including myself, makes no moral or scientific judgments regarding cannabis use.

Thank you again for the opportunity to testify today. We look forward to working with the committee to advance the SAFE Banking Act. I am happy to answer any questions you may have.

[The prepared statement of Mr. Deckard can be found on page 62 of the appendix.]

Chairman MEEKS. Thank you.  
Mr. Barnette?

**STATEMENT OF COREY BARNETTE, OWNER, DISTRICT GROWERS, LLC & METROPOLITAN WELLNESS CENTER, INC.**

Mr. BARNETTE. Chairman Meeks and members of the committee, thank you for inviting me today to discuss banking services to the cannabis industry.

My name is Corey Barnette. I have lived here in Washington, D.C., since 1999 and I currently own District Growers Cultivation Center and the Metropolitan Wellness Dispensary, both of which are licensed and located here in Washington, D.C.

The medical cannabis industry in Washington, D.C., is incredibly, incredibly well-regulated. There are mandatory licensing, background checks, financial disclosures, video surveillance, alarm systems, seed-to-sale tracking, RFID tags, child-resistant packaging, labeling and testing regulations, and routine and random inspections. The same is the case throughout many States that have these laws.

In essence, our businesses are safe. Our owners are well-vetted and should be a welcome addition to efforts to dismantle cannabis prohibition.

However, we are crippled by Federal regulations on banking that serve to stifle sanctioned operators while simultaneously butressing the illicit markets that regulators are actually targeting.

The issue of access to banking is acutely concerning to business owners like me. A large majority of the country has access to legal medical cannabis, and 10 States, including Washington, D.C., have legalized cannabis for adult use. However, there is still no federally approved system for businesses to perform typical duties like pay salaries, service customers using credit cards, access working capital loans, pay bills, or, effectively, pay taxes.

The current system serves to create a public safety disaster. It advantages the illicit markets. It hassles employees and service providers seeking to do business with the industry. It makes tax collection overburdensome and serves highly to stifle the growth of the industry altogether.

In terms of safety, business owners are often forced to operate completely in cash, making the businesses and their customers incredibly vulnerable to robberies and threats. Many dispensaries have hired on-site armed security guards, maintain excessive on-site security infrastructure, and utilize armored cars and armored trucks in order to transport cash. However, the problem of large cash reserves anywhere creates an enormous headache and a significant threat to the public safety.

For the Federal Government, the system is a disaster too. Like my firm in the past, many cannabis businesses bounce from bank to bank, opening accounts, only to have them randomly closed within weeks. As a result, law enforcement and regulators struggle to preserve and insure a system that is transparent. Payment of Federal and State taxes is made difficult. Ancillary service providers are unable to work with the industry because they don't want to take excessive amounts of cash. And many employees have had their bank accounts closed and are often denied basic services that we all enjoy, like getting a mortgage, using credit cards, or having personal banking services, just simply for working in the industry.

It should be noted that the absence of the participation of banks is also particularly hard on small and minority-owned businesses. Mom-and-pop businesses and minority-owned businesses traditionally look first to bank loans as a method of financing the start and the growth of their businesses. Without bank participation, the hurdle to entry is substantially higher for this segment of owners. Restrictions on banking serve to create a barrier that only the wealthy can overcome.

In short, nobody benefits from the system, with the exception of private security firms and the super-wealthy operators that exist out there.

Fixing the banking issue is a crucial part of fixing the broken system of cannabis prohibition, but it is far from the only issue we need to resolve. In recent years, I have been involved in numerous campaigns, and have spoken on many panels, including here in Congress, about the need to increase diversity in the cannabis industry. Despite cannabis arrests falling largely on the backs of people of color, this vibrant industry has often closed its doors to those very same communities.

Congress should tackle the banking issue. I applaud the efforts around the SAFE Banking Act. But it should also do so in a way that includes other reforms, like the need for expungement of criminal records, investments in communities impacted most by the war on drugs.

Banking is an important piece of the puzzle, but it is only a small step on the road to dismantling cannabis prohibition. We have to be bold if we are to solve problems for the communities that we serve.

Thank you.

[The prepared statement of Mr. Barnette can be found on page 60 of the appendix.]

Chairman MEEKS. Thank you for your testimony.

And last but not least, Mr. Talcott, you are recognized for 5 minutes.

**STATEMENT OF JONATHAN H. TALCOTT, CHAIRMAN OF THE BOARD, SAM, INC. (d/b/a SMART APPROACHES TO MARIJUANA, INC.)**

Mr. TALCOTT. Chairman Meeks and Ranking Member Luetkemeyer, thank you very much. I am honored to give testimony about the SAFE Banking Act of 2019.

I wanted to say that I thoroughly agree with everything that Ranking Member Luetkemeyer said. I also wanted to say that I am very how—do I put it? I am the only one here who is opposed to the SAFE Banking Act, and I feel a little lonely having to address some of the issues. So I am going to try to get through them quickly.

Chairman Meeks was kind enough to introduce me. Unfortunately, he focused on my law firm. Actually, I am not speaking on behalf of my law firm. I am speaking on behalf of Smart Approaches to Marijuana. We are a 501(c)(3) that is dedicated to educating people about the dangers associated with marijuana and its legalization.

I have also served the community banking community for a long, long time, as a lawyer both at Nelson Mullins and at Alston & Bird. I also work with investment banks, many of whom would like to get into this business.

Finally, I also worked at a bank. I worked at JP Morgan for a period of time and worked as a regulator during the savings-and-loan crisis at the Office of Thrift Supervision.

I have heard a lot of conversations up here about the dangers associated with cannabis and having it sold when there is money that is going to change hands in the form of cash. I wanted to say I also speak on behalf of people who have been the victims of cannabis, who have been the victims of marijuana.

I am here, actually, because I got involved in this issue because my little sister, Mary, started smoking pot after my father died. She developed schizophrenia, and she died young at the age of 42. I am also here on behalf of my cousin, who picked up a pot-smoking habit in high school that led her to opioids, and she died of a heart attack at the age of 20.

As anybody knows who has read Alex Berenson's recent book, there are a lot of dangers associated with cannabis. As a matter of fact, it is very well-established that smoking marijuana can, in a small subset of people who do so, develop psychosis, and psychosis often leads to violence and violent crime.

I would like to take one moment to say what I think of the drafting of this particular legislation. I was told that that is one place I should focus my attention.

As you can see from my submitted testimony, I think you really need to address the Controlled Substances Act and its prohibition on marijuana, its scheduling of it as a Schedule I drug, before any of the proposed changes and safe harbors would be effective.

Suffice it to say, there is probably universal agreement on the fact that the Controlled Substances Act as a Federal law, as Representative Luetkemeyer said, preempts all the State laws. So, technically, everybody who is involved in the cannabis industry nationally now is committing a Federal felony.

Until that is changed, any changes to the Bank Secrecy Act (BSA) or, related, the anti-money-laundering statutes (AMLs), won't get us very far. I think that that is kind of—I don't want to give you a roadmap to how to make this work, but if everybody in this room wants legalization to go forward, the place to start is with the Controlled Substances Act.

I also want to point out that, if this legislation were to pass, it would do nothing more than reinforce a trend that has already occurred in those States that have legalized.

We have a serious problem with the black market in every State that has announced that it is legalizing pot for recreational use. There is a shadow economy going on that is using the front of legitimacy to make money illegally. This is why tax revenues in certain States are less than they should be. After all, if you didn't pay taxes when you were selling pot illegally before, why should you pay taxes now?

So we see, in Oregon, they estimate that 70 percent of the transactions were to have occurred on the black market. Even Governor Hickenlooper in Colorado talked about the problems with the black

market. You even have problems in California, where Mexican drug cartels are propping up black-market marijuana farms all across northern California.

I think that it is worth mentioning these things because we need to be very careful about how we proceed in this area. If we want to discourage the black market, which I think we all want to do, then we need to be much more straightforward about how we approach this issue. We need to change the scheduling of marijuana, if that is what people want to do, and then go about putting in place the appropriate banking regulations.

I think that it is important, as a last point, to say that I don't think everybody in the country wants marijuana to be legalized for recreational use. As a matter of fact, most surveys that include the option of decriminalization show that it is a minority of people who would like recreational marijuana. I think what it really comes down to is this is a public health issue, not a banking law issue.

Thank you have very much.

[The prepared statement of Mr. Talcott can be found on page 87 of the appendix.]

Chairman MEEKS. Thank you.

I ask now, without objection, to enter into the record 22 statements from various associations, credit unions, banking associations, State attorneys general, and banking alliances.

Without objection, it is so ordered.

And I now recognize myself for 5 minutes for the purpose of asking questions.

Let me start out with Ms. Pross and Mr. Deckard.

What do you see as the most immediate impact for your respective organizations if and when passage of the SAFE Act or its equivalent is passed?

Ms. PROSS. Thank you, Mr. Chairman.

I think the most immediate impact that we would see is a significantly reduced legal risk. That is something that we deal with every day, knowing that we have this tremendous legal risk of serving the industry.

I also think it would have a significant impact on the credit unions that we are instructing on how to do cannabis banking in compliance with the FinCEN guidance. The risk of criminal prosecution is a huge barrier for them, and they have the same goal of wanting to increase safety in their communities. And I think we could have a really powerful impact if there were legal protections in place.

Chairman MEEKS. Mr. Deckard?

Mr. DECKARD. In Washington State, there are three banks and three credit unions that provide banking services to the cannabis industry. I am aware of several other banks in the State that, if there was some clarity provided and a safe harbor created for institutions, there would be more entrance into the cannabis banking market.

As Ms. Pross had indicated, the clarification of the legal risks and regulatory risks and compliance risks also factor into a bank's decision of whether to engage in that line of work or not. And something that each bank has to consider in their own risk model, what their tolerance is. But I do believe that the immediate impact



would be that you would have more institutions being willing to serve as a result of the safe harbor.

Chairman MEEKS. Thank you.

And, Mr. Barnette, as a minority business owner, what has been your experience with respect to the industry's diversity and inclusion and access to startup and working capital and the ease of doing business, especially small businesses?

Mr. BARNETTE. Sure.

In the way of access to capital, it is difficult for small businesses, particularly those that come from disadvantaged communities and communities that have been impacted significantly by the war on drugs.

For the most part, when these owners are granted licensing, the hurdles to get over the regulatory requirements just to open your doors can oftentimes be several hundred thousand dollars, never mind the cost of build-out and things of that nature.

In the past, most of these business owners would have, perhaps, gotten a second mortgage on their house or would have taken out a loan using whatever assets they have available to them via their, perhaps, family trust or savings or anything of that nature.

However, the absence of banking prevents that altogether. And so it is very difficult for communities that don't have access to sort of, let's say, hedge fund money or wealthy benefactors to actually get the investment capital needed to actually start their businesses in the space without the help of banks, at least to fill in whatever gaps they have.

The first part of your question, do you mind repeating it?

Chairman MEEKS. Well, I just wanted to know your experience with respect to diversity in the industry.

Mr. BARNETTE. So, in my company, I can tell you that we have a very diverse labor force. We have made that a policy. We believe that our labor force should be reflective of the communities that we serve, both patients on the medical side as well as should we find ourselves in a recreational market, that we should actually make it a point to bring people in the business who actually live and work around our companies.

To that end, what we have done is, within a 1-mile radius is where we typically recruit first. And we try to hire most of our labor force within a 5-mile radius of our businesses.

My business here in Washington, D.C., I am proud to say, is staffed with 100 percent D.C. residents: 80 percent of our people are people of color; and about 60 percent of our employee base are women. And we have a portion of our employee base who is also homosexual. So we have a very diverse labor force that is reflective of the D.C. community.

Chairman MEEKS. Thank you.

Let me ask Ms. Ma quickly, can you summarize in a few words why you believe that only Federal action will resolve the issues?

Ms. MA. Yes.

In California, we have been trying to pass many pieces of legislation to either work around, go around, patch this issue of banking access. And we have come to the conclusion that we really need Congress to act. And having a safe harbor for banks is probably the most expeditious way of getting more folks out of the black and

gray markets and into the legitimate markets. By not having banking access, it also affects many other critical impacts. For example, if you don't report any income, you may not be liable for any child support or any alimony payments. If you are being paid by cash, you are clearly not going to be putting in all of your taxes for Social Security, so may not be eligible later on.

And then also the impact of folks not reporting, for example, domestic violence incidences because they are scared that the police are going to come into their homes or their businesses. So there is a lot of social impacts that are also affecting the communities by not having access to banking.

Chairman MEEKS. Thank you very much.

I now recognize the distinguished ranking member for 5 minutes for questions.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

I request unanimous consent to submit letters from the National Fraternal Order of Police, the Faith and Freedom Coalition, and the Major Cities Chiefs Association in opposition to marijuana banking into the record.

Chairman MEEKS. Without objection, it is so ordered.

Mr. LUETKEMEYER. Thank you.

I am kind of curious. I go back to my opening statement when I think this whole situation revolves around the fact that we have Federal law trumping State law. And we have a situation where we are going to muddy the water a little bit more here with the bill in front of us.

And for those individuals in front of us today representing your different entities, it would seem to me that the hemp industry showed us—and the gentleman from Kentucky can talk about that here in a minute—last fall how to solve this problem by descheduling that substance.

So I ask the question of each of you. Ms. Ma, have the States asked the Department of Justice, the Attorney General, who is in charge of overseeing the Controlled Substances Act, as Mr. Talcott indicated—have you talked to them about asking us, Congress, to do something about this and, in particular, the Judiciary Committee?

Ms. MA. I believe so. I am just starting my fifth week in this position. Prior to that, I was the tax collector in California, so I do believe we have been—

Mr. LUETKEMEYER. The States have done this?

Ms. MA. I know State treasurers, my former predecessor, Treasurer John Chiang, did sign a letter with other State Treasurers in other States.

Mr. LUETKEMEYER. To the Attorney General?

Ms. MA. Yes, asking the Attorney General—

Mr. LUETKEMEYER. Have you contacted a member of the Judiciary Committee, the committee that has jurisdiction over the Controlled Substances Act?

Ms. MA. I personally have not. But I know past administrators have. We do have a new Governor. And I will follow up and send—

Mr. LUETKEMEYER. So it would seem to me that is where we need to start.

Mr. Franklin, you are talking about law enforcement officers.

Have law enforcement officers contacted the Department of Justice, the Attorney General, and asked him to contact and support a change in this law, and gone to the Judiciary Committee to do so?

Major FRANKLIN. We have. Our organization has.

Mr. LUETKEMEYER. You have talked to the Attorney General?

Major FRANKLIN. We have sent letters, yes.

Mr. LUETKEMEYER. Have you sent letters to the Judiciary Committee to ask them to reconsider this, to look at it?

Major FRANKLIN. To my knowledge, no.

Mr. LUETKEMEYER. Ms. Pross, credit unions, have you contacted the Attorney General and asked him to support descheduling a drug, and contacted the Judiciary Committee to make a change?

Ms. PROSS. No, we haven't.

And I just want to clarify that I am not a cannabis expert or a Controlled Substances Act expert. I am a regulatory compliance expert for the financial industry.

Mr. LUETKEMEYER. Okay. Well, if you are regulatory and compliance, you know how this works. You have to have a law; you have to enforce the law, or you else you can change the law, one or the other.

Mr. Deckard, ICBA, have they contacted the Department of Justice and asked them to support changing this law, and asked the Judiciary Committee to make the changes?

Mr. DECKARD. I am not aware that we have.

But, again, it is important for me reiterate that ICBA takes no position on the legalization of cannabis on either the moral or scientific thing, so I am not sure if they have contacted—

Mr. LUETKEMEYER. That solves your problem, though. Right now, you are put in the crosshairs, and so we need to solve the problem one way or the other, in my judgment.

Mr. Barnette?

Mr. BARNETTE. Yes.

Mr. LUETKEMEYER. Have the Growers contacted the Department of Justice and asked them to support—

Mr. BARNETTE. The Growers have not. I personally, actually, am a member and my company is a member of several organizations in the cannabis industry, like the National Cannabis Industry Association and several others, that have gone to the extent of actually not only asking the Department of Justice and several other branches of the government that actually have policies that are restrictive to our industry to find methods of actually easing them.

And so, yes, that is a very active, ongoing request. And what is more, we have been supportive and have actually paid for lobbyists to come up and speak to you here in Washington, D.C., as you probably already know. It is actually Congress that is stopping the District from actually legalizing and putting together a recreational market right now.

Mr. LUETKEMEYER. Congress is in charge of—and this is the problem we have is that the States have jumped the gun here. They should be contacting their Members of Congress as they are contacting Mr. Perlmutter, and we should be initiating this change if it is wanted, if it is desired. People in my State have not con-

tacted me about doing this yet, so I am waiting for somebody to say so.

But I guess it goes back to—we have many problems here. And I guess, Mr. Talcott, one quick question.

What about FDIC deposit insurance—or Mr. Deckard—FDIC deposit insurance. Is that going to insure the deposits of these kind of illegal transactions, illegals funds in your bank?

Mr. DECKARD. FDIC insurance supplies to the deposits in my bank up to the limits, and—

Mr. LUETKEMEYER. Does it apply for funds that have been obtained illegally?

Mr. BARNETTE. To my knowledge, it is legal in the State of Washington under Initiative 502, and—

Mr. LUETKEMEYER. Under the Federal law, it is still an illegal drug, so you are involved in illegal drug transactions. So my question is, does the FDIC insure deposits that have been obtained illegally?

Chairman MEEKS. The gentleman's time has expired.

Mr. BARNETTE. The deposits in the banks that are banking the cannabis industry are FDIC-insured up to the limits for those deposits—

Chairman MEEKS. The gentleman's time has expired.

Let me just remind the gentleman that we are here to talk about banking. This committee only has jurisdiction over the banking aspects of it. And the purpose of this hearing is simply so that we could understand the banking aspects of cannabis and to make sure about the public safety and what that entails.

I am going to allow Chairwoman Waters to ask questions. There are votes on the Floor. And so, after the questions of Chairwoman Waters, we will adjourn and come back immediately after votes—we will recess. Excuse me. We will recess and come back immediately after votes.

But I yield 5 minutes to the chairwoman.

Chairwoman WATERS. Thank you very much, Mr. Chairman.

This question is directed to the Honorable Fiona Ma, California State treasurer.

Thank you for your very thorough testimony. And I think you very well described that the clash between Federal law and State law in the cannabis industry presents an especially difficult problem for States such as California. You went on to talk about a working group that you had belonged to who actually considered establishing a State-backed financial institution devoted exclusively to the cannabis business. But after all of that work, it was decided that it would be better if we could have a safe harbor for banks who are dealing with the cannabis industry.

If we don't get it done here in Washington, D.C., do you think the working group would say we have to do something and they will go back to the whole idea of exploring establishing a State bank financial institution?

Ms. MA. Thank you, Chairwoman Waters.

Yes. The report did say that States can establish their own State public banks, such as North Dakota as well as America Samoa. But it would take a long time and a lot of money to capitalize a bank.

And, yes, I said the most expeditious way would be for this committee and Congress to act to allow banks to continue to follow the FinCEN guidelines, fill out their SARs reports, their AAM—know their customers, AML reports. And that would create the safest, quickest solution to the issues that many States are facing right now.

Chairwoman WATERS. Thank you.

And you also added that to do that would improve the efficiency of collecting the taxes and fees we use to regulate the industry, does not allow banks and credits unions to totally abdicate their responsibilities to know their customers, on and on and on.

You have made a really strong case here for why it makes good sense to have a safe harbor and why you, and California, are supporting the SAFE Banking Act. So there are about 300 financial institutions that are following the FinCEN guidelines and doing all the reporting and accepting cannabis clients. But that is clearly not enough. And that is why we are here. If they could get a safe harbor provision, then I think more banks would consider banking the industry.

Thank you very much.

And, Mr. Chairman, let me thank you for making this your very first hearing. This is so important. So many people have been waiting on it. I appreciate it so much.

And I yield back the balance of my time.

Chairman MEEKS. Thank you.

The committee will now pause for votes and resume immediately after.

The committee now stands in recess.

[recess]

Chairman MEEKS. The hearing is now in order. And I think where we are now is I recognize the gentleman from North Carolina, Mr. McHenry, for 5 minutes.

Mr. MCHENRY. I thank the witnesses for taking this long break. I hope you are still attuned to the subject matter we are dealing with. But I want to talk a little more—get back into the details of this.

And so, Mr. Deckard, Ms. Pross, we are talking about legislation that would allow financial institutions to operate in direct conflict with Federal law.

Are either one of you banking lawyers by trade or primarily involved in regulation of your institutions?

Ms. PROSS. I am not an attorney, no.

Mr. MCHENRY. All right.

Mr. Deckard?

Mr. DECKARD. I am not, no.

Mr. MCHENRY. Okay. I just wanted to check before I started getting to these questions for disclosure purposes.

So, as an institution, when you have those two conflicts between Federal and State law, that creates uncertainty, does it not?

Mr. DECKARD. Correct.

Ms. PROSS. It does.

Mr. MCHENRY. And we are trying to resolve that uncertainty with changes to the Federal law, correct?

Mr. DECKARD. Correct.

Mr. MCHENRY. Okay. So how do you limit risks to financial institutions if you have a law that still leaves the rest of the Federal regulatory scheme opposed to what you are doing as an institution? How would you resolve that as an institution?

Mr. DECKARD. I think that has been a difficult thing for each financial institution to do their own cost-benefit analysis and determine what the risks are and what benefits are derived from being involved in the banking of the industry.

My particular bank, we are not involved in banking—

Mr. MCHENRY. Right.

Is there reputational risk? Is there a question about reputational risk?

Mr. DECKARD. I believe there is a reputational risk, sure.

Mr. MCHENRY. And not just regulatory but reputational and compliance risk.

Okay. Ms. Pross?

Ms. PROSS. Yes. Certainly. There is reputational risk and legal risk. And we certainly understand the risks and challenges that financial institutions are facing with this issue, and we understand positions like the financial institution of Mr. Deckard, that they choose that this is not worth that risk.

But from Maps Credit Union, we had the FinCEN guidance, and that is not safe harbor, but it is guidance on how to comply with reporting requirements for banking this industry, and it really came down to an issue of community safety.

Mr. MCHENRY. Right.

And so, because of that guidance, you had three different ways to have a suspicious activity report, right?

Ms. PROSS. Correct.

Mr. MCHENRY. And how you disclose that, right?

Ms. PROSS. We file—yes.

Mr. MCHENRY. How many SARs have you filed over the last 12-month period, roughly?

Ms. PROSS. In the last 2 years, we filed approximately 3,000 suspicious activity reports.

Mr. MCHENRY. So, a massive amount.

Ms. PROSS. Correct.

Mr. MCHENRY. A massive amount.

And there are regulatory costs associated with that.

Ms. PROSS. Sure.

Mr. MCHENRY. But the reputational risk piece, your institution resolved that. In your community, you resolved the reputational risk, right?

Ms. PROSS. We did.

Mr. MCHENRY. Because it is a State-regulated product, and you resolved that reputational risk piece?

Ms. PROSS. Yes, I believe we have.

Mr. MCHENRY. So are you familiar with Operation Choke Point?

Ms. PROSS. I am.

Mr. MCHENRY. Okay. Mr. Deckard?

Mr. DECKARD. Yes.

Mr. MCHENRY. Operation Choke Point focused on reputational risk, State-regulated products, also federally recognized as lawful,

and yet you had Federal regulators trying to force institutions to stop doing things that comply with both State and Federal law.

It is difficult to see how we flipped this conversation to, in essence, mandate institutions to do something that is in conflict with the Federal law without resolving the substance of the Federal law, which is the classification of the product you are using, right?

Ms. PROSS. My understanding is that the SAFE Banking Act does not mandate any financial institution to provide services—

Mr. MCHENRY. I am not saying that. But it makes it an opt-out rather than an opt-in situation for institutions.

So, going back to this, do you think that this legislation as it is currently written resolves those issues for you to engage in this?

Mr. DECKARD, you are not currently engaged in it. We passed this law. Does that resolve this for your institution?

Mr. DECKARD. It resolves the lack of clarity regarding how a Federal regulator could come in—

Mr. MCHENRY. Have you checked with your insurers about that?

Mr. DECKARD. Yes.

Mr. MCHENRY. And your insurers would be comfortable insuring—

Mr. DECKARD. I'm sorry. Have I checked with our insurers about this bill? No, I have not.

Mr. MCHENRY. Correct. Okay.

So there is a lot to be resolved, a lot of questions, including the reputational risk question that in most communities would come down to a different understanding just based off of where they are, right? The 33 States and the difficulties of each individual State's version of regulation of this, much less the 17 States that have no form of this. Do you see that as a major challenge for us legislating in this area? I think so.

I yield back.

Chairman MEEKS. The gentleman's time has expired.

Mr. Scott is now recognized.

Mr. SCOTT. Thank you very much, Mr. Chairman.

I would like to ask who was putting up the map on the screen. Yes, there it is. Right there. I want us to put our attention on that map because I think it points out the great necessity and importance that we need to do in getting Mr. Perlmutter's bill enacted. I listened very attentively to Mr. Talcott and others on the other side, and speaking about the debate on this issue of marijuana.

But the point is the people of America have already spoken. Just look at that map. And it gives you the reason why we need this bill more than anything else we could say. Up there, it says that 47 States, the people in 47 States in this Nation have said that at some level, they are accepting the use of marijuana.

Now, there is nothing we can do about that but to try to bring some significant regulation properly that reflects the concerns of the American people. If we don't do that, we will have a tremendous safety issue if we don't bring this.

And that is why I am just proud to work with Mr. Perlmutter on this. And I hope that we all can see the value of that. It is a safety issue. And then it becomes an issue of, how do we regulate it, because I think the issue is basically this, that some of the States, 47 of them, have accepted in some form or another the ac-

ceptance of legalization of the use of marijuana for the American people. But without having some uniformity, it creates a tremendous problem of uncertainty as well as safety.

Now, Ms. Pross, I would like for you to comment for a moment because I think that you really hit the nail on the head. Could you please tell us—it is SARs, correct?

Ms. PROSS. Correct.

Mr. SCOTT. —that have to be performed. Tell us how problematic that is and the added pressure of complications that this issue brings.

Ms. PROSS. So the suspicious activity reports are outlined in the FinCEN guidance, and those are the requirements laid out for us. There are three different types of SARs. There are marijuana-limited SARs for activity that appears to be operating within the guidelines of State law. There are marijuana priority SARs, which are the SARs that we are flagging if we suspect that there could be some illicit activity going on. And then there are marijuana termination SARs that we would file if we needed to terminate an account relationship because of either failure to communicate with us and allow us to have it transparently in our compliance program or if there is activity that could indicate a serious concern about violating the law.

Mr. SCOTT. Thank you very much.

There are two other points I want to make that really give a sense of urgency here.

We have what is called transaction payments, credit cards, debit cards. How do we intercede them into our banking and financial system? And how does the transaction payment caucus industry react to that? How do we bring them into the flow?

This is basically a cash business. But how long before now they will be paying with credit cards or debit cards? Where are we there?

In my final 30 seconds, I want to call to our memory, 85 years ago, we had a similar problem with alcohol. But this Nation rose to the occasion, and we responded. Just think if we hadn't. There were people then who were saying, "Well, we don't like liquor," just like many people are now saying, "We don't want marijuana." But it is here just as surely as alcohol was.

But we responded to that, and we were able to do that in a very meaningful way at a very critical time. And I think we had the wherewithal to do this with Mr. Perlmutter's bill.

Thank you.

Chairman MEEKS. The gentleman's time has expired.

Mr. Posey is recognized for 5 minutes.

Mr. POSEY. Thank you, Mr. Chairman. And thank you for holding this hearing today.

The discussion draft bill that we have before us today, as you probably already know, is titled the Secure and Fair Enforcement Banking Act of 2019. And as you know, it basically is to encourage banks to have the ability to deal with people who dispense marijuana or sell marijuana or whatever.

And to me, fair would mean repealing Operation Choke Point, which prohibits banks from doing businesses with—or for doing business or allowing businesses—banks to do business with busi-



nesses the government doesn't like. And now I guess the government is going to like your business, the marijuana business, but they are still not going to like a lot of other legal businesses that are legal in every single State. In my district, they are not going to like or allow banks to do business with somebody that manufactures weapons for our military because they don't like guns.

So I am just wondering if any of you—we can start on the left end—could just tell me one iota of a reason that this makes sense, that it is honorable, that it is fair, that I should support something like this when we can't get this kind of support for legal businesses?

Ms. Ma?

Ms. MA. I believe the gentleman up there, Mr. Scott, said, first off, that 47 States have passed it, some form of it. And so we at the State level are dealing—

Mr. POSEY. No. No. No. I mean, why it makes sense to do this and not do other businesses that are absolutely legal, have been legal in every State since 1776.

Okay. Next one. You don't have a good reason.

Yes, sir?

Major FRANKLIN. So, from my perspective of public safety, it is all about the cash that is out in our communities and these businesses. So any business, from my perspective, that is dealing in large amounts of cash needs a process to eliminate that.

Mr. POSEY. I agree.

Major FRANKLIN. So that is—

Mr. POSEY. I agree. That is why I just wonder why the fair banking act, the SAFE Act, doesn't repeal Operation Choke Point, which prohibits legal businesses that are legal in every State for over 200 years to do business with them.

Ms. Pross?

Ms. PROSS. I agree with the comments that Major Franklin made. I think that this issue is these are—these cannabis businesses—we are certainly not taking a position on legalization of cannabis. But they are, by nature, very cash-intensive businesses. And we are talking millions of dollars of cash that is unbanked.

Mr. POSEY. Well, so are the other businesses. I mean, they are cash-intensive too. Just why should we single out the cannabis suppliers and nobody else from Operation Choke Point?

Mr. Deckard, can you give me a good reason?

Mr. DECKARD. Well, community bankers around the country have to make a decision of the risk and return of entering any line of business. So there is no mandate. There is no opt-out. It is a choice of the bank to live in an uncertain environment of the conflict between Federal law and what is a legal licensed business, in my case, in the State of Washington, so—

Mr. POSEY. Okay. But maybe I didn't make it clear.

I am hoping that one of you can tell me why we should encourage banks to do business with cannabis sellers and not with other legal businesses that have been legal for over 200 years in this country because the government doesn't like those people.

Mr. DECKARD. I don't feel—

Mr. POSEY. Why should we single this business out? I am trying to understand the bill. The bill title is, "Fair and Equitable." And

I don't see anything fair and equitable when we take one segment of the market now that hasn't been able to do business like they want that is cash-intensive, but we still don't include the other businesses that have been legal for years that are very cash-intensive as well.

Mr. Barnette?

Mr. BARNETTE. Congressman, I believe that all the time we pass laws that are designed to target one industry or one sector of our economy without reference or giving precedence to the other sectors of our economy. We don't have to look any further than the tax laws in order to see that there are certain preferences given to certain industries.

Right now, this bill gives you the opportunity to address a huge safety issue, and as someone who has been—

Mr. POSEY. Reclaiming my time, because I am almost out.

Mr. Talcott, can you give me a reason?

Mr. TALCOTT. I totally agree with you.

Chairman MEEKS. The gentleman's time has expired.

Mr. Clay, for 5 minutes.

Mr. CLAY. Thank you, Mr. Chairman.

And let me thank the witnesses for your participation in this hearing today.

Let me start with Mr. Deckard.

I understand your bank does not accept cannabis businesses as customers. And why is that?

Mr. DECKARD. For a multitude of reasons. First and foremost is that we do not want to take the risk exposure of the actions that Federal regulators could take depending on what the politics of the moment are versus what the laws of the State of Washington are.

So, again, nobody is encouraging us to participate in this line of business. But we have made a choice that, based upon the ambiguity of the statutes, the cost-benefit, the size of my market, the size of my bank, the risk-reward aspects of all those things, that when the law was first passed, we determined there was too much uncertainty for us to engage.

Mr. CLAY. Let me ask you, have you had to cut ties with any customers as a result of them getting involved with the cannabis business?

Mr. DECKARD. We have not.

Mr. CLAY. Okay. How many of your agricultural customers have considered entering the marijuana business and consulted with you?

Mr. DECKARD. I am not aware of any agricultural customers that have contemplated that. We have had some requests to open accounts from clients in our metropolitan area, and we have respectfully declined to open those.

Mr. CLAY. If you had better guidance from Federal regulators with banks, would you then participate in the market?

Mr. DECKARD. I think that we would get past that initial risk of having the threat of civil money penalties or me even barred from the industry. I mean, my board of directors, who are investors in the bank, take on that risk. So, if you eliminate that, we certainly would reconsider a cost-benefit analysis on the rest of the issues that are related to it.

Mr. CLAY. Thank you for that response.

And, Mr. Barnette, how does oversight work in the District of Columbia for cannabis businesses?

Mr. BARNETTE. We are very heavily regulated. We are subjected to routine random inspections, and we are required to conform to a lot of regulatory oversight on behalf of the Department of Health and several other departments in the District of Columbia regularly.

Mr. CLAY. Okay. Thank you for that.

Let me ask Ms. Ma, can you talk to us about limitations to employees who work in the cannabis business who—as far as regular banking is concerned, say, when they go to buy a home, a car, student loans, do they encounter—

Ms. MA. Yes.

Mr. CLAY. —difficulties.

Ms. MA. Yes. As we all know, a lot of what we talk about is our FICO credit rating. And they always tell us the best way to get a good rating is to get a credit card, buy things on your credit card, and pay them off. Well, these folks don't have an opportunity to even do that.

So trying to get an apartment where you are supposed to fill out an application based on your income, you don't have any, based on your tax return, you don't have any. And the list goes on. An auto loan, a student loan, a home mortgage, all of these things depend on having credit, establishing credit, having a bank account, filing a tax return. And all of this is very, very difficult for an industry that is barred from even opening up one bank account to start even that process.

Mr. CLAY. So you are saying potential creditors discriminate; they are fearful of engaging with a potential customer because of the origins of the income?

Ms. MA. Right. This is why we believe this bill is very necessary because it gives the banks that safe harbor and some security in entering this industry and accepting these type of cannabis employers, vendors, anybody who is associated. And, therefore, they can start accessing credit, paying with a credit card or a bank debit account. And that is kind of the American way at this moment, to move away from cash, not move back to cash. There is a whole industry and folks who are prohibited from transacting what everybody else is asking us to do, right? Go paperless. Go cashless.

Mr. CLAY. Thank you.

Chairman MEEKS. The gentleman's time has expired.

Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman.

I appreciate the panel for taking the time to be here today. And I respect the hard work and effort I know that my colleague out of Colorado, Mr. Perlmutter, has put into trying to be able to address a challenge that we have in many of our States.

In Colorado, we have had many questions that have been raised about the relationship between the Federal, State, and local governments and regulators since legalization, including, obviously, the banking industry.

When we move forward on issues of the banking industry, however, I think that one issue that we may not have fully explored

here in today's hearing is giving the ability of our regulators to be able to aid the communities in their fight against some of the bad actors and having those tools.

So, Ms. Ma, as Treasurer of the State of California, one of the chief concerns that we have heard with the retail marijuana industry in southern Colorado has been the possibility that cartels can gain access to State legitimate retail stores and financial institutions to be able to mask illicit operations. There was an article in yesterday's Denver Post that cited that. And an October 28th report from the Colorado Division of Criminal Justice stated that organized crime cases almost tripled in the 5 years since legalization.

So we have had the concerns raised that the cartels are increasingly able to commingle traffic products and funds with products and profits from legitimate retail businesses.

As a top elected official out of California, you may have well heard as you went to the other States some of these issues as well and encountered some of those problems that I have just highlighted.

So, in your view, Ms. Ma, does Mr. Perlmutter's legislation give regulators the ability to be able to conduct necessary oversight to be able to root out potential illicit activity, especially given that the banking industry can and has served as a check against those who want to take advantage of State legitimized businesses?

Ms. MA. Yes.

So, in California, this industry is highly scrutinized in terms of licensing, permitting, even having to pay your taxes. And we have found that the cartels, whereas before they would come to California and nestle in some of our forests, stay for 2 years. They have to do their setup in terms of water distribution and canopies and protecting their grows. The cartels actually don't come to California anymore because of Prop 215, because of Prop 64 that passed.

So the legalization in our State has actually made it safer where we are requiring extensive labeling and testing, which is why many of us are here today is because we are concerned with the quality of the product. So we believe that the initiatives that have passed have enabled better, safer, more regulated products in the States, and, therefore, less cartels are even involved in cannabis these days.

Mr. TIPTON. I appreciate that. I get the concern, though, coming out of my State on the AML, on the SARs reports, that they are seeing some cartel activity that is being involved with that.

Mr. Deckard, Ms. Pross, would you like to maybe speak to that?

Ms. PROSS. Sure.

A lot of the speaking engagements that I have had over the last couple of years have actually been with law enforcement audiences, and that is one of the points that we try to drive home to law enforcement is that, by banking this industry and abiding by the FinCEN guidance, we are providing information to law enforcement about financial activity related to the cannabis industry that they would not otherwise have if the industry was forced completely into the underground economy.

Mr. TIPTON. Mr. Deckard?

Mr. DECKARD. In the State of Washington, there was a very deliberate active effort once the initiative passed. I think there was

a lot of collaboration with legislators and regulators in the industry in crafting what is a very good model for regulating cannabis.

And so, as was previously stated, everything is tagged from seed to sale. So there is a lot of oversight of it of which the banks perform part of that oversight of the filing of SARs and currency transaction reports and all those things. Nothing in this bill changes what any of the reporting is being presently done to alert regulators of—

Mr. TIPTON. Thanks. I appreciate that. I am going to be running out of time. I think this is something as this bill moves forward that we do need to probably look into.

And the final question is for Mr. Deckard. Does this answer transporting dollars across State lines, say into Kansas where it is illegal, in terms of the commingling of funds given the current regulation on marijuana?

Mr. DECKARD. My understanding is it doesn't address that. The Cole Memo specifically talks about that being one of the prohibited activities, so I am not aware of any institution that is—

Chairman MEEKS. The gentleman's time has expired.

Mr. Heck, for 5 minutes.

Mr. HECK. Thank you, Mr. Chairman.

I am not particularly interested in relitigating someone's paradigm of reefer madness or who stands where on the 10th Amendment and States' rights. I am, with all due respect, not interested in relitigating the Choke Point controversy, indeed.

I am interested in pointing out that quite some time ago the ranking member, Mr. Luetkemeyer, led an effort to get the FDIC to issue guidance that said that this can no longer occur. It has to be done on a business-by-business basis. I think he had to take a victory lap for that instead of us pretending as though this was still going on.

And I do want to keep my questions/comments to the banking access part of this. However, I want to ask Mr. Barnette a question about his customers who have medical issues, as a predicate for that.

And like all of us, I am often asked where is it that my motivation for this legislation comes from. And we all have a personal story. I don't often share mine, but here it is.

My older brother Bob graduated from high school in 1965. He had a football scholarship. He turned it down. He went to community college. Kicked it around a while. And then he did what he had always wanted to do. He enlisted in the United States Marine Corps.

And if you get the year reference, you know what happened next. He went to Vietnam. In fact, he was there during the Tet Offensive. He served in I Corps near the DMZ for 13 months. He came home.

Two and a half years later he developed a large lump on his neck. It turned out to be diagnosed as the most common manifestation of exposure to Agent Orange, namely Hodgkins disease.

He fought that battle for 12 years. Indeed, on two occasions, it had been in remission for 5 years, and he was told his chances of it recurring were the same as anybody else's, until December of 1981 when he passed.

Toward the end of his life, the only relief he could find from what was then chemotherapy, initially it was cobalt, was from the illegal consumption of marijuana. And I have always thought and lived with the irony that the same Nation that asked my brother to put on a uniform and put his life at risk in an activity that eventually did, in fact, take his life held him to be a criminal when he found relief in the only way that he could.

Mr. Barnette, I am certain that you have customers who come in terminally ill, maybe with children with medical conditions. And I am wondering if you could just anecdotally suggest whether or not you have observed or have had reported to you people finding relief from your dispensary's products.

Mr. BARNETTE. Congressman, I have had mothers come in with their children elated at the fact that their children are being more responsive than they have ever been. They are having reduced seizures. I have had actual fathers show up at our dispensary and get driven to tears at the relief that they are being able to see that their children are having. I have had members of our military talk to us about how they are dealing with PTSD and that, for the longest time, they haven't been able to have a good night's rest and are plagued with the memories of having fought in the field, in the theater of war and are getting relief from cannabis.

And daily, daily, we have instances where people are coming in and sharing their stories and actually thanking the members of my staff for being there despite some of the things that they are having to deal with as employees of our dispensary, because without them, they would have to go through illicit channels to just get the same relief that you are talking about, absolutely.

Mr. HECK. So, then, sir, to bring this back to banking, does it stand to reason to you that if the SAFE Banking Act were to be passed, that it would be easier for dispensaries with banking services to be able to provide these kinds of products more uniformly to those who are suffering under the kinds of conditions which you outlined?

Mr. BARNETTE. Simply put, yes.

Mr. HECK. Thank you, sir.

Major Franklin, first of all, I want to thank you for your career and your presence here as well today. I want to thank you for appropriately placing this emphasis on public safety.

Just quickly, sir, do you know of any entity, maybe even including your own, which is collecting the data on how it is that the incidence of crimes associated with cash-based businesses has trended over time?

Major FRANKLIN. Not at this point. We usually get most of our data from UCR, Uniform Crime Reporting, under the Department of Justice, by the FBI. And right now it is not categorized. It would be an extensive project to do that because we would have to find a reliable source for the data.

Chairman MEEKS. The gentleman's time has expired.

Mr. Loudermilk, for 5 minutes.

Mr. LOUDERMILK. Thank you, Mr. Chairman.

And I want to thank our panel for being here. I want to thank every member of the subcommittee because this is a conversation we should be having. It is refreshing that this is truly a bipartisan

issue, both for and against. This doesn't go down party lines. It will be more on ideological lines.

And, quite personally, I am not interested in the least in helping the marijuana industry or the marijuana retailers. But in my position as a Representative in the Federal Government, I think these decisions are better made at the local level. I have several concerns with the industry, but I also have several concerns with the regulatory industry. And so I think it is very important for us to have this discussion and this debate.

I will tell you what I do support. I do support the Georgia State legislature who, just about 3 years ago, passed a law to allow cannabis oil to be used to treat symptoms of certain illness. Now, one of the concerns I have is that the Federal Government is determining what is moral and what is immoral over the business. And I agree with Mr. Posey in that is, determining a gun seller is immoral, so, therefore, we are going to make it difficult for them.

I do think this is something that is better held at the local level, as I said. In fact, in Georgia, we have pushed most of the decisions like that down to the local level. I know in several of the counties in my district, adult stores were not able to operate and still aren't able to operate in certain counties because the citizens have said this is not the type of retail that they want there. But in other counties where they do operate, they do have access to financial services.

So my concern is not the retailers or the marijuana industry but the financial services industry. And do we put those businesses in a catch-22 situation of conflicting regulations? And are we putting the financial services industry in a no-win situation while we battle it out between the State and the Federal Government in this? And so that is really where my concern is. And especially when we are forcing businesses into a cash-only operation, my concern is, does that allow these businesses to go around certain other regulatory requirements that financial institutions have such as suspicious activity reporting? Does this, and this is one of the questions I have, does our current policy maybe incentivize nefarious activity of money laundering or organized crime using these businesses to get around financial institutions? So that is kind of where I am coming from on this. I want everybody to understand. I am not taking a pro or con stance on the issue itself.

Ms. Pross, I know that financial institutions are operating under FinCEN guidance for filing the suspicious activity reports that I just mentioned for these businesses, and the SAFE Act would codify that requirement into law.

I am very focused on this issue and have introduced legislation that would raise the Bank Secrecy Act's (BSA's), CTR, and SAR thresholds. If the SAFE Act becomes law, how do you see it affecting the SAR compliance regime?

Ms. PROSS. My understanding with the SAFE Banking Act is that the FinCEN guidance would remain in place and that we would be required to comply with that guidance. And I actually—we value that guidance as a compliance framework for being able to offer the service to our members. I think that changing—I understand that there are conversations about changing the reporting thresholds. And I do believe that would have an impact on our

credit union, but I am certainly not an expert on the specific proposals around the Bank Secrecy Act. But I think having clear guidance from Treasury on those reporting thresholds is absolutely critical in being able to do this.

Mr. LOUDERMILK. Okay. Thank you.

Mr. Deckard, another area of concern I have is, even though we have 47 States that at some level legalized marijuana, whether it is cannabis oil or recreational use, the laws differentiate. But yet when we are talking about electronic payments, that is a nationwide service that operates nationwide.

What problems do you anticipate, given that only some States have chosen legalized recreational and medical marijuana, but yet the payments are going nationwide?

Mr. DECKARD. One of the things that the SAFE Banking Act does is to not only provide clarity for financial institutions but provides clarity for those indirect businesses, such as a service credit card provider or debit card provider, to be able to use the payment system to reduce the amount of cash that comes through and to enhance public safety via that method.

We have, in the State of Washington, the largest armored car delivery service that not only will not go and pick up from a CRB but won't provide services to a bank that is involved in banking that business.

So providing that clarity is not only just to help banks and to enhance public safety, it is to open up the rest of the system of providers of that that gives them the clarity that they are not going to be penalized for—

Chairman MEEKS. The gentleman's time has expired.

Mr. LOUDERMILK. Thank you.

Chairman MEEKS. Mr. Foster, for 5 minutes.

Mr. FOSTER. Thank you. And I would like to thank Chairman Meeks for convening this important hearing. I would also like to thank Representative Perlmutter, Representative Heck, and the other bill sponsors for their long work on this issue. And I think I can speak for the entire committee when I say that the image of Representative Perlmutter sitting alone at the witness stand with a smile like the cat that just ate the canary is an image that we will all cherish forever.

Now, at this time, a majority of States covering a majority of the Nation's population have legalized cannabis for medical and adult use. And that number will most likely grow in the coming years.

In the State of Illinois alone, there has been almost \$280 million in retail sales by licensed medical cannabis dispensaries since State legalization of medical marijuana first took effect. And in this landscape, it has become ever more important to address the well-documented public safety issues experienced by cannabis-related businesses that operate primarily or exclusively in cash.

With this in mind, I would like to ask Ms. Pross and Mr. Deckard, as representatives of the Credit Union National Association and the ICBA, to tell us a little bit more about how ensuring that cannabis-related businesses can have access to banking services, how that will increase transparency and accountability of those companies and allow law enforcement and regulatory authorities to effectively focus their limited resources towards inves-



tigating other criminal activity? And specifically, if you could describe in a little more detail the types of information that banks would be able to share with law enforcement and regulatory authorities if lawful cannabis-related businesses are allowed to access standard banking services like deposit taking payroll, other information that banks would not otherwise have and perhaps give some concrete examples of how this additional information might be of use to law enforcement?

Ms. PROSS. I appreciate your question. With the FinCEN guidance, I believe that with the passage of the SAFE Banking Act, you will see more financial institutions who are willing to take on the risk of banking cannabis businesses. There is still risk with just the regulatory requirements in order to be able to provide services and adequately monitor and maintain those accounts, but the FinCEN guidance again we are providing this information to law enforcement that they wouldn't otherwise have if these businesses were not banking with us. So we are filing quarterly suspicious activity reports, and those suspicious activity reports are escalated if we see any type of activity that is indicated as a red flag in the FinCEN guidance.

We are also submitting currency transaction reports, so that is cash moving through the system related to cannabis businesses. And to that end, in the last 2 years, my credit union alone, Maps Credit Union in a relatively rural part of Oregon, has filed over 13,000 reports to FinCEN. And that again is free information to law enforcement that wouldn't otherwise be available if we weren't banking this industry.

Mr. FOSTER. Mr. Deckard?

Mr. DECKARD. While my bank is not involved in banking cannabis, several of my colleagues in the State, you know, we talk about what the status of things are. There is not a business line in financial institutions that is regulated more and scrutinized more than marijuana banking. The amount of reports from the State from what banks are filing, what law enforcement is looking at is a very onerous task to put on the bank, and yet, for public policy reasons, financial institutions are choosing to engage in that.

Some of the anecdotal information I can share with you is there is a bank on the west side of the State of Washington that has 50 accounts, and they have 4 full-time employees staffed in the compliance department just to manage the amount of reporting. So, when you look at the ratio of staff to number of accounts, it is robust and something that each bank has to decide whether they want to devote those kinds of resources to.

Mr. FOSTER. Let's see. I was just thinking that there may be a lot to learn of the history of liquor legalization and taxation. Initially, there was a lot of moonshining, which I think at least in my part of the country has faded away with time. And now most taxes are being collected, and I think liquor distribution is pretty well regulated. Do you think there are any lessons to learn from that experience? Anyone on the panel?

Major FRANKLIN. I think there are some great lessons to learn from the end of alcohol prohibition where, number one, it was the States that led that effort. My home State of Maryland never participated in it, so we now moved into—I mean, I don't know where

you can get bootleg whiskey today. I know some people do, but I can't because it is a well-regulated industry, and whatever you need you can go buy at a regulated store, and again, as you mentioned, what is really important is that the taxes are being paid, and it is very easy to track because of the banking system and the methods that are used, and it is clear-cut policy. There is very little question about what you are required to do when, where, and how.

Chairman MEEKS. The gentleman's time has expired.

Mr. Williams, for 5 minutes.

Mr. WILLIAMS. Thank you, Mr. Chairman, and before I begin my questioning, I want to thank all of you today. But I wanted to reiterate that the substance at the center of today's hearing is still illegal at the Federal level. States like Colorado and California have exercised their authority to legalize marijuana, and under the 10th Amendment, they have the right to do just that.

This committee can debate this issue all they want and perform the cost-benefit analysis of banking this emerging industry, but regardless of what we come up with, marijuana is federally illegal. It affects people's minds. It affects their thinking. And the breakdown of the family structure today is too prevalent. Opioids are killing thousands of Americans a year, and countless Americans suffer from addiction every single day. Those are problems that deserve our immediate attention in this body, not to debating the use of a federally controlled substance.

So, additionally, I find it hard to believe this committee is going to be considering legislation to make marijuana more commercially available to the public when there are still so many unanswered questions about the drug.

So, Mr. Talcott, is it a universally accepted fact that marijuana is not a gateway drug and has no negative impacts to public health?

Mr. TALCOTT. No, it is very clearly a gateway drug, and it has a lot of negative impacts for public health. In particular, if you look at the opioid crisis, a vast majority of people who die a death by opioid overdose started off with pot as a gateway drug. I think that the other public health problems with pot are people who have smoked pot and regularly have been known to go into a psychotic state. As a matter of fact, if you look at places like California or you interview the people in emergency rooms in Colorado—these are people we hear from all the time—you will find out that the number of people coming in with marijuana-induced psychosis or psychosis generally has skyrocketed since legalization.

Mr. WILLIAMS. Okay. Thank you. Last Congress, there were many discussions on possible changes to the Bank Secrecy Act regarding anti-money-laundering policy.

Mr. Deckard, in your testimony you mentioned the Bank Secrecy Act and the current suspicious activity reports and currency transaction reports that institutions must file. I have been told from ICBA and other banking groups that the existing SAR and CTR reporting requirements are onerous and offer little feedback to the financial institutions. So, Mr. Deckard, what do you think the effect will be on the number and quality of CTRs and SARs should this safe harbor provision pass?

Mr. DECKARD. I don't see any impact on the filing of SARs in terms of the number or anything else for the existing businesses that are legally licensed in the State. They are banking somewhere. I am told from our department of financial institutions that 97 percent of all of the licensed marijuana businesses are making their tax payments with a checking account. So I don't necessarily see that as an expansion of the number of businesses. In fact, the liquor and cannabis board in the State of Washington controls the number of licensed businesses that can operate.

Mr. WILLIAMS. Okay. Major Franklin, thank you for your service in law enforcement. During your time as a police officer, I am sure you saw lots of people driving while under the influence of drugs and alcohol. And as I am sure you know, marijuana affects the brain, specifically the parts responsible for memory, learning, decision-making, coordination, and reaction time. So all of these capabilities we are talking about are vitally important to keep our roads safe, which I know you want to do, and so my question to you, Major Franklin, is, if police officers have a device or a method by which they can accurately detect if someone is driving under the influence because of marijuana?

Major FRANKLIN. If they do currently?

Mr. WILLIAMS. Is there a way to detect if somebody is driving under the influence of marijuana when you pull them over?

Major FRANKLIN. Oh, Yes. As the head of training for the Baltimore Police, as well as the Maryland State Police during my career, drug recognition experts are very good at making this detection of whether or not someone is driving under the influence of any mind-altering substance, and this is what we recommend: to train, to provide the money to law enforcement to train so that we can have more DREs out in our communities. And, again, this is nothing new. It has always been illegal to drive under the influence of any mind-altering substance, and that is what we do. We work very hard on the highways and in our communities in pushing back against this. We are very effective at doing this.

Mr. WILLIAMS. So, if you are buying or smoking marijuana, don't be driving, right?

Major FRANKLIN. Correct.

Mr. WILLIAMS. Okay.

Chairman MEEKS. The gentleman's time has expired.

Mr. WILLIAMS. Thank you. I yield back.

Chairman MEEKS. Mr. Lawson, for 5 minutes.

Mr. LAWSON. Okay. Thank you very much, Mr. Chairman, and witnesses, welcome to the committee.

It has been very educational listening to all of you. And I have just a few things I would like to say. Florida is part of a growing train of States that are now permitting medical or recreational cannabis use. Currently, most of the cannabis industry operates, as you know, on a cash basis without the benefit of using traditional financial institutions and financial products, such as credit cards.

Your testimony here today has been very significant. None of us are medical people, but over the years, for those who have served in the legislature before, not only do you have problems under the influence of alcohol but with prescription drugs and everything else on the road. I ask unanimous consent to enter this into the record

from the Florida Department of Agriculture and Consumer Services Commissioner Nicole “Nikki” Fried who said, “On behalf of the Florida farmers and medical marijuana professionals and consumers, I want to thank you for the efforts to provide the cannabis industry across the traditional banking and express my strong support for securing the Fair Enforcement Banking Act, H.R. 2215. Conflicting guidance from the Federal Government has unsuccessfully led to a high level of risk and hustles from businesses and emerging markets.” I won’t read the whole letter, which I will give to the chairman here, but the problem, what we are here to resolve today is, what do you do with this particular cash business? And I know, from the banking standpoint, if I walked into the bank today with \$20,000 or \$30,000 in cash in a suitcase, and said I wanted to deposit it in my savings, what would you do? You would start questioning me about where I got the money from, am I in the business, whatever, and I have seen this happen. I have gone into, for instance, a Bank of America, and a lot of people, especially people, Hispanics and so forth, deal in a lot of cash and they are working, and they come into the banks on Saturday morning and try to make their deposits. And sometimes they are held up because people are saying, you have all this cash, and they are coming in to make cash to send money back home. And so, from my standpoint, I am not here to debate what marijuana is going to do to you and all the other stuff, but what I am here to do is to try to make it safe for people who are in this business that the consumers, the people in the States have voted on, at 65 to 70 percent on, how do we deal with this cash situation? And you all are the experts, and I ask the experts, especially the banking experts on the committee, I am not going to debate how bad it is or whatever it is, but how do we deal with this to make it safe for people to make deposits. And I will just ask the treasurer, Ms. Ma, just to comment on it because you are working with it every day, and so I am not going to continue to talk, but I just want you to make a comment on it.

Ms. MA. Well, as a tax collector, we would see hundreds of thousands sometimes of tax payments come in. So not only is it not safe for the business owners to have to keep all that cash then to drive it around and then come to our offices, it also poses a public safety risk for the people in government who have to accept this type of cash. We have to count it. We hold it until the bank sends an armored truck and then ship it over to the bank.

So it is not only a public safety risk for the communities, homes, and businesses, but also, for government, I would say. So having some safe harbor allowing folks to put it directly into a bank that is best equipped to deal with cash in terms of security protocols and cash—fast cash counters and deposits, big vaults and security cameras, I mean, that is where cash should be stored, not in our homes and in our businesses or in government agencies.

Mr. LAWSON. I can understand that. Before I yield back, it is important because I walked into Bank of America and had a check for about \$45,000, and everybody in the bank came to see what was going on, and it might have been because of my color and not because I had the ability to actually bring it in, and they said, “Well,

you need to go someplace else; we don't know whether we can handle this."

So I can imagine what it is like with a cash situation, and that is the thing we need to resolve.

Mr. Chairman, I yield back.

Chairman MEEKS. Thank you. The gentleman's time has expired.

Mr. Barr, for 5 minutes.

Mr. BARR. Thank you, Mr. Chairman, and I want to first recognize and acknowledge my good friend from Colorado, Mr. Perlmutter. You and I have had many conversations over the past 6 years about your legislation about this issue, and to a certain degree, our interests and our views converge, and on other parts of this issue, they may diverge a little bit, but one thing I admire is persistence, and you are a portrait of persistence, and I really do appreciate that.

As my colleagues know, I represent central Kentucky, and we in central Kentucky at one time were the burley tobacco capital of the world. And before that, we were the cannabis capital of the world. We legally grew and produced rope for the war effort and cannabis and industrial hemp. And as you all know, in the 2018 farm bill, with my support, we descheduled industrial hemp, low THC cannabis for our farmers, and I will just say just as an aside, it is ironic that many of the people who supported policies that literally bankrupted the burley tobacco industry in my area are now the very same people who want to legalize smoking recreational pot. That is a little ironic to me, but nevertheless, the fact that our tobacco farmers are now out of business has given them a renewed interest in industrial hemp, and that was the impetus behind our farm bill legislation that now has descheduled low THC cannabis.

One question about that, and I will direct this to Mr. Talcott, following the passage of the farm bill back in December, do legally licensed hemp businesses low THC, nonmarijuana cannabis businesses, now have unfettered access to the banking system?

Mr. TALCOTT. Yes, they do.

Mr. BARR. Okay. And I think that raises kind of a fundamental issue. I am going to kind of play a little devil's advocate with Mr. Perlmutter here because we have a mechanism for doing this if we want to provide legal certainty to higher THC cannabis businesses, right? We did it. We did it in December in the farm bill, and whether we like it or not, wherever you are on this issue, the fact remains that the Controlled Substances Act, Federal law, continues to make illegal high THC marijuana, high THC cannabis, and with the rescission of the Cole Memo, we now have a direct conflict of Federal law, assuming Mr. Perlmutter's legislation were to pass.

So, given that reality, to Ms. Pross and to Mr. Deckard, in the event that a United States Attorney was actively prosecuting a cannabis-related business in your area, even if Mr. Perlmutter's legislation was passed, would you and your institution be willing to bank that business that is under Federal prosecution, would you do that? Ms. Pross?

Ms. PROSS. I certainly think it would depend on the situation. There are times where law enforcement, and I am not just referring to the cannabis industry, but in general, there are times when law enforcement requests us to keep an account open so that it can

assist them in analyzing the activity in determining what exactly is going on.

Mr. BARR. So, Mr. Deckard, to you, if a U.S. Attorney is prosecuting a cannabis-related business under Federal law under the Controlled Substances Act and the current rescinded Cole Memorandum, would you feel comfortable banking that business?

Mr. DECKARD. No, I wouldn't. That is one of the reasons that my bank has not engaged in providing services.

Mr. BARR. And I think that is the point. The point is that, even if we were to pass Mr. Perlmutter's legislation, and Lord knows he has put his heart and soul into this thing, and I really respect that, but the reality is his legislation would not solve the problem because you could have a U.S. Attorney who would—I guess my point is this, we have shown the blueprint of how to do this, and it is an amendment to the Controlled Substances Act, which is not in the jurisdiction of this committee. I am raising the point because I am just wondering if—

Mr. HECK. Will the gentleman yield?

Mr. BARR. I will. I would like to know how this legislation ultimately solves that problem.

Mr. HECK. Are you willing to vote to delist marijuana?

Mr. BARR. No, I am not.

Mr. HECK. Okay. I don't understand the argument. It is spurious if you suggest that is the solution, but say you are against it.

Mr. BARR. No, what I am saying here, I am making the point that the Congress—reclaiming my time—would have to make the same moves, the same policy choices that we did in the case of industrial hemp, and this Congress has not done that. And while I appreciate the intent of the legislation, I think we have to think through whether or not it is an efficacious solution to the problem that we are dealing with here.

Chairman MEEKS. The gentleman's time has expired.

Mr. BARR. My time has expired, and it is a very interesting topic. I would love to have more time, but I yield back.

Chairman MEEKS. Ms. Porter, for 5 minutes.

Ms. PORTER. Thank you, Mr. Chairman.

I wanted to welcome my fellow State resident, Ms. Ma, to testify before the committee. I have testified before this committee, and I appreciate all of your patience. These can be very, very long days, so thank you.

Ms. Ma, I have a question about how much money, just an estimate, has California collected from taxes on the cannabis industry in this State?

Ms. MA. The latest figure I have is in November 2016, we collected about \$228 million.

Ms. PORTER. Okay. And as California Treasurer, you have oversight over where California's tax revenues are deposited?

Ms. MA. That is under the California Department of Tax and Fee Administration. That is where the taxes are supposed to be deposited.

Ms. PORTER. To the best of your knowledge, has any bank ever refused to accept the taxes generated by the cannabis industry because the income is derived from cannabis transactions?

Ms. MA. No. As many of you know, even if you are in an illegal business, you still must pay your taxes either to the Federal Government or the State government. We passed Prop 215 in 2006. We did not start collecting sales tax until—I'm sorry, 1996. We did not start collecting sales tax until 2006, which is 10 years later. And even then, we were assessing a 10-percent penalty for anyone who paid their taxes in cash. The Federal Government still to this day charges a 10-percent penalty to anyone who pays their taxes in cash.

Ms. PORTER. So have you ever told any of the banks that are happy to bank the tax dollars that as a condition—or do you think the State should, not you personally, but do you think the State should say to banks that as a condition of banking this considerable cannabis industry tax revenue those institutions ought to have to accept deposits from cannabis-related businesses?

Ms. MA. Yes, so we do business with about eight different large banks, and each one is in charge of a different sector. So our cannabis or cash tax payments from sales taxes, which are commingled, go into one national bank. And there have been issues surrounding this type of issue whether they want to continue to accept it. In California, we expect to collect about a billion dollars in cannabis taxes, and it really is going to be dependent on whether these banks are going to accept cannabis freely or at least with some sort of safe harbor, are we going to be able to continue to collect even any tax from the cannabis industry.

Ms. PORTER. Thank you. That is very helpful. At this time, I ask unanimous consent to enter into the record two statements, one prepared by a fellow Californian and one of the Nation's leading cannabis industry experts, Henry Wykowski. He is counsel to the National Cannabis Industry Association, and in his statement he describes the difficulty he has as an attorney providing legal advice, and he is required to have a bank account in which to hold client funds by the California State Bar Association and yet is continually being denied banking services.

The second statement is prepared by Lindsay Robinson, who is the executive director of the California Cannabis Industry Association, which represents businesses who employ over 11,000 Californians in cannabis-related jobs.

Chairman MEEKS. Without objection, it is so ordered.

Ms. PORTER. I yield back the remainder of my time.

Chairman MEEKS. The gentlelady yields back. I will say, at this point, there being no other Republicans who are on the subcommittee, we will now go through the Democrats who are present on the subcommittee, and then we will go on to hear questions from individuals. So next would be Mr. McAdams for 5 minutes.

Mr. MCADAMS. Thank you, Mr. Chairman.

Before I begin, I would ask unanimous consent to have a letter from Utah State Treasurer David Damschen entered into the record.

Chairman MEEKS. Without objection, it is so ordered.

Mr. MCADAMS. Thank you, Mr. Chairman. So this past November, Utah voters approved the use of medical cannabis in Utah through Proposition 2. And with its passage and then subsequent legislation by the Utah legislature, Utah joined, as we see on this

map, nearly every other State in permitting the use of medical marijuana in some capacity.

But unlike other States, Utah has not approved the use of marijuana for recreational purposes. Despite this difference, however, Utah is now beginning to grasp how to implement its medical cannabis program and is now encountering the same challenges that so many of the witnesses have testified to today; that is, how do businesses operating legally pursuant to State law have access to our financial system?

So I want to briefly quote from the letter from Utah State Treasurer Damschen that he sent to the Utah congressional delegation, and then I have a question for the witnesses on this. He said, “The inability of insured financial institutions to handle cannabis-related transactions has forced businesses and governments throughout the U.S. to resort to cash to settle transactions. This represents an enormous public safety issue, increasing risk of violent crime, fraud, and theft.”

So, to the witnesses, I would ask just a yes or no, do each of you agree with the comments that I read from Treasurer Damschen that cash-only operations present a public safety risk and a risk of fraud and theft?

Ms. MA. Yes.

Major FRANKLIN. YES, in all caps.

Ms. PROSS. Yes, I do.

Mr. DECKARD. I wholeheartedly agree.

Mr. BARNETTE. Very much so.

Mr. TALCOTT. I think engaging in any illegal activity produces cash, and that produces problems. Your banking system is having problems because you are engaging in a felony.

Mr. MCADAMS. So I want to quote again from the letter from Treasurer Damschen. He said, quote, “Providing regulated and insured financial services to cannabis businesses allows law enforcement and specifically the Financial Crimes Enforcement Network, or FinCEN, with the U.S. Department of Treasury, provides them the transparency needed to distinguish legal cannabis businesses from illegal activity.”

So, to the witnesses, I would also ask, do you agree or disagree that bringing these cash businesses into the regulated financial system would increase transparency for law enforcement communities?

Ms. MA. Yes.

Major FRANKLIN. I know for a fact that it would, yes.

Ms. PROSS. Yes, I do.

Mr. DECKARD. Absolutely.

Mr. BARNETTE. Yes.

Mr. TALCOTT. I think bringing every illegal activity into the banking system would make it more transparent, so maybe we should bring the heroin business into the banking system. Maybe we should bring the illegal betting system into the banking system. I mean, all of this—this is kind of a fallacious question because ultimately the decision has to be made, are we going to have legal marijuana, or are we going to have illegal marijuana? And right now, we have illegal marijuana, so any kind of business that involves marijuana is engaged in a felony, and any—I was interested



earlier to hear about questions directed to my colleague Mr. Deckard about, gosh, what should happen with respect to banking? You know, all the people who are on the board of a bank are personally liable for any activities, any activity with a bank—a felony.

Mr. MCADAMS. Thank you. Let me just interrupt right there, thank you, and reclaim my time. The purpose of this hearing isn't about heroin or other illegal industries. This is about medical marijuana and the industry which 47 States have legalized to some degree.

Mr. TALCOTT. But the Federal Government hasn't.

Mr. MCADAMS. That is correct, but my question is would—somebody was saying earlier today let's not—the inability to do everything shouldn't stop—maybe shouldn't stop us from doing something that would make the industry safer and create transparency and help us to ferret out illegal activities that haven't been made legal by 47 States.

One last question, and then I will be done, but I would like to ask maybe Major Franklin—thank you, also, for your service—if you could or would care to elaborate and provide any insights on how access to the banking system for these businesses could actually improve the operations of law enforcement?

Major FRANKLIN. Well, one of the things that we used to do, and I commanded a number of task forces as you heard in the State of Maryland, and we had a unit that dealt specifically with financial research on people we were targeting, businesses we were targeting, and banks were the number one source to go to to check financial records to get a clear, accurate picture of money transactions where the money was coming from, where it was going to. In an all-cash environment, for the most part, it is nearly impossible, unless you conduct a search warrant and just happen to luck out and get some records that are being maintained by your target. This recommendation here is crucial to law enforcement being able to do that work.

Chairman MEEKS. The gentleman's time has expired.

Ms. Ocasio-Cortez, for 5 minutes.

Ms. OCASIO-CORTEZ. Thank you.

I am listening to all of this testimony today, and one of the questions and the concerns that I have is with respect to the racial wealth gap. Very often and very frequently we think of racial justice issues as independent of our financial industry or independent of financial issues, but that is like saying there are no for-profit motives in the practice of slavery, in addition to the scaffoldings of white supremacy. Same goes for Jim Crow, and same goes for our systems of mass incarceration, which right now 80 percent of people kept in Federal prison are Black or Latino, but at the same time the private for-profit prison industry is a \$5 billion valued business.

So my question is really about, are we compounding the racial wealth gap right now based on who is getting the first mover advantage? And so, according to an industry trade publication, 73 percent of cannabis executives in Colorado and Washington are male; 81 percent are white. In the State of Massachusetts, just 3.1 percent of the marijuana businesses in the State were owned by minorities, and just 2.2 percent were owned by women.

So, Mr. Barnette, one of my questions for you is, first of all, does this seem kind of in line with your personal experience on the ground? Is this industry representative of the communities that have historically borne the greatest brunt of injustice based on the prohibition of marijuana?

Mr. BARNETTE. Absolutely not.

Ms. OCASIO-CORTEZ. So these industries are in no way looking—and it doesn't look like any of the people who are reaping the profits of this are the people who were directly impacted?

Mr. BARNETTE. That is correct.

Ms. OCASIO-CORTEZ. Ms. Pross or Mr. Deckard, one of the questions that I have is, in your opinion, do you foresee investments from private equity groups or firms to kind of be funneling into this industry?

Ms. PROSS. We are certainly seeing more interest in that.

Ms. OCASIO-CORTEZ. And so do you foresee—is it possible for a situation where a private equity group that profited off of for-profit incarceration could turn around and take that margin, invest it as a first mover in the cannabis industry while there are still systematic barriers for investment from Black and Brown Latinos, particularly—Black and Brown communities, including Latinos.

Ms. PROSS. I think you are raising really valid points, but as a chief risk officer for a financial institution, my focus is just keeping my program in compliance and making the streets of Oregon safer. So I really couldn't speak to that with any level of expertise.

Ms. OCASIO-CORTEZ. Of course. Mr. Barnette, do you have any—

Mr. BARNETTE. The answer to your question is yes. I mean, certainly it is the case that private equity firms who make money in one sector of our economy can definitely come in and—into this industry and, because they have tremendous access to wealth and banks, aren't necessarily going to say to a \$12 billion hedge fund that, "No, we won't bank you." They will turn around and have access that the average mom-and-pop Black-owned businesses, Latino-owned businesses what have you, just won't be able to actually surmount some of the same hurdles that they can.

Ms. OCASIO-CORTEZ. And have you experienced or seen any barriers to entry for individuals who were formerly incarcerated, particularly for nonviolent drug offenses, to enter the cannabis industry?

Mr. BARNETTE. Absolutely. In fact, we work tirelessly here in Washington, D.C., to get the laws changed to allow people who had previously been incarcerated or had marijuana-related offenses to allow them to be able to work in the industry. And you do see a movement across the industry to try to make that happen, but it is a challenge.

Ms. OCASIO-CORTEZ. Great. And so you see really what this looks like, it is kind of coming to the big picture, that the folks who profited off of for-profit incarceration get to profit off of the legalization of marijuana first while the communities most impacted are last in the door.

Mr. BARNETTE. Absolutely. But I would also say that this particular Act serves to actually give a valuable tool to winners of licenses in that if banks do actually get active, then you do have an access to capital that you previously didn't have. And having start-

ed the second dispensary that I ever owned for under \$100,000, it definitely puts opportunity firmly within reach.

Ms. OCASIO-CORTEZ. Great. And just one last question. So would you recommend that in us kind of opening this opportunity or opening this lane that also be paired with kind of affirmative licensing laws that prioritize frontline communities and communities that were most impacted to get those licenses first so that they can reap the benefits or recoup some segment of costs that they had beared in the nineties in the war on drugs.

Mr. BARNETTE. Absolutely. There should definitely be social equity opportunities that allow those hit hardest by the war on drugs to be first in line to benefit.

Ms. OCASIO-CORTEZ. Thank you very much.

Chairman MEEKS. The gentlelady's time has expired.

Ms. WEXTON, for 5 minutes.

Ms. WEXTON. Thank you, Mr. Chairman.

And thank you to the witnesses for coming and testifying today.

Treasurer Ma, I would ask, what assurances do you have that your State received the full tax remittances that would have been due on these cannabis-related businesses?

Ms. MA. In California, we definitely are not collecting all of the taxes due. So the way we audit these businesses is we will go in, and we will ask them for their financial statements. And many of them will say, "We don't have any; we are all cash."

And then we proceed by having someone stand outside and watch how many people go into a dispensary on 3 given days. Then we assess an amount, maybe \$65 on average per person. We send them a bill for 3 years. We extrapolate back 3 years, add interest and penalties, and send them the bill. That is the way we audit these cash businesses in California. It is not efficient. It is not effective. It is not accurate. So many of these businesses are not paying their fair share of taxes.

Ms. WEXTON. So it is not a very scientific method of determining what taxes are due.

Ms. MA. It is not. Without a paper trail, as you know, it is very hard to audit a cash business.

Ms. WEXTON. Major Franklin, you testified about some of the dangers to these businesses of being robbed and other crimes taking place. Do you have statistics that show that marijuana-related businesses are more likely to be robbed or more in danger than other businesses in the same geographic areas?

Major FRANKLIN. No, I don't know of anyone or any source for that data that is even capable of really collecting that data. And it is still rather early, but we do know there are plenty of anecdotal stories that we are able to pick from across this country where this does occur, even one right here, an attempt right here at Takoma Wellness in Washington, D.C., where armed people were attempting to rob that particular dispensary.

Ms. WEXTON. And related to that, what sort of steps do these dispensaries have to take for security? Are they allowed to have armed guards or are they prohibited under the marijuana laws?

Major FRANKLIN. For the most part, when this initially started, there was a lot of confusion there. I don't know if all of them are, but many of them do now, but it is very expensive. The security

measures are enormous from cameras, the personnel, I mean, the cost. Again, just tracking the possibilities of internal theft, and then you have to deal with the possibilities of armed people robbing you and your employees, so it's quite extensive and expensive.

Ms. WEXTON. Thank you very much.

Ms. Pross, could you please describe briefly what your financial institution goes through before accepting a cannabis-related business and accepting them as a banking client?

Ms. PROSS. Of course. We do an extensive—it is a very lengthy application process where we are getting extensive corporate records, financial records. We run criminal background checks on all account signers, so that is anybody who is going to be interacting with the credit union we are running criminal background checks on. We are validating their licensure with the State of Oregon and ensuring that their license is in good standing with the Oregon Liquor Control Commission, so it is quite an extensive process to get an account with us.

Ms. WEXTON. And you had testified that there was some large number of SARs that you filed, the marijuana-related SARs. How many was that over how long a period of time?

Ms. PROSS. In the last 2 years, we filed nearly 3,000 marijuana-related suspicious activity reports to FinCEN.

Ms. WEXTON. And do you have a breakdown of how many of those were cannabis limited, cannabis priority, and cannabis termination SARs?

Ms. PROSS. Unfortunately, under the Bank Secrecy Act, I am prohibited from disclosing details around suspicious activity reports, but I can tell you out of the 3,000 that we filed, 90 percent were related to cannabis businesses that we serve.

Ms. WEXTON. Thank you.

Ms. PROSS. Of course.

Ms. WEXTON. And, Mr. Barnette, can you explain some or just tell us a little bit more about some of the challenges that your business or other businesses that you are familiar with have faced with regard to finding commercial leases or purchasing property and credit card processing with the inability to be clients of commercial banks?

Mr. BARNETTE. Absolutely. We have had—you know, the problem not only affects our business, right? We definitely can't take credit cards. Our customers have to walk up with cash in their pockets. That obviously puts them in harm's way both coming into the dispensary and leaving the dispensary. When we are actually transporting cash and trying to get it offsite so that we aren't exposed onsite, we have employees and/or security professionals leaving with tens of thousands of dollars of cash on their person and moving it to a safer location and things like that. All of that presents a huge issue, but then there are certain things that we just don't even think about. When you go to recruit talent and you try to build your business, and you look to try and hire someone, let's say maybe as a marketing MBA needing to be paid \$150,000 a year, how do you pay that person \$150,000 a year in cash? They can't take it to their bank. They are in all kinds of situations if they try to do so, and it affects your employees. You can't do business with

service providers because you can't pay an architect \$75,000 in cash to do a design so that you can improve your business.

Chairman MEEKS. The gentlelady's time has expired. Ms. Pressley, for 5 minutes.

Ms. PRESSLEY. Thank you, Mr. Chairman, and thank you all for being here. And I want to thank Representative Perlmutter for his leadership here. I really do see this legislation as being one that is pro-jobs, pro-small business, pro-equity, and it is really apropos that we would have this subcommittee hearing today when we had a Full Committee hearing earlier today on homelessness. And I do definitely see an intersectionality here. We need more small businesses that will prioritize hiring locally, hiring veterans, hiring people of color, hiring women, and ultimately just the broader goal here, and although this is not the debate for today because we know that whether or not legalization is good or bad, I am so glad that this was not a subcommittee hearing about that because that is a State's rights issue. But what I would say is that to the gentlelady from New York's point, and I represent Representative Clay's line of questioning and Representative Porter, as well, that there are these systemic inequities and disparities along racial lines, many or all of which have been created and perpetuated by policy. And so this is an opportunity to right the injustices of the past, but we need equity embedded, and we need the financial industry to be—and institutions to be nimble as they are with any other growing industry. And the data supports that the two fastest growing industries in the country right now are green jobs, clean energy, and the green rush. And so one of the contributors to homelessness is that people are underemployed. And this is an industry whereby people are fully employed.

So just a couple of my questions, I wanted to know—oh, and then also this is an industry for those who face barriers to employment, including those with queries. And so we can't have a situation which is what we see playing out where people who have been historically locked up are now locked out of a multibillion dollar industry.

But I wanted to speak about the impact here on small businesses and on real people. That is the advice we were given in new Member orientation, to not forget the plot. The plot here is about the people, the small business owners.

So, Mr. Barnette, if you could just elaborate a little bit more on what that burden is for you as a dispensary, as a small business owner. I am curious if anyone could just share generally speaking how many employees, how many people are usually employed by small businesses, and then how many ancillary businesses are we talking about, and what is that impact?

Mr. BARNETTE. Sure. Right now, in our cultivation operation, we employ right around nine people. In our dispensary, we employ just under 14 people. And that is full-time equivalent employees.

Now what we estimate is that, because our growth is impeded with because we can't do business with banking that if we could, we would actually be able to grow our operation within 12 months to more closely like 16 employees in our cultivation operation and just approximately 30 people in our dispensary. So you could definitely—we could definitely see how we end up creating jobs, but

more or less, right now, when you look at the number of businesses around us that we spend our money with because we operate in cash, we spend almost all of our money within a 25-mile radius of our actual business. That is a tremendous stimulant to the local economy, and it is a lot of relationships that we end up going to. I have made the decision in my operations to work with other small businesses for two reasons. One, they will take our cash.

Ms. PRESSLEY. I'm sorry. I am going to lose my time.

Mr. BARNETTE. I am sorry about that.

Ms. PRESSLEY. No, no. I want to know more, so I am going to follow up with you. So how do you pay your employees, and have any of them had any problems with their banks as a result of doing business with you or being employed by you?

Mr. BARNETTE. Right now, we pay our employees in cash. We file taxes just like we normally would or what have you, and currently none of them have had problems actually depositing their checks, but they have had some problems getting things like credit cards or other things like that.

Ms. PRESSLEY. And how do you pay your bills?

Mr. BARNETTE. The same way.

Ms. PRESSLEY. Okay. If you want to pick back up on that last point, oh, it looks like my time is up.

Mr. BARNETTE. What I was saying was, just generally, you know, that we try to do business with local businesses. One, they will take our cash. Two, we actually find that we have an opportunity to radically impact their businesses, as well, and they tend to have some of our shared values. So their employee base looks a lot like our employee base, and it tends to be very localized, and so we are really trying to make an impact on the city. And I think that to the degree that you can usher in mom-and-pops and small businesses, minority-owned businesses, you will see more impact in that space.

Chairman MEEKS. The gentlelady's time has expired.

Ms. Tlaib, for 5 minutes.

Ms. TLAIB. Thank you so much, Mr. Chairman.

Mr. Barnette, how are you?

Mr. BARNETTE. Hi.

Ms. TLAIB. I know, it is tiring. I am trying to get everybody's attention. So does the money smell? I am being serious. We are talking about bags of cash, right?

Mr. BARNETTE. You joke about it. That is actually how—

Ms. TLAIB. No, I heard it is true. The money does smell, correct?

Mr. BARNETTE. That has been the case in some instances, yes.

Ms. TLAIB. So one of the things that is frustrating for me is our State is probably the latest State that passed what I would call a ballot measure. Most of these States, it was through a people's initiative, people put it on the ballot; they voted for it; they legalized it. Just like you know it is a democratic process, that is how it was done, and we are talking about thousands of people. It wasn't even close. Like most people want to legalize marijuana. And that is not the question. The States have spoken. I think you are looking for obviously support as this legalized form of business now in many of these States, and the frustration that I have, again, is obviously, collection of taxes, paying for all the things that I think are so im-

portant to the American people and I think everyone wants to do right, but the constant discrimination towards these businesses.

And I am wondering, have you all ever tried to challenge this through the courts, and this is me, my ACLU hat, thinking to myself because you have to be having trouble getting insurance, real estate. Can you talk a little bit about that?

Mr. BARNETTE. Sure. There are a number of organizations that have been very active in our space. You have the Drug Policy Alliance. You have the National Cannabis Industry Association. You have the Marijuana Policy Project. And a whole host of other organizations that have been active on Capitol Hill trying to address the needs of the industry and help get these laws changed. Our industry funds lobbyists to try and make relationships with the proper authorities so that we can tell our stories and we can get our businesses in.

But also you see a very significant activity at the local level as we are impressing upon our council members and our State legislators to try and make sure that they understand the issues because they have a better voice. When the Treasurer of the State of California steps up and speaks to Federal legislators, obviously, the issues that she is dealing with carry a little bit more weight than perhaps my small business actually can. And so we spend a lot of time trying to make sure that our local politicians also understand what we are dealing with and the perils that we are actually facing. And so we try to encourage all of the cannabis businesses, no matter where they are, to be just that active. We have definitely taken that position, but then we are right down the street from you guys, and so we can spend time on the Hill

Ms. TLAI. Thank you so much.

And I yield the rest of my time to the chairman.

Chairman MEEKS. The gentlelady yields back.

Mr. Stivers, for 5 minutes.

Mr. STIVERS. Thank you, Mr. Chairman.

I want to thank Mr. Perlmutter for his hard work on this, and I want to say he has been bugging me about this bill for about 5 years. And, finally, I relented, not because I believe that marijuana should be a recreational drug, but because I live in the world of reality, and I know that there are marijuana-related business out there, and we can't endanger them by putting people in a cash-only business.

So I have a few questions. They are pretty simple. Ms. Ma, you already stated this, but just a simple yes-or-no question, do you believe that allowing marijuana related—legal marijuana-related businesses access to the banking system will make them more auditable and reduce tax fraud?

Ms. MA. Absolutely, yes.

Mr. STIVERS. Thank you. Major Franklin, you have already indicated this, but do you believe that passing the SAFE Act will make these marijuana-related businesses safer? I know that my colleague talks a lot about a Marine Corps member who was working in one of these businesses who was killed because he was robbed. Do you believe that giving them access to the banking system and reducing cash will make them safer?

Major FRANKLIN. Absolutely, I do. Can I comment quickly on the fraud issue?

Mr. STIVERS. Quickly, because I don't have much time.

Major FRANKLIN. So, in the mid-1990s, many people are familiar with the raid we did on the Baltimore block of the strip clubs down there. Sunday was their all-cash day, and we were able to, through our investigation, recoup \$3.1 million for the State of Maryland. So that is that is the kind of fraud—

Mr. STIVERS. As they say, cash is fungible, and it was hard to find. My guess is, you had to go there on a Sunday?

Major FRANKLIN. No comment.

Mr. STIVERS. Several Sundays.

Thank you. Great levity.

My next few questions are for Mr. Deckard. There is an agriculture business that operates in Ohio that does not do direct business with marijuana-related businesses that has told me they are worried about losing their banking relationships because they know their products are used, sold through other folks by marijuana-related businesses. I know you don't do business with any marijuana-related businesses, but have you heard from anybody in the supply chain that is worried about losing their banking relationships?

Mr. DECKARD. Yes.

Mr. STIVERS. So I think that is—we are not even talking about people who are directly in the marijuana-related business now, and they are worried about losing their banking relationships, and I have a letter I would like to submit to the record from one of those businesses, Mr. Chairman.

Chairman MEEKS. Without objection, it is so ordered.

Mr. STIVERS. Thank you, Mr. Chairman. Finally, I also have a letter from a banking company that does not do business with marijuana-related businesses, and they do think that there are some things that need to be changed about this piece of legislation, and maybe you are the right person to ask this about, Mr. Deckard. Would you like to see more clarity on making sure that financial institutions have access to see if these businesses are legitimately licensed in States? Would that be part of your due diligence?

Mr. DECKARD. I think, as a community banker, the more clarity we can have, the better.

Mr. STIVERS. Would you like to have more clarity on suspicious activity reports and when you file them, in fact, both you and Ms. Pross, would you like more clarity on that?

Mr. DECKARD. I think our anti-money-laundering and BSA regs and policies are pretty clear on when it is required to do so, so I don't see any ambiguity there.

Mr. STIVERS. Would you like to have an effective and written anti-money-laundering policy for these businesses, because that is what this chief risk officer has asked for, those four things they would like to see. Maybe you don't see that, but this chief risk officer of a bank, I would like to submit that one for the record, also, Mr. Chairman.

Chairman MEEKS. Without objection, it is so ordered.

Mr. STIVERS. Thank you. Do either of you think that there is some additional clarity we can give to this Act, and my intent is not to undermine but to improve this Act?



Ms. PROSS. Sure. I believe that the FinCEN guidance provides quite a bit of clarity for financial institutions who choose to serve the industry, so I would not be seeking additional guidance regarding the suspicious activity reports.

Mr. STIVERS. Great. And, Mr. Deckard, one last question because I have 34 seconds. Can you speak to reputational risk and that some financial institutions may choose not to provide services even after the SAFE Act is passed into law?

Mr. DECKARD. As a community banker, we take pride in serving the communities that we operate in. At my bank, it is right in our mission statement that we know our customers by name. So it is a relationship model, not a transaction model. Speaking for the community banks across the country that may be family-owned, operating in a rural community where there is not competition, we have to keep in mind the processes that those banks would need to go through. We are always looking for clarity and, this bill when you are talking about opening an account or originating a loan, we go through that process of every legal business within the State of Washington of getting a copy of the business license, the UBI number, a copy of their driver's license and go through the due diligence for every type of business, not just—and it is expanded for marijuana-related business certainly.

Chairman MEEKS. The gentlemen's time has expired.

I now recognize Mr. Davidson.

Mr. DAVIDSON. Thank you, Mr. Chairman.

And I thank you all for a long day and an important cause. Frankly, I view this as a civil liberties issue. We have had some troubled past in our country on any number of fronts where people looked askance at someone and said, "You are not going to bank those people, are you? You are not going to do business with these people?"

And this is a case where communities all across the country have decided to legalize something that is, frankly, still sensitive for lots of people. We have seen it on display in this hearing, a range of views as to whether it should or shouldn't be. The reality is, it is.

And our financial institutions are the wrong place to kind of backdoor relitigate whether it should be legal or not. Frankly, that is at the core of the issue here when we talk about banking legal marijuana in the States. States have said it is legal.

There are a number of other fronts, as a couple of my colleagues alluded to, where there are legal business activities that some people object to, whether that is selling firearms or doing payday loans or you name it. Regulators, at times, have deemed them to have reputational risk. And we don't have to look back too far to find people who thought, well, maybe there is reputational risk because—"You are not going to bank Jewish people, you are not going to bank these people with this race or group, you are not going to bank these people with this religious group, are you?" And I think we need to move away from that.

Personally, I think it is very important. When we speak about intersectionality, a lot of that comes together right here. And the civil liberties are protected when we say, if it is legal in the jurisdiction you are in, then you should be free to do that without some regulator telling you that you can't because you are doing it wrong.

But we also shouldn't diminish the fact that there are reputational risks with any business. So the way that a business is operated, the type of activities that the business engages in could draw suspicion.

For example, the FinCEN guidance talks about businesses in this space, the marijuana business, that would maybe market their products to juveniles.

Ms. Pross, you are familiar with the FinCEN guidance on that? How would you apply that type of reputational risk to the situation?

Ms. PROSS. Part of our compliance with the FinCEN guidance is our cannabis businesses that bank with us, they certify their compliance with the Cole Memo priorities.

And we also work hand-in-hand with the Oregon Liquor Control Commission to ensure that we are monitoring violations of licenses. And if we do see a violation like that, we have the choice then to terminate an account or to file a marijuana priority SAR for a violation of that nature.

Mr. DAVIDSON. I am glad to hear you mention SARs there because, frankly, in all the States that it is legal, it is prohibited to do business in marijuana with juveniles. And, pediatricians will tell you that there are, frankly, big differences in the impact these chemicals have on juvenile brain development versus adult brain function. So, I think it is an important protection.

It is an application of reputational risk that isn't in violation, in my mind, of civil liberties. You have a law that says it is legal, and you also have a law that says it is illegal. And so you are actually applying the law there.

I think a lot has been said already—it hasn't been said by everyone, but there is only one person left. And I want to thank Mr. Perlmutter for his hard work and, frankly, his openness to continue to find language that can make this as bipartisan as possible. I truly believe that if we open it up and get at the core issue of reputational risk, this can be an enormously bipartisan bill.

I thank the committee and the witnesses for all this work. And I yield back.

Chairman MEEKS. The gentleman yields back his time.

Mr. Perlmutter, for 5 minutes.

Mr. PERLMUTTER. Thank you.

And I want to thank the witnesses for your stamina, for being here this long.

Even you, Mr. Talcott, I thank you for being here.

And I just want to say—

Mr. TALCOTT. Thanks.

Mr. PERLMUTTER. —a couple of things.

For years, we have been trying to address this in one form or another here in the Congress, whether you like marijuana or you don't like marijuana, whether you think it has medicinal, beneficial purposes or you think it causes a psychosis or medical problems. But, obviously, the people across the country have made a decision that they want to pursue this. Okay?

We have a problem in the banking system, and this is the banking committee, this is the Financial Services Committee, and our job is to try to assist the system so that it can deal with this cash,

deal with these businesses, help these employees, help these ancillary businesses—the real estate company, the lawyer, the accountant, whomever.

And I would say to my friend, Mr. Luetkemeyer, and my friend Mr. Barr—and they are my friends—for 6 years, we tried to go to the Judiciary Committee, we tried to have a hearing in this committee, we tried to have a hearing in the Rules Committee, we tried to get this in front of the Congress to address these problems. Not one hearing.

And, instead, we had to go to the Obama Administration, in which case we got the Cole Memo and we got the FinCEN guidance almost 5 years, to the day, 5 years ago. The Trump Administration, under Attorney General Sessions, rescinded the Cole Memo, but Secretary Mnuchin and the Treasury Department has maintained the FinCEN guidance.

So it isn't for lack of trying to try to address this problem.

And is this a perfect solution? No, because we only have jurisdiction over banks and financial services. And that is what is trying to be addressed in this so that banks and credit unions and other financial service companies can provide legitimate financial services to businesses that are legitimate in one form or another in their particular State. That is the purpose of the SAFE Banking Act. And its other purpose is to provide for public safety.

So I would like to read a couple of things and then ask some questions.

The National Cannabis Industry Association has a lot of, sort of, testimonials. And I have a number of things to introduce into the record, including a statement from the Florida Agriculture Commission and a number of letters.

But just a couple of testimonials.

This is from Mandy Tingle: “Our company is all female-founded and -run. When we are unable to utilize banks to store our money, it puts us at significant risk for break-in, theft, or being targeted by attackers. We regularly struggle with large quantities of cash management. It doesn't work well for us to carry suitcases full of cash to our local tax office to pay our taxes. Our businesses are already forced into less desirable parts of town because of the type of business we have. This leaves us as sitting ducks to be attacked or worse for what we have in our possession. Please allow us access to banking.”

Then, another one is from Sabrina Fendrick of Berkeley Patients Group. She says, “Regardless of our State compliance, we have been removed from well over 30 banking institutions so far. We seek and request to be treated like any other business, with the rights and privileges that come with being recognized as a legitimate industry.”

Last is sort of the ancillary industry kind of things. It is from—let's see if I can find it. There it is. “Eden Labs in Seattle, Washington, is a 24-year-old botanical extraction and distillation company that has worked in a multitude of industries, such as biofuels, flavorings, perfumes, natural products, and liquor, to name a few. However, because of our work in the cannabis industry, we have been getting moved from bank to bank to bank.”

And so that is what we are trying to address.

I am going to ask a safety issue of you, Major Franklin. In your career, you were, I believe, a narcotics officer. Was it important for you to be able to track and trace? And would having, sort of, banking records help you as a law enforcement officer?

Major FRANKLIN. Absolutely. We were always in search of banking records. We were always getting subpoenas from the local prosecutor's office to seize those records, to freeze accounts. That was so important—and still is—to the work that we do, because we need the evidence when we finally charge the individual to get a conviction in court, but, again, to also be able to positively track not just for evidence but also for removing those illegal proceeds and profits from the hands of these criminal enterprises so they can't use that money to start up other criminal enterprises. And, many times, we will find that tied to things like human trafficking and other nefarious activities.

So, again, the banking records are just so critical. Trying to do it with pretty much 100-percent cash—I will say this again—we really have to luck out when we search warrants in getting computer records or written records, but they are so easy to dispose of rather quickly, so it is hard to do.

Chairman MEEKS. The gentleman's time has expired.

Mr. PERLMUTTER. Well, I just want to thank the chairman. And I want to thank this panel for being here today.

Chairman MEEKS. I, too, want to thank this panel for a long afternoon but a very productive afternoon. The information that you have given has been very productive.

This is the first such hearing that we have had on the financial regulations of banking with cannabis. And I think that the array of questions that have come from both sides of the aisle has been very informative also and wide-ranging in talking about, from what Mr. Clay, Ms. Ocasio-Cortez, and Ms. Pressley have talked about with reference to some of the injustices that have taken place by not having banking, to some of the things that Mr. Heck has talked about in regards to relieving pain for his brother and some life issues.

And we tried to stick to and make sure that the focus of this hearing was on the relevant jurisdiction of this committee, which has oversight over banking and financial service regulations, as indicated by Mr. Perlmutter.

I want to thank Mr. Perlmutter particularly. I thought it was important that we started and ended with your testimony, because you have been working long and hard at this and have made the difference.

I want to also, this being our very first hearing for the 116th Congress and the first one for the Consumer Protection and Financial Institutions Subcommittee, I want to thank my ranking member for his patience and diligence and cooperation in working on this together.

So, again, let me thank the witnesses.

Before I close, I think that there were a couple of items that Mr. Perlmutter wanted to put into the record, so without objection, it is so ordered.

Also, I know Mr. Lawson had made a request earlier about a letter from Florida. I did not at that time say so ordered, but that is

from the Florida Department of Agriculture and Consumer Services. Without objection, it is also submitted.

The Chair notes that some Members may have additional questions for these witnesses, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

This hearing is now adjourned.

[Whereupon, at 6:40 p.m., the hearing was adjourned.]



# **A P P E N D I X**

February 13, 2019

Safe Banking Act Testimony before the Committee on Financial  
Services

By

Corey Barnette  
Owner, District Growers, LLC & Metropolitan  
Wellness Center, Inc

Good afternoon members of the committee. Thanks you for inviting me today to discuss banking services to the cannabis industry. My name is Corey Barnette and I have lived here in Washington, D.C. since 1999 and currently own District Growers cultivation center and the Metropolitan Wellness Center dispensary – both licensed in Washington D.C.

The medical cannabis industry in Washington D.C. is incredibly well regulated. There is mandatory licensing, background checks, financial disclosures, video surveillance, alarm systems, seed-to-sale tracking, RFID tags, child-resistant packaging, labeling and testing regulations, and routine random inspections. The same is the case throughout many states. In essence our businesses are safe, well vetted, and should be a welcomed addition in the efforts to dismantle cannabis prohibition. However, we are crippled by federal restrictions on banking that serve to stifle state sanctioned operators while buttressing the illicit markets that regulators are targeting.

The issue of access to the banking industry is acutely concerning to business owners like me. A large majority of the country has access to legal medical cannabis and ten states, including Washington D.C., have legalized cannabis for adult use. However, there is still no federally approved system for businesses to perform typical duties like pay salaries, service customers using credit/debit cards, access working capital loans, pay bills via check, etc. The current system serves to create a public safety disaster, disadvantages small and minority-owned businesses, hassles both employees and service providers to the industry, makes tax collection over burdensome, and serves to largely stifle the growth of the industry.

In terms of safety, businesses are often forced to operate as “cash-only”, making the businesses and their customers incredibly vulnerable to robberies and other threats. Many dispensaries have hired on-site armed security guards, maintain excessive on-site security infrastructure, and utilize armored trucks to transport cash. The problem of large cash reserves on site – anywhere - creates an enormous headache and significant public safety threat.

For the federal government, the current system is a disaster too. Like my firm in the past, many cannabis businesses bounce from bank to bank - opening accounts only to have them randomly closed within weeks. As a result, law enforcement and regulators struggle to preserve and ensure the system is transparent. Payment of federal and state tax is made difficult. Ancillary service



providers are unable to work with cannabis operators. Many employees have had their bank accounts closed and are often denied basic services such as mortgages, credit cards, and other basic personal banking services simply for working in this industry.

It should also be noted that the absence of bank participation hits especially hard to small and minority owned businesses operators. Mom-and-pop businesses and minority-owned businesses traditionally look first to bank loans as a method of financing the start and growth of their operations. Without bank participation, the hurdle to entry is substantially higher. Restrictions on banking serve to create a barrier to entry that only the wealthy can overcome. In short, nobody benefits from this system, with the exception of some private security firms and super wealthy operators.

Fixing the banking issue is a crucial part of fixing the broken system of cannabis prohibition. But it is far from the only issue we need to resolve. In recent years, I have been involved in numerous campaigns and spoke on many panels – including here in Congress - about the need to increase diversity in the cannabis industry. Despite cannabis arrests falling on the backs of people of color, the vibrant legal industry has often closed the door to these same communities. Congress should tackle the banking issue, but it should do so in a way that is inclusive of other reforms – like the need for expungement of criminal records, investments in communities impacted by the war on drugs, and more. Banking is an important piece of the puzzle, but it is only a small step as we seek to unwind decades of failed cannabis policy. We must be bold if we are to solve problems and have the impact that our communities deserve.



Testimony of

**Gregory S. Deckard**

Chairman, President and Chief Executive Officer

State Bank Northwest

Spokane, Washington

On behalf of the

**Independent Community Bankers of America**

Before the

United States House of Representatives

Committee on Financial Services

Subcommittee on Consumer Protection and Financial Institutions

Hearing on

“Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses”

February 13, 2019

Washington, D.C.

Chairman Meeks, Ranking Member Luetkemeyer, and members of the subcommittee, I am Greg Deckard, Chairman, President, and CEO of State Bank Northwest in Spokane, Washington. I testify today on behalf of the Independent Community Bankers of America and community banks nationwide, with more than 52,000 locations. I have played an active role in ICBA for numerous years, having served as chairman of the Policy Development Committee and currently chairing the Legislative Issues Committee. I am also past chairman of the Community Bankers of Washington State.

Thank you for the opportunity to testify at today's hearing titled "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses." I am pleased to provide the perspective of thousands of community banks such as mine that operate in states that have legalized cannabis in various forms and for various purposes.

The current conflict between state and federal law has created a cloud of legal uncertainty for community banks, inhibited access to the banking system for cannabis-related businesses and created a serious public safety concern. ICBA urges this committee to consider legislation that would create a federal safe harbor for banks that offer direct or indirect services to cannabis-related businesses that comply with state law. The SAFE Banking Act, sponsored by Representatives Ed Perlmutter, Denny Heck, Steve Stivers, and Warren Davidson would create such a safe harbor. ICBA supported this legislation in the last Congress and plans to support it again upon reintroduction.

At the outset I want to clarify that ICBA's support for a safe harbor must not be interpreted as support for legalization of cannabis for medical, therapeutic, or recreational use. We make no moral or scientific judgments with regard to cannabis use.

State Bank Northwest is a \$145 million asset community bank founded in 1902. With 30 employees and three full service branches, we serve urban, suburban, and rural communities in and around Spokane and Garfield. State Bank Northwest meets the needs of our communities through small business, agricultural, and consumer banking. Like any community bank, we have a stake in the economic prosperity and the public safety of our communities: The two go hand in hand. We are responsible corporate citizens who abide by the laws of our state and our nation – which is difficult when the two are in conflict. At this time, State Bank Northwest has chosen not to serve cannabis-related businesses. As I will clarify in this statement, the legal stakes are simply too high for me, my board, and my investors to tolerate. We owe it our community to ensure that our doors remain open.

As you know, Washington and Colorado were the first states in the nation to legalize cannabis for recreational use in 2012 through the passage of referenda. Retail sales began in 2014. Cannabis is now legal for recreational use in 10 states and the District of Columbia and for medical use in 33 states. Today, Washington has nearly 500 active, licensed recreational cannabis retailers, over 1,000 active, licensed producers or growers, and several dozen licensed cannabis transporters, according to the Washington State Liquor and Cannabis Board.<sup>1</sup> In Washington, the cannabis industry is tightly regulated, including tracking from seed to sale and accounting for literally every gram of cannabis. A fixed number of licenses are available for every category of cannabis business, and cultivation is limited to two million square feet. Security

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<sup>1</sup> <https://lcb.wa.gov/>

requirements include 24-hour video surveillance and other measures to prevent theft. Cannabis businesses are subject to a 37 to 43 percent excise tax, and tax revenues are dedicated to health care and substance abuse education.

### **Cannabis Banking Too Risky for Overwhelming Majority of Community Banks**

While legal under state law, every cannabis business licensed in the state of Washington is illegal under the federal Controlled Substances Act, which puts cannabis in the same category as heroin and LSD. As a financial institution, though chartered by the state of Washington, I am regulated, supervised, and examined by the Federal Deposit Insurance Corporation (FDIC). Other state-chartered community banks are regulated by the Federal Reserve. Based on long experience with examiners, bankers fear they will be highly critical of loans to businesses that are illegal under federal law. An examiner could, for example, reduce the balance sheet value of a sound and performing loan, forcing the bank to raise capital, or even pressure the bank to terminate the relationship.

The memories of Operation Choke Point are still fresh. Even legal, legitimate, long-established businesses were, and unfortunately remain, subject to examiner coercion, both subtle and direct. ICBA appreciates the ongoing work of Ranking Member Luetkemeyer and others on this committee to bring an end to Operation Choke Point, just as we now seek your help in creating a safe harbor for legal cannabis businesses.

Financial Crimes Enforcement Network (FinCEN) guidance (described below) does provide some assurances that a bank is complying with anti-money laundering rules if it follows the agency's heightened Suspicious Activity Report (SAR) guidelines. However, without a statutory safe harbor, bankers rationally fear that the politics could shift against cannabis in an instant. It is telling that banks that choose to serve cannabis-related business are required to have an exit plan to unwind their loans, a requirement that does not exist for any other category of lending.

### **Cannabis Banking Compliance**

Financial institutions that choose to accept the risk of serving cannabis-related businesses – and there are only three such banks and three credit unions in the state of Washington – must comply with FinCEN guidance requiring heightened due diligence and ongoing monitoring consistent with the priorities of the 2013 Cole Memo. Named for then-Deputy Attorney General James M. Cole, the Cole Memo reaffirms the Justice Department's commitment to enforcing the Controlled Substances Act, while establishing a set of priorities for the Department's use of its limited investigative and prosecutorial resources. These priorities include preventing distribution of cannabis to minors, preventing the involvement of a cannabis business with organized crime, and ensuring that cannabis is not diverted to a state where it is not legal, among others. In response to the Cole Memo, FinCEN issued guidance creating three new types of SARs for cannabis banking: The Cannabis Limited SAR, Cannabis Priority SAR, and Cannabis Termination SAR, reflecting various degrees of risk of violation of the Cole Memo. FinCEN also established "red flags" to guide institutions' selection of the appropriate SAR. Essentially, the bank is appropriated in a law enforcement capacity and charged with ongoing monitoring of the cannabis-related business. Any lapse or oversight in bank due diligence or monitoring, however inadvertent, could result in severe penalties.

The Cole Memo was rescinded by then-Attorney General Jeff Sessions, but the Treasury Department chose to keep the FinCEN guidance in place.

Cannabis banking compliance goes well beyond compliance associated with other types of banking relationships. This is appropriate given the nature of the industry and the risks involved, but compliance expense, in addition to legal uncertainty, is a significant part of the risk calculus a bank like mine must perform in deciding whether to enter into cannabis banking.

### **Risk Goes Beyond *Direct* Cannabis Lending**

What I have described so far are the risks and burdens associated with serving *direct* cannabis businesses – the licensed producers, processors, and retailers. State Bank Northwest has chosen not to assume those risks and burdens. What is less well appreciated are the risks and burdens of serving, or merely monitoring in the course of our due diligence, the numerous *indirect* cannabis-related businesses. Ancillary businesses provide specialized products and services for growers, processors, and retailers of cannabis. These could include anything from specialized fertilizers, grow lights, marketing, and legal compliance. It could include the owner of a converted warehouse used for indoor cannabis cultivation or a storefront used for retail sales. As businesses that derive revenue ultimately attributable to the sale of cannabis, they too are a source of compliance risk to banks.

But even these businesses do not represent the full scope of compliance risk. Consider the plumbers, electricians, internet service providers, and accountants, all of which offer their services to the broader public, whose customer base includes cannabis-related businesses. These businesses are also drawn into the net, as is any business that, knowingly or unknowingly, derives any revenues from a cannabis business. As a senior official from the Washington State Department of Financial Institutions recently told me, “banks may not know” that they are serving cannabis-related businesses.

In the Inland Northwest, we have a major energy provider. Naturally, their customers include cannabis-related businesses. Utilities don’t discriminate in who they serve. For that reason alone, my bank cannot bank this utility without assuming legal risk and additional compliance burden. But what about their vendors? How many degrees of separation from cannabis do I as a community banker have to investigate and monitor to ensure compliance with federal law?

The problem extends to consumer lending. Employees of cannabis-related businesses are paid from the sale of cannabis, illegal proceeds under federal law and technically subject to a superior federal lien. This means that as a banker I cannot rely on the employee’s salary to underwrite consumer debt. If I want to make a car loan, for example, I would have to consider outside collateral, such as home equity.

This may sound like an overabundance of caution and extreme risk aversion, but I can assure you the risks are very real and carry potentially catastrophic consequences for community banks, including asset forfeiture of tainted deposits which could put a bank out of business overnight. Community bankers are conservative by nature and insist on legal bright lines. This approach has ensured the survival and prosperity of State Bank Northwest for over a century. I like to describe my banking model as “vanilla.” Typical among community banks, we take local deposits and we make local loans.

If State Bank Northwest were to change its risk calculus and offer services to cannabis-related businesses, my bank itself would effectively become a cannabis-related business and “toxic” to other banks I rely on for day-to-day services. It is the nature of our financial system that a bank exists within a network of other financial institutions. These include credit card processors, check clearing providers, wire transfer services, correspondent banks, and bankers’ banks, among others. Since cannabis legalization, many of these critical partners, facing the same legal conflicts that we face, have refused or threatened to withdraw services from banks that serve cannabis-related businesses in states where it is legal. At least one prominent bankers’ bank in my region, has flatly refused to work with such banks. The largest armored car services provider has cancelled contracts with banks that serve the cannabis industry.

#### **The SAFE Banking Act of 2019**

I hope that I have given you a sense of the full scope of the legal and compliance quagmire faced by community banks in states that have legalized cannabis. This statement reflects not only my judgment but a broad consensus of the many bankers I’ve spoken with in Washington state and around the country. While a small number of institutions have chosen to assume the risk of serving cannabis-related businesses, the industry remains cash intensive and a target for armed robbery. While I am not aware of violent crime statistics specifically associated with cannabis businesses, intuition, supported by anecdote, tells us that cash businesses are a potentially grave public safety hazard. This is the most urgent aspect of limited access to banking services for cannabis-related businesses.

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

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

#### **Public Banking is Not a Viable Solution**

Before concluding this statement, I wish to stress that, with an effective safe harbor, America’s community banks have ample capacity and willingness to serve all facets of the legal cannabis-related industry, should they choose to.

I urge this committee not to consider various forms of public banking as a viable solution to the banking access problem. The California State Treasurer’s Office, represented on today’s panel,

recently commissioned a study of the feasibility of establishing a state bank in California to serve the cannabis industry.<sup>2</sup> That study, conducted by Level 4 Ventures, Inc., a business analytics firm specializing in cost modeling, was released in December 2018. The study found that such a bank would not be viable because it would be too costly to capitalize and would not return a profit for at least 30 years. The study states that: “Our conclusion is that no option for a public bank focused on the cannabis industry is feasible.”

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

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

### **Conclusion**

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

I’m happy to answer any questions you may have.

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<sup>2</sup> <https://www.treasurer.ca.gov/comm-external-urls/cannabis-feasibility-full-report.pdf>. See also: Laura Alix. “Public Bank Isn’t the Answer for California’s Pot Industry: Report.” American Banker. December 28, 2018. <https://www.americanbanker.com/news/public-bank-isnt-the-answer-for-californias-marijuana-industry-report>.



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**To:** Chairwoman Maxine Waters and  
Members of the Subcommittee on Consumer Protection and Financial Institutions

**From:** Major Neill Franklin, Ret., on behalf of the  
Law Enforcement Action Partnership (LEAP)

**Re:** Challenges and Solutions:  
Access to Banking Services for Cannabis-Related Businesses

**Hearing:** Wednesday, February 13, 2019, 2:00 p.m.

**Position:** Support

Distinguished members of the Committee, thank you very much for the opportunity to present the views of the Law Enforcement Action Partnership (LEAP) in support of this legislation.

LEAP's mission is to unite and mobilize the voice of law enforcement in support of drug policy and criminal justice reforms that will make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations.

"LEAP envisions a world in which criminal justice and drug policies keep our communities safer." This is a quote directly from our website and that quote is exactly what this hearing is about. It is about enacting policy that will dramatically enhance public safety in our communities.

This hearing is not, nor should it be, a hearing about whether we should legalize, regulate, and control marijuana for adult use. It should be clear to everyone here that Americans have already decided this issue. In October, Gallup said 66% of American residents supported legalizing marijuana. More than half of states already allow marijuana for medical and/or adult-use purposes. A vast majority of Americans live in a state where marijuana can be purchased legally. This is not a niche business market; it's a significant part of our economy.

If Congress respects the rights of the states and the will of the people, as protected in the Tenth Amendment, then we don't need to debate the legalization of marijuana or medical marijuana here today. We need to decide how best to protect those states, given the choices they've democratically enacted. However, I know some opponents will try to cloud the banking issue with attacks on legalization, so I will quickly address some of these concerns.

**LawEnforcementActionPartnership.org**

*Formerly known as Law Enforcement Against Prohibition*



Let's talk about what's happened in Colorado, the first state to legalize marijuana for adult use. A federal study by the National Survey on Drug Use and Health showed that teen marijuana use decreased after legalization.<sup>1</sup> The American Public Health Association determined that "motor vehicle crash fatality rates... were not statistically different from those in similar states without recreational marijuana legalization."<sup>2</sup> Furthermore, legalization has resulted in a significant decrease in traffic stops, leading to fewer negative interactions between police and drivers, potentially limiting dangerous clashes and tensions with people of color.<sup>3</sup> And because police didn't have to waste their time on these stops and could concentrate on real crime, researchers studying Uniform Crime Reports data (another federal publication) concluded legalization had resulted in greater police clearance rates.<sup>4</sup> So don't listen to Chicken Little. The sky over Colorado did not fall.

Licensed marijuana businesses are legitimate contributors to our economy. It follows that regulated banking, vendor relations, payroll, and tax payments should be permitted as part of that legitimacy – a condition that will further serve to dismantle the illicit market's influence in this growing industry and help local economies.

Current conditions, which require all-cash transactions in every aspect of the business encourage tax fraud, add expensive monitoring and bookkeeping expenses, and – most importantly – leave legitimate businesses vulnerable to theft, robbery, and the violence that accompany those crimes. The SAFE Banking Act presents us with an opportunity to greatly assist in stabilizing the industry and enhancing public safety.

As more legitimate businesses are established, opportunities for cash robberies will increase as more grow-facilities and dispensaries come on line. Securing cash onsite, transporting cash to secure locations, and managing cash payroll are necessities for these businesses. And criminal entities are quite adept at conducting high-level reconnaissance of businesses and their security protocols when they know those businesses will have tens of thousands – or even hundreds of thousands – of dollars on hand.

Although extremely important for business owners and the people they employ, my greatest fear is not the loss of profits due to theft. It is the potential for serious assaults and death to the people attempting to protect that cash, or who are merely responsible for it. I fear dispensary employees being at great risk. I fear for the safety of those transporting the cash, and I fear for the well-being of employees on payday. Two weeks of pay for one employee can easily exceed a few thousand dollars. That one employee trying to get home safely from work is an attractive "score" for any criminal, and a very easy target for those who know what to look for. Beyond any concern for protecting profit, we have a duty to protect the lives of community members working to earn a living.

In 2012, Melinda Haag, the U.S. Attorney for Northern California, said, "Marijuana dispensaries are full of cash, they are at risk of being robbed, and many of them are." One example of what can happen: In October 2012, three people kidnapped the owner of a lucrative dispensary in Orange County. According to court documents, the assailants zip-tied the victim, tortured him, and drove him to a patch of desert where they believed he had buried large sums of money. When the kidnappers couldn't find it, they burned him with a blowtorch, cut off his penis, and doused him with bleach before dumping him along the side of a road.

Four of my policing years were spent investigating crimes within Maryland's Division of Corrections. I've interviewed hundreds of incarcerated civilians convicted of serious crimes, many of whom were proud to boast of their criminal activities and strategies. Their strategic thought process is minimal. The easier the target the better. The bigger the "score" the better. Casing the next target is about finding the softest target, and the current conditions in this industry have created many soft targets.

We, the police, teach target hardening when we conduct security assessments for business owners. Our advice to them is not to have large amounts of cash on hand, to make use of credit and debit card services, avoid routine

<sup>1</sup> [https://www.washingtonpost.com/news/wnk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?hpid=hp\\_hp-top-table-main-drug-use%3Ateen-drug-use%3Ahomepage%2Ft-1&utm\\_term=.5cfd88d0b9e](https://www.washingtonpost.com/news/wnk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?hpid=hp_hp-top-table-main-drug-use%3Ateen-drug-use%3Ahomepage%2Ft-1&utm_term=.5cfd88d0b9e)

<sup>2</sup> <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2017.303848>

<sup>3</sup> <https://www.themarshallproject.org/2017/06/21/how-to-cut-down-on-traffic-stops-legalize-pot#.DCrnV04Wf>

<sup>4</sup> <https://journals.sagepub.com/doi/full/10.1177/1098611118786255>


trips to the bank, and to make use of armored car services. This valuable "crime prevention 101" advice is literally useless to marijuana business owners, making them very attractive soft targets.

I'm not one for fear mongering – what I testify to here today is rooted in experience and research. Any police officer who has worked the street, or investigated enough robberies, will testify to the same regarding any business forced to handle large amounts of cash.

Members of the committee, it is up to you and other members of Congress to act upon this legislation, establishing access to banking for legitimate marijuana businesses. The safety of thousands of employees, business owners, security personnel, police officers, and community members is in your hands.

On behalf of myself and the Law Enforcement Action Partnership, I ask that you act swiftly on the SAFE Banking Act because we know it will enhance public safety within our communities. Thank you for your time.

Sincerely,

  
Major Neil Franklin, Ret.  
Executive Director



**California State Treasurer Fiona Ma addresses  
U.S. House Committee on Financial Services:  
House Consumer Protection and Financial Institutions Subcommittee**

**Wednesday, February 13th, 2019  
"Challenges & Solutions: Access to Banking Services  
for Cannabis-Related Businesses"**

Good afternoon, Chairman Meeks and members of the Committee. Thank you for offering me the opportunity to speak on a matter of critical importance to California.

My name is Fiona Ma, and I am a licensed CPA who is proud to serve as California's 34<sup>th</sup> State Treasurer. As the State's Banker, \$2.3 trillion dollars in transactions move through my office, I oversee \$85 billion in bond debt and manage \$92 billion dollars in short term investments for the State and local governments. In addition, I chair 16 boards, commissions, and authorities that provide financing for our schools, roads, housing, levees, public facilities, and other crucial infrastructure projects that better the lives of all Californians, and provide programs that help Californians save money for costs associated with college, disability, and retirement.

I have served in government since 1995 as a staff to the former California State Senator John Burton who also served in U.S. Congress. In 2002, I got elected to the San Francisco Board of Supervisors and moved on to serve as Majority Whip and Speaker pro Tempore in the California State Assembly - passing 60 pieces of legislation under 2 Governors and 3 Speakers during the Great Recession from 2006-2012.

In 2014, I was elected to the State Board of Equalization, one of the two principal tax collection agencies in our state where cannabis dispensaries are supposed to collect and remit sales taxes.

Duffel bags and sometimes suitcases of cash would arrive quarterly at some of our designated offices and some business owners had to drive 350 miles to pay their taxes. I asked how much we collected from the cannabis industry and my agency really didn't know since tax revenues are "commingled" and deposited with other cash tax payments. I participated in educational tours in Humboldt, Mendocino, and Trinity Counties in California, also known as the Emerald Triangle - where legal outdoor harvest can generate up to \$474 million annually in revenue. To better educate myself and my staff around barriers and challenges of the industry, I held public stakeholder meetings around transportation, track & trace, and banking. Many business owners didn't know the local and state filing requirements and many didn't even file income taxes. And we were also concerned with the public safety surrounding all cash businesses and heard many off-the-record stories. Eventually it became starkly clear that the "Big Elephant" in the room was lack of banking access.

Additionally, I travelled to Colorado, Washington, and Canada and met with Executives of their respective tax collection departments to discuss their experience with this emerging industry and around banking. According to the Colorado Department of Revenue, overall cannabis revenue (from taxes, licenses & fees) has increased dramatically from approximately \$68 million in 2014 to over \$266 million in 2018. Additionally, Washington State has also seen a significant tax collection increase of \$130 million from 2016 to 2017 - when the state collected \$319 million in excise taxes alone. Sales of legal cannabis in Washington have skyrocketed from \$259 million in fiscal year 2015 to \$1.3 billion in fiscal year 2017 - to put that in perspective that is a 500% growth in just two years.

Now we get to California - With nearly 40 million residents and more than a million medical cannabis patients, California's market represents about a third of the North American cannabis market. In the first three quarters after legalizing adult-use cannabis in November 2016, we collected approximately \$228 million in tax revenue.

The cannabis market in California alone is expected to exceed \$5.1 billion in overall revenue in 2020 according to an Arcview Market Research and BDS Analytics report. This same Report highlighted that the legal cannabis market could triple over the next four years - being worth as much as \$32 billion GLOBALLY. The US will fuel a majority of this revenue, and it's critical we accommodate the magnitude of this economic uptick with access to banking for this new state regulated industry.

I wanted to give some history on medical cannabis. The first public cannabis dispensary was founded in San Francisco in 1994 to alleviate nausea and pain to AIDS patients.

Speaking of advocating for patients, we are elected to speak on behalf of our constituents. Additional problems we don't commonly think about related to the unbanked cannabis industry is the negative impact on families when employees are paid in cash because their cannabis employer can't secure a payroll system as an unbanked business:

- How is someone supposed to build credit by operating primarily in cash? If they can't build credit, how can they buy a car, buy a home to support their family, or even qualify to rent a home or an apartment?
- Social Security, State and, Federal Income taxes can't be accurately collected on cash payments wage statements done manually to employees. This doesn't allow employees to pay into - or receive - Social Security benefits.
- The lack of a paper trail for all-cash businesses can pose as a challenge in meeting financial obligations such as paying alimony and child support if an employee chooses to not report their cash income.

The early adopters of medical cannabis helped pass California's landmark Prop. 215 in 1996, the first medicinal cannabis initiative in the U.S.

Fast forward to 2016 and Prop 64: the Adult Usage Marijuana Act also known as California Marijuana Legalization Initiative which was passed by the California voters with 7.9 million votes representing 57% of the vote.

Following the passage of Prop 64, my predecessor Treasurer John Chiang invited me to join a seventeen-member working group made up of members of the cannabis industry, the banking and financial services sector, state licensing officials and the related tax collecting agencies.

The group published a report of its findings in November of 2017 concluding that even though there were some temporary, or adaptation steps the state itself could take to improve the safety of the public and enable efficient collection of tax and fee revenue, the only truly durable solution was for the federal government to act.

One of the recommendations of the group suggested that the state explore establishing a state-backed financial institution devoted exclusively to the cannabis business. That exploration produced another thoughtful report, released just six weeks ago, that concluded much the same thing—that the only effective long-term solution that would produce acceptable results for the financial services sector was to change federal laws and regulations related to offering basic banking services to this growing industry.

I recognize that there have been multiple federal congressional proposals to tackle the complex and multi-faceted issues surrounding this industry. But all have stalled either from lack of broad-based support or from some measure of over complexity. One particular and promising standout in this group of proposals is to offer some form of “SAFE HARBOR” to banks engaged with the industry. I support this approach.

The Committee is undoubtedly aware that cannabis businesses are not alone in struggling to gain access to banking—even though theirs is the most difficult situation. Any business that handles significant amounts of currency is also subject to greater scrutiny by the financial services industry for all of the reasons that are well understood by members of this committee. Large sums of cash are untraceable and are frequently associated with illicit activities making banks and financial service providers approach these businesses with a high degree of caution. Even with these barriers, it is important to note that more than three hundred financial institutions across the U.S have filed Suspicious Activity Reports associated with cannabis businesses in a recent quarter.

However, the clash between federal law and state law in the cannabis industry presents an especially difficult problem for states such as California where cannabis use is now legal. Currently, there are 33 states that allow legal medicinal use and 10 states plus the District of Columbia that allow adult recreational use. One of the surest ways of bringing a business out of the shadows and collecting lawfully-imposed taxes is to promote access to the economy's banking and payments systems.

Yet, federally regulated banks and financial institutions risk severe penalties if they inadvertently aid and abet—no matter how remotely—activities that the federal government deems illegal.

The well understood Cole Memorandum offered some sense of comfort to those financial institutions skilled enough to properly know their customer, apply appropriate due diligence to the business activities of those customers, and to safeguard their banks as well as the nation's payment system from known bad actors who violated the eight basic tenets set forth in that Memo.

Unfortunately, the Cole Memorandum has been rescinded and now these financial institutions are left without even the most basic safe harbor mechanisms to guide their business decisions.

It is for this reason that I believe that the risk management of these financial service firms has been transformed into outright risk avoidance by too many institutions and why we need your help.

We supported "The SAFE Banking Act", originally introduced as H.R. 2215 in 2017, proposed by Congressman Perlmutter. The SAFE Banking Act would provide a "safe harbor" for those federally regulated or federally insured banks and credit unions wishing to accommodate cannabis businesses in my state—and the thirty two others—who have approved the use of cannabis in some form or another, is a necessary step, represents a positive evolution of public policy, and exhibits a common sense approach to the problems I've described.

To sum, an effective safe harbor mechanism in federal law promotes the safety of the public, improves the efficiency of collecting the taxes and fees we use to regulate the industry, and does not allow the banks and credit unions to totally abdicate their responsibilities to know their customers and avoid illicit money laundering. I encourage the committee to consider and approve such a measure.

I would be happy to answer any questions you have and I thank you again for the opportunity to speak with you today.

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Testimony  
Of  
Rachel Pross  
Chief Risk Officer  
Maps Credit Union  
On Behalf Of  
The Credit Union National Association  
Before the  
Subcommittee on Consumer Protection and Financial Services  
Committee on Financial Services  
House of Representatives  
At a Hearing on  
""Challenges and Solutions:  
Access to Banking Services for Cannabis-Related Businesses""  
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Good afternoon, Chairman Meeks, Ranking Member Luetkemeyer, and Members of the Subcommittee. Thank you for this opportunity to testify on a very important issue: ensuring access to mainstream financial services for cannabis businesses that operate legally under state law.

My name is Rachel Pross. I am the Chief Risk Officer of Maps Credit Union, a midsized financial cooperative in Salem, Oregon. I am testifying today on behalf of the Credit Union National Association, the nation's largest credit union advocacy organization. CUNA represents both state and federal credit unions and the 115 million members across the United States that they serve.

Maps Credit Union ("Maps") has approximately two hundred and fifty employees and \$750 million in assets. Our credit union was founded in 1935 when a group of teachers pooled together their scarce resources for the collective, greater good. Today, Maps has a community charter and serves over 65,000 member-owners in Oregon's relatively rural Willamette Valley. Our cooperative has ten branches in addition to a robust educational outreach program that includes two student-operated branches in our local high schools.

As a community-focused organization, we have seen and experienced first-hand the many challenges facing both financial institutions and state-sanctioned cannabis businesses seeking to operate within the financial mainstream. My testimony will talk about those challenges, but, before going into great detail, I'd like to start by telling you a story. It is the story of how my credit union, Maps Credit Union, has sought to overcome those challenges since 2014 and has become a part of the solution for the Willamette Valley communities of Oregon. Our efforts were sparked by the people of the state of Oregon voting in favor of ballot measure 91 and, as a result, making the use of cannabis for both recreational and medicinal purposes legal under Oregon law.<sup>1</sup>

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<sup>1</sup> Cannabis usage for medicinal purposes became legal in the state of Oregon in 1998.

**The Maps Credit Union Approach to Cannabis Banking:  
Offering Communities in Oregon a Safe Solution**

As a financial cooperative, Maps believes that it is our duty to serve the members of our community and to listen to the needs of the individuals and businesses who contribute to that community. Though Maps has no position on whether cannabis should be legalized federally, we acknowledge that the voters of Oregon have already spoken on that issue for the people of our state. Accordingly, after extensive research and risk analysis in 2014, our member-elected, volunteer Board of Directors voted to serve cannabis businesses for two primary reasons:

(1) to serve the underserved—which speaks to the Credit Union mission and philosophy as a not-for-profit financial cooperative, and

(2) to enhance the safety of our community in the Willamette Valley by removing large amounts of cash from the streets of our cities by ensuring that legal cannabis businesses operating in the State of Oregon had access to mainstream financial services.

To our knowledge, Maps is the only financial institution in the state of Oregon that has continuously served the cannabis industry since 2014. And, in the five years since, our organization has come to provide banking services to five hundred Oregon-sanctioned cannabis businesses. That makes the cannabis banking program at Maps one of the largest in the United States.

In terms of safety, statistics show that cash-only businesses increase the risk of crime. This is especially true in the cannabis industry given the lack of access to mainstream financial services. A 2015 analysis by the Wharton School of Business Public Policy Initiative found that, in the absence of being banked, one in every two cannabis dispensaries were robbed or burglarized—with the average thief walking away with anywhere from \$20,000 to \$50,000 in a single theft. Compare that with the statistics from our credit union. In 2017 and 2018 alone, Maps received well over \$529 million in cash deposits from cannabis businesses—meaning that five hundred million dollars in cash was removed from the sidewalks of Oregon's communities just in the last two years. That's millions of dollars that used to be carried around in backpacks and

shoeboxes by legitimate, legal business owners in the State of Oregon, making them prime targets for thieves and other criminals.

When Maps's Board of Directors voted to serve cannabis businesses, they knew it would be one of the first programs of its kind in the country, and they committed to fostering the diligent culture of risk management and compliance necessary to do it properly. Maps' goal was and is to help set a standard nationwide, enabling other credit unions to eventually serve the industry with tried-and-true best practices.

The compliance framework Maps utilizes to serve canna-businesses is based on the U.S. Department of the Treasury's Financial Crimes Enforcement Network BSA Expectations Regarding Marijuana-Related Businesses ("FinCEN Guidance"). Though the February 2014 Cole Memorandum from the Department of Justice ("Cole Memo") was rescinded in January of 2018 by Attorney General Sessions, the guidelines of the Cole Memo remain in place as part of the FinCEN Guidance.

To comply with the FinCEN Guidance, Maps has established a rigorous screening and compliance protocol and has invested considerably in the robust infrastructure required to appropriately monitor and maintain these high-risk accounts. We have a centralized team of dedicated professionals in our cannabis banking program, and the staffing averages one full time employee for every forty cannabis business accounts. Our Bank Secrecy Act and Anti-Money Laundering Compliance Program has been reviewed by both State and Federal financial regulators on multiple occasions, and we also obtain an independent, external compliance audit of the Program annually. In February 2018, I had the opportunity to represent Maps as a guest presenter on behalf of the financial sector at U.S. Attorney Billy Williams' Oregon Marijuana Summit in Portland. The subsequently issued enforcement priorities of the Oregon U.S. Attorney also play an important role in the monitoring of cannabis business account activity at Maps.

As part of Maps's initial evaluation and ongoing monitoring of cannabis-related accounts, we collect corporate records, ownership information (including criminal background checks on all account signers), ongoing financial statements, and day-to-day account transaction activity. All that information is meticulously scrutinized to ensure the activity on the accounts is legitimate and, to the best of our knowledge,

completed in accordance with State laws and the FinCEN Guidance. We work closely and transparently with our regulators, and we take pride in having a collaborative relationship with the Oregon Liquor Control Commission to ensure that the cannabis businesses we serve are operating in compliance with all applicable state licensure requirements. That information sharing is permissible under Oregon House Bill 4094, which was signed into law in April 2016 by Oregon Governor Kate Brown. HB 4094 exempts financial institutions that provide financial services to lawful marijuana-related businesses from any applicable criminal law in the State of Oregon and includes a provision on information sharing.

Most importantly, in accordance with the FinCEN Guidance, the Credit Union files quarterly Suspicious Activity Reports (“SARs”) on every cannabis-related business account in the organization, and we file Currency Transaction Reports (“CTRs”) on every cash transaction or group of cash transactions aggregating to over \$10,000 in one business day. Also, in accordance with the FinCEN Guidance, the Credit Union prioritizes SARs with regard to which cannabis accounts are acting in accordance with State law and any accounts we suspect could possibly be engaged in illegal activities such as diversion into other states, money laundering, or black-market sales.

To put some numbers around this compliance program, Maps filed over 13,500 individual reports related to cannabis business accounts in 2017 and 2018 alone. For more context around those numbers, Maps has filed 2,770 Suspicious Activity Reports since January 1, 2017, and 90.2% of those SARs were directly due to our filing obligations for cannabis businesses. When filing SARs, Maps provides the names of all individuals who are involved with the accounts, all account activities broken down by individual transactions, and a description of that activity. Once a SAR is filed, law enforcement can request additional supporting documentation related to the reported activity, giving the government a very broad ability to review the information we have so diligently collected and retained on the accounts.

Because the cannabis industry is primarily cash-based, these transaction records would not otherwise be available if financial institutions were not permitted to serve the industry. We firmly believe that providing banking services to this industry delivers a

significant benefit to law enforcement, because Maps is essentially providing free, highly-detailed information at least every quarter on cannabis-related monetary activity in the State of Oregon. Furthermore, we educate each and every one of our cannabis-related accountholders about the FinCEN Guidance and the criticality of compliance and transparency. This ultimately reduces the likelihood of financial crime on their parts. They want to keep their accounts with us, so they carefully adhere to the requirements given to them.

As a pressing word of caution, there are numerous unscrupulous players trying to benefit from the severe shortage of legitimate financial services available to cannabis businesses, and concerns around criminal prosecution are only feeding those predatory players' flames. Cannabis businesses are frequently bombarded with proposals for payment "solutions" that are unregulated (and therefore not subject to Bank Secrecy Act compliance), and their "solutions" are often very clearly a form of money laundering. We have heard of proposals involving everything from cryptocurrency to cashless "chit" mechanisms to the use of prepaid gift cards—none of which would provide the Federal government any valuable information on cannabis-related financial activity or the movement of cannabis within the United States. Credit unions, however, are heavily regulated and prudently abide by State and Federal guidelines, so we are undoubtedly a safe and transparent choice for both cannabis businesses and the U.S. government.

With the momentum currently seen across the United States toward the legalization of cannabis either medicinally or recreationally in many states, there is deepening interest in the financial sector for serving these businesses. Having been founded by a group of teachers, it should come as no surprise that Maps is passionate in our beliefs about the importance of education and advocacy. To that end, I presented Maps' cannabis banking program sixteen times nationwide last year. This collaboration is part of the DNA in credit unions, and we consider it a privilege and an honor to assist other credit unions with vetting their own programs.

**Even Without Directly Accepting the Cannabis Industry as Clients, Credit Unions and Banks Operating in States Where Cannabis is Legal Still Risk Unknowingly Serving Cannabis-related Businesses.**

Indirect connections to marijuana revenues are hard, if not impossible, for financial institutions to both identify and avoid. The simple reality is that growers and retailers in the cannabis industry do not operate in a vacuum. Instead, like almost every other business, the industry is dependent upon any number of vendors and suppliers to function. These are everyday businesses like the printing company that makes a business card, the office supply company that fulfills order for pens and copy paper, the housekeeping crew or landlord that cleans or rents office or retail space, and even the utility company that provides that office/retail space or growing location with water or electricity. Under the existing status quo, a credit union that does business with any one of these indirectly affiliated entities could unknowingly risk violating the federal Controlled Substance Act, USA Patriot Act, Bank Secrecy Act, and/or the Racketeer Influenced and Corrupt Organizations Act, among other federal statutes.

Yet, as a bipartisan group of Senators noted in a 2016 letter to FinCEN, “[l]ocking Lawyers, landlords, plumbers, electricians, security companies, and the like out of the nation’s banking and finance systems serves no one’s interests.”<sup>2</sup> The current rift between federal and state law has left credit unions and other financial institutions trapped in a scenario where their mission to serve the financial needs of their local communities is directly pitted against the inability to have perfect information regarding every indirect business activity and the threat of federal enforcement action.

Without banking services, cannabis businesses and the businesses indirectly related to them are less able to obey the law, pay taxes, and follow state regulations. The public safety risks posed by these businesses are easily mitigated through access to mainstream banking service providers and keeping the cash off the streets. This is a critically important public service.

**Congress Should Grant Financial Institutions That Serve State-Sanctioned Cannabis or Cannabis-Related Businesses a Safe Harbor from Criminal Prosecution for Providing Banking Services.**

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<sup>2</sup> 2016 Senate Letter to FinCEN requesting guidance on ancillary businesses (12/14/16), available at [https://www.warren.senate.gov/files/documents/12-14-16\\_SL\\_FinCEN\\_Indirect\\_Businesses.pdf](https://www.warren.senate.gov/files/documents/12-14-16_SL_FinCEN_Indirect_Businesses.pdf) (last accessed 02/08/19).



In the absence of a federal law providing explicit legal clearance for financial institutions to provide banking services to the Cannabis industry, it is highly likely that many of these businesses will be forced to continue operating outside of the financial mainstream. That outcome increases the potential of lost tax revenue, increases the likelihood of criminal thefts in our communities, and deprives both state and federal law enforcement with important information about cannabis activity. We need Congress to resolve the risk financial institutions face by providing a safe harbor for credit unions and banks serving state-sanctioned cannabis businesses. That's why both Maps and the Credit Union National Association support legislation like "The SAFE Banking Act," previously sponsored by Representative Perlmutter as H.R. 2215 in the House and Senator Merkley as S. 1152 in the Senate during the 115<sup>th</sup> Congress.

If enacted, the SAFE Banking Act would offer narrowly targeted federal protections for credit unions and other financial institutions accepting deposits from, extending credit or providing payment services to an individual or business engaged in marijuana related commerce in states where such activity is legal with a safe harbor, so long as they are compliant with all other applicable laws and regulations. Furthermore, the SAFE Banking legislation provides safe harbor to credit unions and their employees who are not aware if their members or customers are involved in this business. We believe that this is a reasonable and sound approach.

### **Conclusion**

Credit unions do not have a position on the federal legalization of cannabis. The simple fact of the matter, however, is that many credit unions operate in states and communities that have made cannabis usage or growth legal for medicinal and/or recreational purposes. We strongly believe that financial institutions should be permitted to lawfully serve businesses that engage in activities that are authorized under their state laws, even when such activity may be inconsistent with federal law. For that reason, credit unions will continue to support the SAFE Banking Act.

On behalf of America's credit unions and their 115 million members, we urge both Congress and the Administration to work towards turning this legislation into the law

and providing financial institutions with the certainty needed to better serve our communities.

Thank you for the opportunity to testify today. I am happy to answer any questions the subcommittee members may have.

*Testimony of*

**Jonathan H. Talcott**

Chairman of the Board of SAM, Inc. (d/b/a Smart Approaches to Marijuana, Inc.)

*On behalf of*

**SAM, Inc.**

*before the meeting of*

**The House Financial Services Committee  
Subcommittee on Financial Institution and Consumer Credit**

*of the*

**United States House of Representatives**

**February 13, 2019**

Chairman Meeks and Ranking Member Luetkemeyer and members of the Subcommittee, thank you for the opportunity to testify on the “Secure And Fair Enforcement Banking Act of 2019” or the “SAFE Banking Act of 2019.”

My name is Jonathan Talcott, Chairman of Smart Approaches to Marijuana, Inc. (“SAM, Inc.”), a 501(c)(3), non-partisan organization co-founded by former Congressman Patrick J. Kennedy, Senior Editor of *The Atlantic* David Frum, and former Obama Administration Senior Drug Policy Advisor Kevin A. Sabet, PhD. The mission of SAM is to educate citizens on the science of marijuana and to promote health-first, smart policies and attitudes that decrease marijuana use and its consequences. I am also an attorney at Nelson Mullins Riley & Scarborough LLP where I am co-chairman of the Securities Practice Group and have worked with the community banking industry for thirty years. I previously served as a banking regulator in the Office of Thrift Supervision, as well as having worked for the

banking industry as a banker for J.P. Morgan & Company, Inc. I am here to speak on behalf of myself and on behalf of SAM, Inc., not on behalf of my law firm.

I am here to testify against the adoption of the SAFE Banking Act of 2019. Ironically, no name could be less appropriate for this legislation. Not only is the SAFE Banking Act of 2019 a smokescreen to hasten the legalization of marijuana, but without a change to the Controlled Substances Act ("CSA"), changes proposed by the legislation will not be effective and will have some unintended consequences. This bill should be opposed and marijuana should remain illegal. We believe no one should have the rest of their life ruined simply because they got caught with a joint, but there are ways to make needed changes to the criminal justice system without fully legalizing and commercializing marijuana. When it comes to researching new medicines derived from the marijuana plant, SAM is in strong support of reducing the barriers to legitimate research.

SAM, Inc. is funded by donations from individuals, concerned citizens, mothers and fathers, and sisters and brothers of people who have seen firsthand the problems caused by marijuana or who wish to educate the public about its dangers. In the last twenty-five years vast amounts of false information about marijuana have been spread across the United States in an effort to achieve legalization and, more importantly for the people involved, commercialization. I would note that I am the only non-government witness you will hear from today who is not paid to be here and who stands to make no money from this position.

The first issue with the proposed legislation is that it does not actually protect community banks or credit unions. Under the Money Laundering Control Act of 1986 ("MLCA"), banks are prohibited from providing financial services to businesses that are

engaged in illicit activities. These provisions are enforced, in part, through the Bank Secrecy Act (“BSA”). While the SAFE Act purports to provide a safe harbor under the MLCA and BSA to banks serving the marijuana industry, these proposals will have no practical effect because the use, possession and distribution of marijuana remains illegal at the federal level under the CSA.

The CSA was passed in 1970 and makes it unlawful to use or possess or distribute any controlled substance, except as authorized by the Act. In addition, abetting such activity is a federal crime. Marijuana is considered a Schedule I controlled substance and, as such, manufacturing, distributing, dispensing, or possessing marijuana is a criminal offence. The CSA is a federal law which generally preempts all state laws intended to govern the marijuana industry. As a result, all activity in the marijuana industry continues to remain illegal under federal law.

The MLCA prevents banks from engaging in financial transactions involving criminal proceeds. In particular, banks may be liable if they engage in activities involving proceeds of a “specified unlawful activity” with the “intent to promote the carrying on of such specified unlawful activity” among other things. Because cultivating, distributing and using marijuana are unlawful activities under the CSA, providing banking services to participants in the state-approved marijuana industry could result in liability under the MLCA.

MLCA requirements applicable to banks are set forth in the BSA and other related legislation. Under the BSA banks are required to monitor customers transactions and make various reports of suspicious activities.

Finally, through the Financial Crimes And Enforcement Network ("FinCEN"), the Bureau of the Department of Treasury administers and enforces the BSA and the Department of Justice ("DOJ") may bring criminal actions against the banks under the BSA.

FinCEN has issued guidance for banks interested in providing services to the marijuana industry. Separately, the DOJ issued the Cole Memo which provides guidance to prosecutors about enforcement of federal law in connection with medical marijuana and other state-sanctioned marijuana-related activities.

While a thorough analysis of the laws affecting the marijuana industry and banks attempting to serve that industry is beyond the scope of this testimony, a few specific facts should be noted.

The Cole Memo, which has since been rescinded by Attorney General Jeff Sessions, is not controlling law. The FinCEN guidance does not protect financial institutions from criminal prosecution under the BSA and the MLCA addresses money laundering but does not address the question of criminal violations under the CSA.

The proposed SAFE Act attempts to provide a safe harbor for banks serving certain marijuana businesses. This safe harbor will aid banks only insofar as it permits them to assist the marijuana industry without fear of prosecution under the MLCA or fear becoming the subject of an enforcement action by FinCEN or other bank regulatory agencies. The Safe Act does nothing to address the illegal nature of all marijuana-related activities under the CSA or the threat of prosecution by the DOJ.

In addition, the SAFE Act would introduce existing criminal elements into the banking system. Contrary to the promises of legalization, the black market hasn't gone away in legalized states. Many unlicensed operators have store-fronts, delivery services, and even pay for Internet advertising. It is not far-fetched to think they would also apply for bank accounts were they given the opportunity.

In Oregon, 70% of transactions<sup>i</sup> were found to be on the black market several years after legalization, trafficked to 37 states<sup>ii</sup>. California pot growers admit to growing five to twelve times the amount of marijuana compared to what the whole state consumed<sup>iii</sup>. The rest was shipped out of state. These organized crime networks are not small enterprises<sup>iv</sup>.

A detailed exposé on Rocky Mountain PBS revealed the growth of the black market in Colorado following legalization<sup>v</sup>. Former Colorado Governor John Hickenlooper said, "We thought that the black market would disappear. Evidently it contracted and then began to expand again, and that's counter-intuitive, right? It is not what you would expect." Colorado's former U.S. attorney Bob Troyer, who was an Obama Administration appointee, observed, "The thing that nobody predicted [was that] normalization, commercialization, would be a magnet for international black market activity."

In California, Mexican drug cartels are propping up black market marijuana farms all across Northern California, devastating the environment by stealing water and contaminating large areas with pesticides that kill endangered wildlife and harm humans<sup>vi</sup>. Earlier this week, California Governor Gavin Newsom said, "We're seeing a lot more cartel activity" and "the issue of environmental degradation persists."<sup>vii</sup>

We should also watch closely to what's happening with our neighbor to the north.

Access to banking in Canada has allowed offshore firms to invest<sup>viii</sup>, some with ties to organized crime<sup>ix</sup>. We shouldn't repeat Canada's mistake. Andrew Lelling, the US Attorney for Massachusetts, warns, "...marijuana trafficking whether done legally under state law or not can be a source of revenue for organized crime. It can be pursued illegally out of state and the drugs moved into state.<sup>x</sup>"

In regard to public health and safety, the marijuana sold today in pot shops is orders of magnitude more potent than anything available at any point in history. Extracts that have been declared "legal" under state law can go up to 99% purity for the active ingredient THC, earning nicknames like "green crack," "wax," and "shatter." Even one of the most prominent voices to legalize marijuana in Colorado, Dr. Rav Ivker, now believes that these substances should be completely banned<sup>xi</sup>. The Netherlands moved to classify anything over 15% THC as a hard drug<sup>xii</sup>. This is not your daddy's Woodstock weed.

This new, high potency pot is having devastating effects on the mental health of our young people. Malcom Gladwell, the author of *Tipping Point*, recently penned a cover story for *The New Yorker* magazine, asking "Is Marijuana As Safe As We Think?" The answer was a resounding no. The National Academies of Science conducted a comprehensive review of thousands of studies of the effects of marijuana on the brain and came to the conclusion that there were significant links with serious mental illnesses, including psychosis, schizophrenia, and suicidal ideation. More frequent use was linked with stronger negative effects.<sup>xiii</sup> That is why every major medical society has opposed the legalization of marijuana.<sup>xiv</sup>



Based on the National Academies report and many newer studies, former New York Times reporter and best-selling author Alex Berenson wrote a critically important work called *Tell Your Children: The Link Between Marijuana, Mental Illness and Violence*. He has presented the data on which psychiatrists have been sounding the alarm to a popular audience, and you only need to look at the marijuana industry's overreaction to realize that he has touched a very sensitive nerve. Marijuana causes psychosis and psychosis causes violence; this is a simple equation. Statistically speaking, marijuana users are about six times more likely to become psychotic or have psychotic episodes.<sup>xv</sup> The marijuana industry is sitting on a ticking time bomb of product liability, and they may soon face a reckoning that will make the Tobacco settlements look small by comparison.

From Tell Your Children<sup>xvi</sup>:

"The first four states that legalized marijuana for recreational use (Alaska, Colorado, Oregon and Washington) have seen rates of murder and aggravated assault increase much faster than the United States rates as a whole since legalization. The gap has increased every year." (152)

"Uruguay, the first country to legalize recreational marijuana sales, saw its murder rate increase sixty-four percent year-over-year from 2017 to 2018. This is not a coincidence." (185)

Finally, contrary to assertions by the marijuana industry, marijuana legalization has a direct correlation with overdose deaths from opioids since 2005. The rate of people dying from opioid overdose in the United States and Canada where marijuana has slowly been

legalized have increased dramatically. In the United Kingdom, where marijuana use has been declining, the number of opioid deaths has been declining dramatically. Americans are dying from overdoses at a rate of three times that of the United Kingdom.<sup>xvii</sup>

If all of this sounds disturbingly familiar, it's because in our recent history, we still remember the Big Tobacco executives testifying in a room similar to this: "Do you believe nicotine is not addictive?" One by one, they replied, "I believe nicotine is not addictive." "I believe nicotine is not addictive." "I believe nicotine is not addictive." I believe the scene would look very similar today if you lined up the top executives of the marijuana industry. Of course, you would now get some of those same tobacco executives showing up to testify with Altria's (formerly Philip Morris) investment of \$1.8 billion into the medical and recreational marijuana industry in Canada<sup>xviii</sup>. That is what happens when you federally legalize marijuana. Surely you are not so naive to think that won't happen here? And I cannot neglect to mention that the CEO of Purdue Pharma, the very man who oversaw the rollout and deceptive marketing plan for OxyContin, left that company to lead a marijuana company.<sup>xix</sup>

There is much more that could be said about the public health impact of the marijuana industry, when it comes to the doubling of roadway fatalities due to marijuana impairment in Colorado<sup>xx</sup> and Washington State<sup>xxi</sup>, the increased number of hospital emergency room visits from overdose and marijuana-induced psychosis<sup>xxii</sup>, the increased number of teens and children hospitalized for accidental ingestion of a pot gummy<sup>xxiii</sup> (which Washington State almost banned<sup>xxiv</sup> until the industry promised to be better about regulating itself<sup>xxv</sup>), and the rising impact to mental health. The public health costs of our legal drugs, alcohol and tobacco, are ten times the amount of revenue raised through taxes. A similar marijuana banking

amendment failed last year in the House Appropriations Committee, and one of the arguments against came from a Congressman in a legalized state: he wanted to know why he should give the marijuana industry this great benefit of access to capital markets and institutional investors when we aren't even collecting any revenue to cover the collateral costs of their product. Already in Colorado, a very limited set of short-term costs exceeds the amount of tax revenue by 4.5 times.<sup>xxvi</sup> The long-term costs of increased marijuana use could eventually exceed those of tobacco and alcohol.

In conclusion, I urge you to reject this bill. The SAFE Act does not accomplish its intended purpose, and this is the wrong committee to have a debate over whether marijuana should be legal. If those who want to see marijuana legalized, commercialized, advertised, and promoted are successful in legalizing marijuana at the federal level, the SAFE Act is superfluous. If they are not, the SAFE Act is still superfluous. The people and businesses who deposit the proceeds from the sales of high potency marijuana, concentrates, and gummies will still be violating the Controlled Substances Act. That is no small matter, and it is very disturbing to me that those businesses would be willing to take that risk and overlook its implications in order to service an industry that is so harmful to public health.

The legislation as written would not have its intended effect. Most importantly, it is a backdoor means to accomplish full federal legalization. Full federal legalization is a tragedy that will bring in more drugged driving deaths, opioid use, and psychosis and violent crime. I ask that you not pass this UN-SAFE Banking Act.

Thank you.

- <sup>i</sup> See <https://learnaboutsam.org/wp-content/uploads/2017/04/Oregon-State-Police-report-January-2017.pdf>
- <sup>ii</sup> See [https://www.oregonlive.com/marijuana/2018/08/new\\_report\\_finds\\_rampant\\_pot\\_o.html](https://www.oregonlive.com/marijuana/2018/08/new_report_finds_rampant_pot_o.html)
- <sup>iii</sup> See <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-producing-pot-surplus-1501101923-htlmstory.html>
- <sup>iv</sup> See <https://www.latimes.com/local/lanow/la-me-ln-marijuana-bust-20181221-story.html>
- <sup>v</sup> See <http://www.rmpbs.org/blogs/news/how-colorado-became-a-major-exporter-of-illegal-marijuana/>
- <sup>vi</sup> See <https://www.newsweek.com/2018/01/19/mexican-drug-cartels-taking-over-california-legal-marijuana-775665.html>
- <sup>vii</sup> See <https://twitter.com/JeremyBWhite/status/1095081610435690496>
- <sup>viii</sup> See <https://translate.google.com/translate?hl=en&sl=auto&tl=en&u=http%3A%2F%2Fwww.journaldemontreal.com%2F2018%2F01%2F22%2Fles-paradis-fiscaux-finacent-les-firmes-de-pot-canadiennes>
- <sup>ix</sup> See <https://www.cbc.ca/news/canada/montreal/cannabis-health-canada-enquete-investigation-1.4887997>
- <sup>x</sup> See <https://www.wgbh.org/news/politics/2018/07/30/us-attorney-andrew-telling-talks-marijuana-immigration-and-attorney-general-jeff-sessions>
- <sup>xi</sup> See <https://www.westword.com/news/famed-medical-marijuana-doctor-calls-for-making-concentrates-illegal-10476374>
- <sup>xii</sup> See <https://www.theguardian.com/world/2011/oct/07/netherlands-potency-cannabis-hard-drug>
- <sup>xiii</sup> See <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24625>
- <sup>xiv</sup> See <https://learnaboutsam.org/the-issues/public-health-organizations-positions-on-medical-marijuana/>
- <sup>xv</sup> See <https://www.health.harvard.edu/blog/teens-who-smoke-pot-at-risk-for-later-schizophrenia-psychosis-201103071676>
- <sup>xvi</sup> Berensen, Alex. *Tell Your Children: The Truth About Marijuana, Mental Illness, and Violence*. Simon & Schuster. (2019)
- <sup>xvii</sup> Ibid. page 111
- <sup>xviii</sup> See <https://www.cnn.com/2018/12/07/altria-to-invest-1point8-billion-in-cannabis-company-cronos-group.html>
- <sup>xix</sup> See <https://www.theglobeandmail.com/news/national/leadership-behind-canadian-medical-marijuana-company-has-an-oxycontin-past/article33200287/>
- <sup>xx</sup> See <https://learnaboutsam.org/sam-statement-denver-posts-new-stoned-driving-analysis/>
- <sup>xxi</sup> See <http://aaa.com/2016/05/fatal-road-crashes-involving-marijuana-double-state-legalizes-drug/>
- <sup>xxii</sup> <https://www.civnews.ca/health/colorado-experienced-a-sharp-spike-in-er-visits-after-legalizing-cannabis-doctor-1.4137154>
- <sup>xxiii</sup> See <https://www.reuters.com/article/us-health-marijuana-kids/marijuana-related-er-visits-by-colorado-teens-on-the-rise-idUSKBN1HO38A>
- <sup>xxiv</sup> See <https://kinja.com/api/profile/getsession?redirect=https%3A%2F%2Fthetakeout.com%2Fsession%3Fr%3Dhttps%253A%252F%252Fthetakeout.com%252Fwashington-state-ban-marijuana-candy-edibles-1829625086>
- <sup>xxv</sup> <https://www.seattletimes.com/seattle-news/marijuana/washington-cannabis-regulators-approve-new-edibles-rules-avoid-candy-ban/>
- <sup>xxvi</sup> See <http://www.ccu.edu/centennial/policy-briefs/marijuana-costs/>

*February 13, 2019*

**Statement for the Record**

*On behalf of the*

**American Bankers Association**

*before the*

**Consumer Protection and Financial Institutions Subcommittee**

*of the*

**Financial Services Committee**

**United States House of Representatives**

**February 13, 2019**



February 13, 2019

**Statement for the Record**  
*of the*  
**American Bankers Association**  
*for the*  
**Consumer Protection and Financial Institutions Subcommittee**  
*of the*  
**Financial Services Committee**  
**United States House of Representatives**  
**February 13, 2019**

Chairman Meeks, Ranking Member Luetkemeyer and Members of the Subcommittee, the American Bankers Association (ABA) is pleased to submit this statement for the record on the challenges of banking cannabis-related businesses and to share our views on the recently released discussion draft of the SAFE Banking Act. The ABA is the voice of the nation's \$17 trillion banking industry, which is composed of small, mid-size, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

Since 1996, beginning with California, voters across the country have determined that it is appropriate to allow their citizens to use cannabis for medical purposes and, since 2012, for adult use. Despite that, current federal law prevents banks from safely banking these businesses. Leaving this industry unbanked is no longer a viable option – thirty-three states covering 68 percent of the nation's population have now legalized cannabis for medical or adult-use and that number is only expected to grow.

ABA does not take a position on the legalization of cannabis. However, our member banks find themselves in a difficult situation due to the conflict between state and federal law, with local communities encouraging them to bank cannabis businesses and federal law banning it.

Since these businesses find it difficult to access banking services, many operate on an all-cash basis. These stockpiles of cash become attractive targets for armed robbers; just last month, someone was shot inside a cannabis dispensary in East Los Angeles. Operating on an all-cash basis

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also means that these businesses often remit payments for taxes and licensing fees to the states in cash while the states would prefer to use more modern payment methods. Moreover, operating on an all-cash basis means that there are no paper trails for auditors to follow. To address these problems, ABA supports a banking-specific solution that would address the reality of the current marketplace and allow banks to serve cannabis-related businesses in states where the activity is legal.

Critically, that solution must come from Congress.

The Controlled Substances Act (21 U.S.C. §801 et seq.) classifies cannabis as an illegal drug and prohibits its use for any purpose. For banks, that means that all proceeds generated by a cannabis-related business, even when it is operating in compliance with state law, are unlawful proceeds under federal law, and so any attempt to conduct a financial transaction with that money (including simply accepting a deposit) is considered money-laundering. All banks, whether state or federally chartered, are subject to federal anti-money laundering laws. And, all banks must have access to the federal payment system to operate, which is under the purview of federal authority.

Currently, the only direction available to financial institutions in connection with cannabis-related accounts comes from guidance issued by the Financial Crimes Enforcement Network in 2014. That guidance, which references a now rescinded memorandum from the U.S. Department of Justice (the “Cole Memo”), describes how financial institutions can report cannabis-related business activity consistent with their Bank Secrecy Act obligations. It does not create a safe harbor or otherwise modify federal law to protect banks from criminal and civil liability for money laundering. The FinCEN guidance is designed to help banks report suspicious activity that is legal under state law but illegal under federal law. While banks often turn to the federal banking regulators for guidance, the federal banking agencies have not taken an official position, constrained by the restrictions of federal law. In fact, no federal banking regulator has the authority to advise the financial institutions that they supervise on how to break federal money laundering statutes, or absolve them from the potential consequences of doing so.

Although a small number of financial institutions have weighed the prevailing climate of non-enforcement and have decided to shoulder the risk in order to serve the needs of their communities, the majority of financial institutions will not take the legal, regulatory, or reputational

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risk associated with banking cannabis-related businesses without congressional action. As a result, state-legal businesses are excluded from the mainstream financial system.

The problems, though, are not limited to those businesses which have direct contact with the marijuana plant, such as growers and dispensaries. The impact of the divide between state and federal law extends to any person or business that derives revenue from a cannabis firm – including real estate owners, security firms, utilities, vendors and employees of cannabis businesses. In a recent survey of ABA member banks, 75% of respondents reported having to close an existing account, terminate a banking relationship or turn away a potential customer because of the customer's association with cannabis. Many of the examples provided by our members are related to customers with indirect connections to the cannabis industry – such as small businesses and entrepreneurs who lease space or sell their goods and services to dispensaries or growers. As the legal state-cannabis industry continues to grow, the indirect connections to cannabis revenues will also continue to expand. Without a change to federal law, that entire portion of economic activity in legal cannabis states will continue to be marginalized from the banking system.

Cannabis businesses will be safer and better regulated if they are permitted to use the banking system, which would increase the transparency and accountability of the industry and better protect our communities. Offering deposit and payroll services would help reduce the amount of cash being held on-hand, which would in turn reduce the risk of theft and violent crime. Moving proceeds of cannabis businesses into banks would also strengthen the ability of state and federal government to detect suspicious activity and ensure compliance with tax laws. Simply excluding legal state cannabis activity from the banking sector has not prevented the growth and spread of this industry, but providing access to the banking system could help facilitate public safety, streamline tax payments, and enable effective oversight in the states where voters have chosen to embrace cannabis legalization.

As released, the discussion draft of the SAFE Banking Act would be an important first step toward enabling financial services for cannabis-related businesses. The bill specifies that proceeds from a legitimate cannabis business would not be considered unlawful under federal money laundering statutes or any other federal law, which is necessary to allow services to cannabis businesses as well as any ancillary businesses that derive some portion of their income from cannabis businesses. The bill would also direct FinCEN, and the federal banking regulators through the



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FFIEC, to issue guidance and exam procedures. Explicit, consistent direction from federal financial regulators will provide needed clarity for banks and help them to better evaluate the risks and supervisory expectations for cannabis-related customers. The SAFE Banking Act is not a cure all for the cannabis banking challenge, and many financial institutions will undoubtedly decide that the industry is still too high risk for their bank. Nevertheless, the bill will give some added clarity and legal protection for banks that choose to directly or indirectly do business with cannabis-related businesses.

We thank you for holding today's hearing and advancing the important discussion about banking cannabis-related businesses. If these businesses are to be brought into the mainstream financial sector, Congress must provide a path for that to happen. We urge the House Financial Services Committee to consider Representatives Perlmutter, Heck, Stivers and Davidson's bipartisan SAFE Banking Act, which will improve the ability of banks to meet the needs of their local communities.



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*CONGRESSIONAL TESTIMONY*

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**Addressing U.S. Financial Services Policy in 21<sup>st</sup> Century Cannabis  
Marketplace: Impact on U.S. Economy**

**Committee on Financial Services**  
Subcommittee of Consumer Protection and Financial Institutions  
United States House of Representatives

**February 13, 2019**

**Kevin Murphy, Chairman and CEO**  
*Acreage Holdings*

My name is Kevin Murphy and I am the CEO of Acreage Holdings. I respectfully submit the following testimony to this Subcommittee in support of advancing financial services reform to reconcile current federal policies with the 46 states<sup>1</sup> that have enacted laws to regulate and legalize cannabis. Current policies must be updated to align with an industry that has rapidly become the fastest growing in the US and which has the potential to produce historic economic growth and job creation.

Acreage Holdings ("Acreage") is the largest vertically integrated, multi-state owner of cannabis licenses and assets in the US with business interests in 19 states. Having entered the cannabis market in 2011, Acreage now employs more than 300 individuals across the US and serves a population of consumers and patients representing more than 172 million Americans. Acreage will expand its dispensary operations from 19 at the end of 2018 to 55 by the end of 2019. Based on Acreage's growing national footprint, we are uniquely positioned to convey to the

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<sup>1</sup> A total of 33 states, the District of Columbia, Guam and Puerto Rico have approved a comprehensive public medical cannabis programs. A total of 10 states have approved adult consumption or recreational use laws. A total of 13 states have enacted laws regulated some form of cannabis, including consumption of "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations or as a legal defense.  
See <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

Members of this Committee, the economic *gains* to be realized by reconciling the glaring discrepancies between current federal banking laws and the reality of both the US and global cannabis economy. These gains include:

- 1. Reclaim the “first mover” competitive advantage for US jobs and the US economy;**
  - 2. Improve transparency of tax revenue collection so as not to forego significant new tax revenue; and**
  - 3. Decrease the number of violations of money laundering activity, and improve oversight in the AML/KYC regulations.**
- 

**1. Reclaim the “first mover” advantage for US jobs and the US economy**

Current US policy denies cannabis companies access to capital markets. Therefore, when these companies need to raise capital, they are left to rely on foreign financial markets to fuel their growth, which results in a lost opportunity for the US economy and for the growth and job creation that would otherwise be captured as a benefit to our country.

Although Acreage has created a significant number of jobs - and has made economic investments across the country - our company nevertheless remains disadvantaged among global cannabis companies because we have not been permitted to participate in capital markets within our own country. Access to these markets would improve Acreage’s profitability and our ability to reinvest in the US.

In addition, current policy has the effect of barring US investors from domestic opportunities. As US capital markets are permitted to infuse US dollars in non-US cannabis companies, this has the effect of *exporting jobs, exporting dollars and exporting an economy* that the US could and should be leading. In 2018, New Frontier Data estimates that there were 259,000 people working full-time in the legal cannabis industry in the US - a nearly 30% increase from the previous year - and that such jobs are expected to increase to 659,000 by 2025.<sup>2</sup> As an industry leader in this economy, Acreage’s eligibility to participate in US capital markets would add significant

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<sup>2</sup> New Frontier Data/2019 Global Cannabis Outlook/January 2019

momentum - and an even more rapid upward trajectory for job growth - if domestic capital markets were open to the regulated cannabis market.

Thus, as long as the US Congress delays updates to the existing financial regulations, the current policies unnecessarily give other countries and their financial markets the “first mover” advantage. Only by addressing these outdated federal banking policies will the US be able to continue to lead with innovation and economic excellence.

## **2. Improve transparency in the collection of tax revenue**

In addition to exporting jobs and relinquishing market share for this thriving economic opportunity, Congress’ failure to avail industry stakeholders of banking and financial services harms not only lawful, licensed and regulated US businesses and entrepreneurs, but it also deprives the federal government itself by leaving millions of tax dollars uncollected. Although this Committee is not charged with addressing the inequitable tax treatment which significantly stifles cannabis industry market valuations, the current cannabis banking policy impacts US Treasury revenues.

In 2019, the regulated cannabis market will generate approximately \$12.9 billion in sales. While a segment of cannabis industry stakeholders *does* have access to fundamental banking services, an estimated 70% of this market operates in unbanked cash. When unbanked cash is *not* tracked and *not* traced, we know that it is also likely *not* taxed at its full value.

According to New Frontier Data, in 2018, the estimated total federal tax revenue raised by cannabis businesses was \$2.7 billion, with an estimated for increase to \$6.9 billion by 2025. Even with the the most conservative estimate, leaving even a nominal percentage of tax dollars against a multi-billion dollar tax base is wholly unnecessary, especially if this regulated industry had access to banking.

**3. Decrease number of violations of money laundering activity, improve oversight in the AML/KYC regulations, and protect public safety.**

Enacting the safe harbor language in the SAFE Banking Act would provide banking access for the cannabis industry and reduce money laundering. This much needed update to the current federal policy for banking as it relates to the cannabis industry would improve *efficiency* and *effectiveness* for combatting money laundering activity.

More than 486 banks filed SARS as reported by FinCEN as of the end of 2018. However, given estimate that less than half of the businesses in the regulated cannabis industry have access to banking, regulators are unable to extend the appropriate level of financial oversight for this industry.<sup>3</sup> Banking access for regulated and licensed cannabis stakeholders would place banks and credit unions in the position to assist law enforcement by distinguishing between *compliant* financial activity and *illicit* financial activity.

Arguments against the proposed Safe Harbor language fail to appreciate that this exception does not create statutory “carte blanche” defense for proceeds from cannabis banking. Further, adopting the proposed Safe Harbor language in the SAFE Banking Act is restricted to establishing the safe harbor from federal sanctions in states where cannabis is legal - it does not create unlimited protection if a financial institution otherwise violates its AML/KYC obligations.

Although the intent of US banking regulations are centered around prioritizing and measuring risk based on *Know Your Customer* and tracking business proceedings to counter money laundering, current US banking policies undermine effective and efficient AML/KYC regulations; current banking restrictions are based on antiquated policies and systems and do not reflect the capabilities currently available to banks to trace activities using modern technologies. Unnecessarily supporting policy that keeps such an inordinately high amount of cash unbanked threatens and undermines US anti-money laundering efforts.

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<sup>3</sup> See: <https://www.inc.com/will-yakowicz/the-startup-quietly-convincing-banks-to-accept-cash-marijuana-industry.html>

*If every dollar generated from a regulated licensed cannabis entity were banked, bankers could then apply a comprehensive AML/KYC policy to the entire regulated and licensed cannabis market, thus permitting regulators and law enforcement to pursue actual money laundering criminal activity.*

Finally, the lack of access to banking creates a significant public safety hazard. Licensed cannabis entities are forced to pay vendors and employees in cash as opposed to electronic transfer. In many cases, vendors are paid with dufflebags full of cash. This situation presents a clear and present danger to the public at large, especially those whose job it is to transport or accept these all-cash payments. The ongoing lack of banking for the cannabis industry has directly led to such heinous crimes as torture and murder. Without access to banking, licensed cannabis entities will continue to be a target for theft and violent crime.

Adopting the principles in the SAFE Act constitutes the beginning of this Committee's work on formulating responsible, fair and credible policies for 94% of the states with the means to bank, track and tax this inevitable and significant economy. Lawfully regulated and compliant businesses and service providers in the cannabis industry must have the same access to fundamental banking as other industries in the US.

Again, we applaud the Subcommittee for holding today's hearing and look forward to working with Members of Congress to ameliorate the issues created by the federal government's continued policy of prohibition.

**Americans for Safe Access**  
**Statement for the Record**  
**House Subcommittee on Consumer Protection and Financial Institutions:**  
**Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses**  
**February 13, 2019**

Americans for Safe Access (ASA) would like to thank Chair Gregory Meeks (D-NY), Ranking Member Blaine Luetkemeyer (R-MO), and the entire House Financial Services Subcommittee on Consumer Protection and Financial Institutions for the opportunity to submit testimony regarding the importance of cannabis-related businesses' ability to access banking services. As the nation's largest member-based organized of patients, medical professionals, scientists, and concerned citizens working to promote safe and legal access to cannabis for therapeutic use and research, ASA would like acknowledge that this hearing is an historic forum for an overdue discussion about the need to update our banking laws to reflect the changing landscape around cannabis in the United States.

Twenty-three years have passed since California became the first state to legalize cannabis for medicinal purposes in 1996. Today, the adult use of cannabis is legal in 10 states and the District of Columbia.<sup>1</sup> Thirty-three states and DC have created comprehensive medical cannabis programs, and 14 additional states have created more limited medical cannabis programs or protections.<sup>2</sup> It should be noted that progress is not limited to the 50 states and DC: Puerto Rico, Guam,<sup>3</sup> and the U.S. Virgin Islands<sup>4</sup> have legalized medical cannabis, while the Commonwealth of the Northern Mariana Islands has legalized the adult use of cannabis with special provisions and protections for medical cannabis patients.<sup>5</sup> American Samoa, Idaho, Nebraska, and South Dakota are the only U.S. jurisdictions that have not liberalized their laws regarding cannabis to allow for medical or other adult use.

The federal government's continued classification of cannabis as a Schedule I controlled substance means that the cannabis industry has developed in the face of federal hostility. That hostility has taken many forms over the years, some of which are

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<sup>1</sup> Marijuana Overview. National Conference of State Legislators. December 14, 2018.

<http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>

<sup>2</sup> State Medical Marijuana Laws. National Conference of State Legislators. January 23, 2019.

<http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

<sup>3</sup> State Medical Marijuana Laws.

<sup>4</sup> Bryan Signs Medical Cannabis Law. The St. John Source. January 19, 2019.

<https://stjohnsource.com/2019/01/19/gov-bryan-signs-medical-cannabis-law/>

<sup>5</sup> State Medical Marijuana Laws.

more obvious than others. While a lack of banking access for cannabis-related businesses may not be as terrifying as a SWAT-style raid on a medical cannabis dispensary by federal law enforcement officers, it nevertheless does inflict harm on patients, consumers, and businesses.

When cannabis-related businesses cannot access traditional banking services, they must either operate on an all-cash basis or turn to high-cost, high-risk payment processors in order to operate. Such payment processors may offer an alternative to working exclusively with cash, but their terms are unfavorable and affect businesses' bottom lines and ability to conduct normal operations.<sup>6</sup> They are not a effective solution for many businesses. The more difficult and unstable a business' operating environment, the less likely that business is to succeed - and fewer successful cannabis businesses can mean reduced patient access to medical cannabis.

Businesses that handle high-value goods and operate on an all-cash basis are compelling targets for robbers. From January 2014 through October 2016, there were almost 600 dispensary robberies in the city of Denver, CO alone.<sup>7</sup> In June 2016, Travis Mason, a 24-year-old security guard, was shot and killed during an attempted robbery at a dispensary in Aurora, CO. Mr. Mason, a former U.S. Marine with dreams of becoming a police officer, was the father of three young children.<sup>8</sup> The two men who murdered him were never apprehended.<sup>9</sup> One can't help but wonder whether Mr. Mason would be alive today were his place of employment a less attractive target. Access to banking services would reduce the amount of cash kept on hand at dispensaries, cultivation centers, and other cannabis-related operations, which would make robbing them a less lucrative endeavor. The result would be lower crime rates and safer employees, patients, and customers.

Changing federal law to allow banks to work with cannabis-related businesses would make life easier not only for business owners, but for medical cannabis patients, too. For many people with mobility issues or serious illness, every trip outside of the home must be carefully planned and may subject the patient to greater risk of further illness or injury than one who is not ill or dealing with mobility issues would face. When

<sup>6</sup> Payment Processors Purge All Ancillary Marijuana Startups After Trump. Inc. April 10, 2017.

<https://www.inc.com/will-yakowicz/payment-processors-purge-marijuana-related-businesses.html>

<sup>7</sup> Dispensary robberies have pot businesses calling for access to banks. New York Post. October 31, 2016.

<https://nypost.com/2016/10/31/dispensary-robberies-have-pot-businesses-calling-for-access-to-banks/>

<sup>8</sup> Slain dispensary security guard dreamed of becoming a police officer. The Denver Post. June 20, 2016. Updated October 2, 2016. <https://www.denverpost.com/2016/06/20/green-heart-marijuana-dispensary-security-guard-killed/>.

<sup>9</sup> Metro Denver Crime Stoppers highlight Marine cold case on Veterans Day. KDVR. November 11, 2018.

<https://kdvr.com/2018/11/11/metro-denver-crime-stoppers-highlight-marine-cold-case-on-veterans-day/>



cashless payments are not an option, patients often must plan to visit a bank or ATM in addition to a dispensary in order to retrieve their medication. The ability to pay without cash would reduce the number of trips patients must make in order to acquire medicine. Some jurisdictions allow cannabis delivery, but patients would still need to have cash on hand with which to pay the delivery driver. Giving cannabis-related businesses access to traditional banking services would enable online sales, which would facilitate patients' use of delivery services and increase delivery drivers' safety by reducing their cash on hand. Therefore, access to banking services for cannabis-related businesses would reduce the burden on, and barriers to access for, people with mobility issues or serious illness.

The Obama Administration recognized the need to allow some form of access to banking services for cannabis-related businesses but could not unilaterally change federal law in that regard. Instead, the Administration released guidance through the Financial Crimes Enforcement Network on February 14, 2014 that described how financial institutions might do business with these entities without being prosecuted under the law with the stated goal of enhancing "the availability of financial services for, and the financial transparency of, marijuana-related businesses."<sup>10</sup> However, relatively few financial institutions have begun servicing cannabis-related businesses since the guidance was issued. As of September 30, 2018, a total of 486 financial institutions (375 banks and 111 credit unions) are providing banking services for cannabis-related businesses in the United States.<sup>11</sup>

Outdated laws regarding access to financial services for cannabis-related businesses are placing undue burdens on patients, hampering business operations, limiting economic growth, and contributing to violence by making cannabis operations and their employees and customers the targets of criminals. It is well past time for an overhaul of banking laws to finally enhance the availability of financial services for, and the financial transparency of, cannabis-related businesses.

Americans for Safe Access is grateful to have been able to submit testimony on this important topic and would like to thank the members of the subcommittee again for giving us the opportunity to do so.

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<sup>10</sup> BSA Expectations Regarding Marijuana-Related Businesses. U.S. Treasury, Financial Crimes Enforcement Network. February 14, 2014.  
<https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>

<sup>11</sup> Marijuana Banking Update. U.S. Treasury, Financial Crimes Enforcement Network. No date.  
[https://www.fincen.gov/sites/default/files/shared/Marijuana\\_Banking\\_Update\\_September\\_2018.pdf](https://www.fincen.gov/sites/default/files/shared/Marijuana_Banking_Update_September_2018.pdf)

**United States House of Representatives  
Committee on Financial Services  
Subcommittee on Consumer Protection and Financial Institutions**

Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses

February 13, 2019

Statement of the American Property Casualty Insurance Association

**INTRODUCTION**

Dear Chairman Meeks, Ranking Member Luetkemeyer and Members of the Subcommittee:

The American Property and Casualty Insurance Association (APCIA) appreciates the opportunity to address this important hearing.

Representing nearly 60 percent of the U.S. property casualty insurance market, APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.

The following comments do not seek to promote views for or against the legalization of marijuana. However, to the extent that states decide to make marijuana “state legal”, APCIA supports full consideration of a broad range of necessary regulatory and enforcement standards and a resolution of the direct conflict between state and federal law on the legality of providing financial services, including insurance, to marijuana related business and activities. Specifically, APCIA supports adoption of comprehensive marijuana standards, including adoption of a federal safe harbor allowing voluntary coverage of state legal marijuana related activities as well as a number of other essential policy elements discussed in our testimony.

**BACKGROUND**

Thirty-three states and the District of Columbia have approved medicinal marijuana, eleven of which have also approved recreational use. These state laws conflict with federal law, which classifies marijuana as an illegal drug with no currently accepted medical use and a high potential for abuse.

Insurers are experiencing increased accident frequency, seemingly attributable to expanding marijuana use as we examine below. At the same time, in this “state legal” environment, insurers are being asked—and in some states required—to provide reimbursement for medical marijuana

and insurance coverage for marijuana-related commercial activities or even routine losses that may involve marijuana. Additionally, surety exposures are increasing because of state requirements for individuals or entities to maintain license bonds, tax bonds and even fidelity bonds. In this regard, insurers, including sureties, are like other financial services sector participants, such as banks, who are seeing increased demand for services or may be unwittingly handling transactions that may implicate marijuana directly or indirectly.

In fact, claims have been asserted against insurers for marijuana-related losses on property insurance policies in a number of states. See for examples—*Tracy v. USAA Cas. Ins. Co.* (D. HI 2012); *Green Earth Wellness Center v. Atain Specialty Ins.* (D. CO. 2016); *KVG Properties, Inc. v. Westfield Ins. Co.*, (6<sup>th</sup> Cir. 2018). At least one state Supreme Court has obligated insurers to cover medical marijuana under workers' compensation insurance.<sup>1</sup> At the same time, in California insurers are now exposed to even greater demand for products and services because of regulatory requirements adopted on January 16, 2019.<sup>2</sup>

Finally, and perhaps most importantly, property and casualty insurers are state regulated. We have state-based rate, form and underwriting regulation and state claims practice laws. This element can place even more emphasis on the "state legal" aspects of marijuana for our industry, and particularly when one considers that widely adopted and uniform state claims practice laws obligate insurers to make speedy claims decisions and payments.

Whether seeking to write marijuana business based on state law or under compulsion from litigation or otherwise, insurers are potentially exposed to liability arising from differences between state and federal legal systems.

#### LEGISLATIVE LANGUAGE ELIMINATING A CATCH 22 FOR INSURERS

In the last Congress, Congressman Perlmutter introduced the SAFE Act of 2018, H.R. 2215, to address this predicament. He should be commended for his foresight in trying to reasonably bridge the demands between the competing legal systems. Unfortunately, however, though that bill did address banking activities, it did not include protections for insurers and our consumers.

To avoid the legal limbo that insurers find themselves in because of inconsistent state and federal legality, we are asking that Congress enact language providing that insurers do not have legal exposure in situations when we are acting within state legal requirements related to marijuana. Insurers and banks want the same thing—no federal criminal exposure when acting lawfully under state law in this evolving space.

<sup>1</sup> *Vialpando v. Ben's Automotive Services*, 331 P.3d 975 (Ct. App. 2014), *cert denied*, 331 P.3d 924 (2014).

<sup>2</sup> See Bureau of Cannabis Control, Tit. 16 California Code of Regulations Div. 42, § 5008 (Licensee Bond), § 5308 (insurance requirements for distributors), § 5312 (insurance for cannabis transport) at <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/01/Order-of-Adoption-Clean-Version-of-Text.pdf>

Moreover, this is not to say all insurers, including surety bond writers, want to write this business. There are some who will, and some who will not. However, neither group believes they should be forced to write the business for a variety of reasons that we examine further below. Nonetheless, they may be compelled to make claims payments or underwrite the risk based on state law or be ordered to do so by a court, which is untenable.

To resolve this Catch 22, we suggest the inclusion of language such as the following in legislation on this subject:

“A depository institution or insurer that makes or receives payments or any valuable consideration or provides other financial services related to cannabis, with respect to a cannabis related activity that is legal under the laws of any State or a political subdivision of a State shall not be considered in violation of or liable under sections 1956 and 1957 of title 18, United States Code.”

This language recognizes that banks and insurers, acting appropriately and within the confines of state law, are not unfairly put at risk because federal law has not been as quick to evolve. We believe this a prudent step, and one we strongly ask the Committee to include in its legislation.

#### **IMPORTANT PUBLIC POLICY CONSIDERATIONS MUST INFORM EXAMINATION OF MARIJUANA**

In addition to addressing the potential legal jeopardy that the financial sector faces because of the federal treatment of marijuana, there are important policy considerations regarding marijuana that we wish to share with the committee. We urge the committee, and indeed all policymakers, to weigh the following recommendations carefully as they consider legislation related to marijuana.

##### **1. Improved Understanding of Marijuana and Its Risks**

It is indisputable that marijuana is an intoxicant and impairs those who have used it. The Highway Loss Data Institute found that collision claim frequency in Colorado, Nevada, Oregon, and Washington, all of which legalized marijuana for recreational use, was six percent higher than their neighboring states.<sup>3</sup> In Colorado, the Rocky Mountain High Intensity Drug Trafficking Area’s Strategic Intelligence Unit released a report that found traffic deaths involving drivers who tested positive for marijuana more than doubled following the legalization of recreational marijuana. Nonetheless, science and awareness of the risks associated with marijuana lag.

For example, the lack of objective marijuana impairment standards or a reliable measurement tool is a particular challenge for both auto safety and employers trying to maintain a drug free workplace. While many states allow for termination of an employee who tests positive for drugs or alcohol, a positive test for marijuana is not necessarily an indicator of impairment. THC, the

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<sup>3</sup> *Crashes rise in first states to begin legalized retail sales of recreational marijuana*, IIHS News, October 18, 2018 at <https://www.iihs.org/iihs/news/desktopnews/crashes-rise-in-first-states-to-begin-legalized-retail-sales-of-recreational-marijuana>

psychoactive component of marijuana, can remain in a user's system for weeks after consumption.

Government agencies have faced difficulties in developing marijuana impairment standards or determining medical efficacy because marijuana research has been severely stunted by federal prohibitions. In 2017, the National Highway Transportation Safety Administration (NHTSA) released a study on the effects of marijuana-impaired driving and concluded that no reliable threshold or measurement methodology currently exists.<sup>4</sup> As a result, NHTSA found that the best method of detecting and prosecuting drivers is a well-trained law officer's able to identify the signs of impairment.

To address these critical lapses in our understanding of marijuana and its hazards, APCIA urges the Committee and Congress to:

- Support increased scientific research to develop objective marijuana impairment standards for auto and workplace safety and medical efficacy by allowing the Department of Transportation to fund highway safety research at the state level based on the laws of the respective states; and
- Promote increased awareness and education for the public and policymakers on the dangers of marijuana-impaired driving or working.

These are simple, common-sense needs to enhance our knowledge and understanding of marijuana and its risks, and to protect the roads, our workplaces and the public.

## **2. Adopt the Strongest Marijuana Safety Best Practices and Enforce Them**

As with any intoxicant, marijuana impairment on the job or on the roads will harm people and property. Public policy for marijuana must be informed by both the harm that can be done when a person is impaired and the need to reduce that potential harm.

While there is universal support for both enforcing and reducing marijuana-impaired driving, the science of marijuana impairment is not yet sufficient to advance a testing regime akin to current standards for alcohol field sobriety. NHTSA is right—now we need well-trained law enforcement officers who can identify signs of impairment. But, that is not enough.

In workplace safety, unfortunately, we are seeing something of a retreat from established standards for employee sobriety and the ability of employers to act based on intoxication. Many states provide some type of employment protection for medical marijuana patients. In other states, employers are not allowed to take adverse action based on a positive drug test, while still other states specify that medical marijuana users are entitled to disability accommodations and protections under state disability laws. Massachusetts, which recently legalized recreational

<sup>4</sup> *Marijuana-Impaired Driving: A Report to Congress*, National Highway Transportation Safety Administration (July 2017) at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>

marijuana, is expected to consider further legislation this year to prohibit the termination of employees for using marijuana outside of work. The implications for allowing working-while-high are enormous.

While we, of course, understand that unimpaired employee protections may make sense under some circumstances, we strongly believe that employers must be empowered to protect their workplaces, employees and customers from obviously impaired employees.

We urge the Committee and Congress to support the same kinds of standards for marijuana that we see with alcohol impairment on the roads and in the workplace:

- Support the strongest marijuana safety best practices from the states and Canada, some of which currently include:
  - a. Mandatory warning labels on marijuana products about driving and working while under the influence of marijuana;
  - b. 21 as the minimum age to purchase or consume marijuana; and
  - c. Zero tolerance for underage drivers to operate a vehicle with any evidence of marijuana consumption.
- Support strong law enforcement standards for marijuana safety, including law enforcement training; and
- Support employers' rights to a drug free workplace

### **3. State Mandates on Property and Casualty Insurers Are Counter Productive**

As the states embrace greater marijuana legalization, we have seen increasing demands for insurance products and services for marijuana activities and losses. The recent movement toward state legalization of marijuana first embraced legality for therapeutic or medical use. In turn, this resulted in the first state court finding that there is an obligation for workers' compensation insurance to cover treatment with marijuana in New Mexico.<sup>5</sup> Of course, this is while marijuana remains illegal under federal law.

State marijuana mandates on our industry are wrong. First and foremost, marijuana continues to be illegal under federal law. In such an environment, any coverage mandate is counterproductive, as it may discourage the very capital formation local public policy decision makers want because it will inject greater legal uncertainty and conflict for insurers.

Secondly, given the already examined paucity of reliable knowledge, science and study on marijuana use, its efficacy as medicine can neither be confirmed nor safe dosing established.

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<sup>5</sup> *Vialpando v. Ben's Automotive Services*, 331 P.3d 975 (Ct. App. 2014), *cert denied*, 331 P.3d 924 (2014). Other states have also found marijuana compensable under workers compensation including administrative law decisions in Connecticut (*Petrini v. Marcus Dairy, Inc.*, 6021 CRB-7-15-7 (May 12, 2016)), and New Jersey (*Watson and 84 Lumber* (unpublished)).

Moreover, necessary impairment standards cannot be established or enforced for the same reasons. A dedicated effort to increase scientific research to develop objective impairment standards for auto and workplace safety and medical efficacy is essential.

Finally, given the history of marijuana as illegal, insurers simply have little, if any, knowledge of it as an insurable risk. In the absence of experience, it would be virtually impossible to meet state coverage mandates.

For all these reasons, APCIA:

- Opposes insurer reimbursement mandates for medical marijuana; and
- Opposes state marijuana coverage mandates on insurers.

To be clear, our intent is neither to support nor oppose marijuana legalization, but rather to avoid unintended or counterproductive consequences for our consumers and industry that could result in adverse outcomes for the very jurisdictions seeking to advance legalization. Moreover, if the legal uncertainty presented by the dueling state and federal treatment of marijuana could be resolved, that might allow for the more orderly development of products going forward if our industry is permitted to develop our understanding of this risk and science-based research on marijuana without burdensome mandates. Until then, state coverage mandates on our industry are premature.

#### **CONCLUSION**

APCIA appreciates the Committee holding this important hearing and seeking our input. We strongly urge the Committee to resolve the legal predicament insurers currently face under competing state and federal laws. APCIA would be happy to answer any questions you may have and to engage with the committee, its members, staff or other stakeholders.



February 11, 2019

The Honorable Maxine Waters  
Chairwoman  
House Committee on Financial Services Committee  
2129 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairwoman Waters,

On behalf of the 350 credit unions in California and Nevada, we write to express our appreciation for the committee's hearing regarding banking of cannabis related businesses (CRBs). In 2016, both California and Nevada legalized adult recreational use of cannabis in addition to their state's already existing medical cannabis laws.

While credit unions do not engage in the debate over legalization, credit unions do support the ability to lawfully serve businesses that engage in activities authorized under their state laws, even when such activity may be inconsistent with federal law. Further, as the association for California and Nevada's credit unions, we continue to educate our state government leaders that the only solution to bringing all CRBs into the banking system must emanate from Congress.

California has published findings from the immediate past State Treasurer, who conducted a yearlong assessment via the California Treasurer's Cannabis Working Group of which we were an active member. The recently published report also acknowledged that the only viable resolution is one from Congress, and that options such as a state operated and insured bank are not practical. This is a message we continue to educate and advocate to state government officials, legislators, and businesses desiring to bring financial services to credit unions.

As not for profit, financial cooperatives owned by our members to provide those members financial services, credit unions can be a resource in bringing large amounts of CBR related cash off the streets, providing for greater transparency for law enforcement, and thus aiding in public safety. Currently, only a few credit unions operate in this space. These credit unions work diligently to ensure they are in full compliance with the February 2014 guidance issued by the Financial Crimes Enforcement Network (FinCEN). Additionally, under the Bank Secrecy Act as a part of the FinCEN guidance, these credit unions file numerous Suspicious Activity Reports (SARs) and Currency Transaction Records (CTRs).

Addressing the continual filing of these reports is a topic the committee should explore, as the more such filings are made on CRBs, the more law enforcement must investigate for criminal activity. In addition to adhering to compliance, these credit unions take on a variety of risks such as adequate processing technologies, specialized equipment and providing safety for their employees – and members. It should be noted that following the rescission of the Department of Justice's Cole Memo, these credit unions prepared exit strategies on the assumption the FinCEN guidance would be revoked. To date, that guidance remains in place.

Our hope is that your hearing will explore a sound legislative proposal, such as the Safe Banking Act, which will provide a safe harbor for those credit unions adhering to the strict guidance for banking these businesses. Indemnifying a credit union in full compliance can serve as a top asset for law enforcement working to filter legal vs. criminal enterprises.

It should be noted that credit unions recognize a need for a larger solution for additional financial service products that go beyond a basic business account. While these businesses processing large volumes of cash, they are ineligible for savings, lending, payment card processing and other products and services a traditional business



account holder receives. This impacts their ability for future planning, capital projects and adding to their employee base.

Banking CBRs is also a problem for ancillary and secondary businesses that provide service for a CRB. For example, an Information Technology firm that sells hard and software to a CRB is likely receiving a cash payment, which in turn forces their financial institution to file a SAR or CTR, potentially leading to a law enforcement investigation. Additionally, last year the Small Business Administration (SBA) issued guidance to SBA lenders stating their objection to any government guarantees aimed at providing services to the CRB sector.

As the witnesses will likely attest to, the largest benefit of a banking safe harbor will be enhanced public safety. Numerous cases of theft, armed robbery, mistaken identities, and deaths due to the large volumes of cash have occurred. Allowing banking services for CRBs will greatly curtail these criminal offenses. This is our greatest concern, that someone's life is placed in danger due to nothing other than going to their place of business.

Again, thank you for conducting this hearing. We hope it will lead to a mark-up of a productive resolution to cannabis related banking. If the credit unions of California or Nevada can be of service to you in your deliberations, please consider us a resource.

Thank you,



Diana Dykstra  
President and Chief Executive Officer  
California and Nevada Credit Union Leagues



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## **Marijuana: Medical and Retail— Selected Legal Issues**

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April 8, 2015

Congressional Research Service

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CRS REPORT  
Prepared for Members and  
Committees of Congress

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## Summary

The federal Controlled Substances Act (CSA) outlaws the possession, cultivation, and distribution of marijuana except for authorized research. More than 20 states have regulatory schemes that allow possession, cultivation, and distribution of marijuana for medicinal purposes. Four have revenue regimes that allow possession, cultivation, and sale generally. The U.S. Constitution's Supremacy Clause preempts any state law that conflicts with federal law. Although there is some division, the majority of state courts have concluded that the federal-state marijuana law conflict does not require preemption of state medical marijuana laws. The legal consequences of a CSA violation, however, remain in place. Nevertheless, current federal criminal enforcement guidelines counsel confining investigations and prosecutions to the most egregious affront to federal interests.

Legal and ethical considerations limit the extent to which an attorney may advise and assist a client intent on participating in his or her state's medical or recreational marijuana system. Bar associations differ on the precise boundaries of those limitations.

State medical marijuana laws grant registered patients, their doctors, and providers immunity from the consequences of state law. The Washington, Colorado, Oregon, and Alaska retail marijuana regimes authorize the commercial exploitation of the marijuana market in small taxable doses.

The present and potential consequences of a CSA violation can be substantial. Cultivation or sale of marijuana on all but the smallest scale invites a five-year mandatory minimum prison term. Revenues and the property used to generate them may merely be awaiting federal collection under federal forfeiture laws. Federal tax laws deny marijuana entrepreneurs the benefits available to other businesses. Banks may afford marijuana merchants financial services only if the bank files a suspicious activity report (SAR) for every marijuana-related transaction that exceeds certain monetary thresholds, and only if it conducts a level of due diligence into its customers' activities sufficient to unearth any affront to federal interests.

Marijuana users may not possess a firearm or ammunition. They may not hold federal security clearances. They may not operate commercial trucks, buses, trains, or planes. Federal contractors and private employers may be free to refuse to hire them and to fire them. If fired, they may be ineligible for unemployment compensation. They may be denied federally assisted housing.

At the heart of the federal-state conflict lies a disagreement over dangers and benefits inherent in marijuana use. The CSA authorizes research on controlled substances, including those in Schedule I such as marijuana, that may address those questions. Members have introduced a number of bills in the 114<sup>th</sup> Congress that speak to the conflict. Additionally, a few marijuana-related provisions were enacted into law late in the 113<sup>th</sup> Congress.

This report is available in an abridged form, without footnotes or citations to authority, as CRS Report R43437, *Marijuana: Medical and Retail—An Abbreviated View of Selected Legal Issues*, by Todd Garvey and Charles Doyle. Portions of this report have been borrowed from CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh.

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## Introduction

Federal law classifies marijuana as a Schedule I Controlled Substance.<sup>1</sup> As a result, it is a federal crime to grow, sell, or merely possess the drug. In addition to facing the prospect of a federal criminal prosecution, those who violate the federal Controlled Substances Act (CSA) may suffer a number of additional adverse consequences under federal law. For example, federal authorities may confiscate any property used to grow marijuana or facilitate its sale or use; marijuana users may lose their jobs, their homes, or their right to possess a firearm or ammunition; and sellers of marijuana may lose the tax benefits and banking services that other merchants enjoy, and ultimately their businesses.

Nevertheless, without federal statutory sanction, more than 20 states have established medical marijuana regulatory regimes. Four have gone further and “legalized” marijuana under state recreational marijuana laws.<sup>2</sup> State officials lack the constitutional authority necessary to trump conflicting federal law. Federal officials, however, lack the unlimited resources necessary to trump the impact of conflicting state law.

The following is an analysis of some of the legal issues the situation has generated and some of the proposals to resolve them.

## Background

Federal regulation of the drugs, chemicals, and plants now considered controlled substances began with the Harrison Narcotics Act of 1914.<sup>3</sup> Relying upon its constitutional power to tax, regulate commerce, and implement the nation’s treaty obligations,<sup>4</sup> Congress used the legislation to establish a system under which it taxed lawful medicinal use and proscribed abuse.<sup>5</sup>

<sup>1</sup> Section 202(c) of the Controlled Substances Act (21 U.S.C. §812(c), Sch.I(c)(10)).

<sup>2</sup> As of the date of this report, the retail marijuana laws in Alaska and Oregon had been enacted but were not yet operational. The terms “recreational marijuana laws” and “retail marijuana laws” are used interchangeably in this report. Some legislators, advocates, and commentators refer to the laws alternatively as “recreational marijuana laws,” “retail marijuana laws,” “adult social marijuana laws,” or “states’ rights marijuana laws.” *E.g.*, Malanie, Reid, The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana, 44 N.MEX. L.REV. 169, 171 (2014) (“Colorado and Washington have legalized marijuana use for recreational purposes”); Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders, 91 ORE. L. REV. 869, 878 n.35 (2013) (“Many in the marijuana law reform movement dislike the term ‘recreational use’ and prefer the phrase ‘adult use.’ ... ‘I don’t use the term recreational, I prefer adult social use’”); H.R. 964 (Respect States’ and Citizens’ Rights Act of 2013); Colorado Retail Marijuana Code, COLO. REV. STAT. ANN. §§12-43.4-101, *et seq.*

<sup>3</sup> 38 Stat. 785 (1914).

<sup>4</sup> U.S. Const. Art. I, §8, cls. 1, 3, 18; Art. II, §2, cl.2.

<sup>5</sup> H.Rept. 63-23, at 1 (1913) (“... [T]he obligations by which [the United States] is bound by virtue of the international opium convention signed at the Hague January 23, 1912, should be sufficient evidence of the necessity for the passage of Federal legislation to control our foreign and interstate traffic in opium, coca leaves, their salts, derivatives, and preparations.... But there is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the States more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels”), quoted in accord, S.Rept. 63-258, at 3 (1914).

Little more than two decades later, Congress supplemented the Harrison Act with the Marihuana Tax Act of 1937,<sup>6</sup> explicitly noting reliance on its tax, commerce, and territorial powers.<sup>7</sup> The Marihuana Act replicated the Harrison Act's procedures in large measure<sup>8</sup> and adopted by cross-reference the Harrison Act's penalty structure.<sup>9</sup> It became apparent over time, however, that the Marihuana Act served no real revenue purpose and in fact had "become, in effect, solely a criminal law imposing sanctions upon persons who [sold], acquire[d], or possess[ed] marihuana."<sup>10</sup>

This proved problematic when, in the late 1960s, the Supreme Court pointed out the Fifth Amendment difficulties inherent in a tax-based enforcement structure like that of the Harrison and Marihuana Tax Acts. The Court in *Marchetti* observed that a gambler's "obligations to register and to pay the [federal] occupational tax created ... real and appreciable ... hazards of self-incrimination" under federal and state anti-gambling laws.<sup>11</sup> The same day, in *Haynes*, it held that by the same token "the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm ... or for possession of an unregistered firearm" under the tax-based structure of the National Firearms Act.<sup>12</sup> Finally, in *Leary*, it struck closer to home. There, it held that the Fifth Amendment privilege against self-incrimination provided a full defense to a charge of transporting marijuana acquired without paying the Marihuana Tax Act transfer tax.<sup>13</sup>

Within months, the Senate Judiciary Committee reported out a Commerce Clause/treaty-based controlled substances proposal that featured most of the components ultimately found in the Controlled Substances Act.<sup>14</sup> It classified marijuana with the most tightly regulated substances in

<sup>6</sup> 50 Stat. 551 (1937).

<sup>7</sup> H.Rept. 75-792 at 1-3, (1937) ("The purpose of H.R. 6906 is to employ the Federal taxing power to raise revenue from the marihuana drug traffic and to discourage the widespread use of the drug by smokers and drug addicts.... This bill is modeled upon both the Harrison Narcotics Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and coca leaves, and firearms, respectively.... Your committee has examined the constitutionality of this bill and is satisfied that it is a valid revenue measure. The law is well settled that a revenue measure will not be held invalid as an attempt to regulate, under the guise of the taxing power, a subject matter reserved to the States under the tenth amendment, if it appears on its face to be a revenue measure and contains no regulatory provisions except those reasonably related to the collection of the revenue.... In addition, certain provisions of the bill may be sustained under the power of Congress to regulate commerce and the power of Congress over the District of Columbia and Territories and possessions of the United States"); see also, S.Rept. 75-900, at 2-3 (1937) ("The purpose of H.R. 6906 is to employ the Federal taxing power to raise revenue from the marihuana drug traffic and to discourage the widespread use of the drug by smokers and drug addicts.... This bill is modeled upon both the Harrison Narcotics Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and coca leaves, and firearms, respectively") (but including no other explicit reference to constitutional authority).

<sup>8</sup> Marihuana Tax Act, §§2-14, 50 Stat. 551-56 (1937).

<sup>9</sup> *Id.* at §7(e), 50 Stat. 555 (1937) ("All provisions of law (including penalties) applicable in respect of the taxes imposed by the Act of December 17, 1914 (38 Stat. 785; U.S.C. 1934 ed. title 26, §§1040-1061, 1383-1391), as amended, shall, insofar as not inconsistent with this Act, be applicable in respect of the taxes imposed by this Act").

<sup>10</sup> The President's Commission on Law Enforcement and Administration of Justice: Task Force on Narcotics and Drug Abuse, *Task Force Report: Narcotics and Drug Abuse*, 12 (1967).

<sup>11</sup> *Marchetti v. United States*, 390 U.S. 39, 48 (1968); see also, *Grosso v. United States*, 390 U.S. 62, 64-6 (1968).

<sup>12</sup> *Haynes v. United States*, 390 U.S. 85, 100 (1968).

<sup>13</sup> *Leary v. United States*, 395 U.S. 6, 29 (1969).

<sup>14</sup> S.Rept. 91-613 (1969). In *Gonzales v. Raich*, the U.S. Supreme Court ruled that Congress had the constitutional authority under the Commerce Clause to prohibit the wholly intrastate cultivation or possession of marijuana for medical purposes, despite state laws that permit such activity. 545 U.S. 1, 32-33 (2005); for more information about (continued...)

Schedule I, but punished its abuse less severely, explaining in its critique of an earlier proposal that

[T]o impose the same high mandatory minimum penalties for marihuana-related offenses as for LSD and heroin offenses is inequitable in the face of a considerable amount of evidence that marihuana is significantly less harmful and dangerous than LSD or heroin.

It had also become apparent that the severity of penalties including the length of sentences does not affect the extent of drug abuse and other drug-related violations. The basic consideration here was that the increasingly longer sentences that had been legislated in the past had not shown the expected overall reduction in drug law violations. The opposite had been true notably in the case of marihuana. Under Federal law and under many States laws marihuana violations carry the same strict penalties that are applicable to hard narcotics, yet marijuana violations have almost doubled in the last 2 years alone.

In addition, the severe drug laws specifically as applied to marihuana have helped create a serious clash between segments of the youth generation and the Government. These youths consider the marihuana laws hypocritical and unjust. Because of these laws the marihuana issue has contributed to the broader problem of alienation of youth from the general society and to a general feeling of disrespect for the law and judicial process.<sup>15</sup>

Consistent with this view, it called for the establishment of a study commission to examine and make recommendations on the troubling marijuana-related issues.<sup>16</sup> The Commission's final report recommended the legalization of possession of marijuana for private personal use, but that the Controlled Substance Act otherwise remain unchanged.<sup>17</sup>

## Controlled Substances Act Today

Congress enacted the Controlled Substances Act<sup>18</sup> as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>19</sup> The purpose of the CSA is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes. The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance's medical use, potential for abuse, and safety or dependence liability.<sup>20</sup>

(...continued)

this decision, see CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas.

<sup>15</sup> S.Rept. 91-613 at 1-2.

<sup>16</sup> *Id.* at 10 ("The study shall include, but need not be limited to, the following matters: 1. Identification of existing gaps in our knowledge of marihuana. 2. An intensive examination of the important medical and social aspects of marihuana use. 3. Surveys of the extent and nature of marihuana use. 4. Studies of the pharmacology and effects of marihuana. 5. Studies of the relation of marihuana use to crime and juvenile delinquency. 6. Studies of the relation between marihuana and the use of other drugs").

<sup>17</sup> National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Prospective*, 458, 466 (2d Rep. 1973).

<sup>18</sup> 21 U.S.C. §§801, *et seq.*

<sup>19</sup> P.L. 91-513, 84 Stat. 1236 (1970).

<sup>20</sup> 21 U.S.C. §§811-812.

Schedule I substances are deemed to have no currently accepted medical use in treatment and can be used only in very limited circumstances, whereas substances classified in Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. The CSA requires persons who handle controlled substances (such as drug manufacturers, wholesale distributors, doctors, hospitals, pharmacies, and scientific researchers) to register with the Drug Enforcement Administration (DEA) in the U.S. Department of Justice (DOJ), the federal agency that administers and enforces the CSA.<sup>21</sup> Such registrants are subject to strict requirements regarding drug security, recordkeeping, reporting, and maintaining production quotas, in order to minimize theft and diversion.<sup>22</sup>

Because controlled substances classified as Schedule I drugs have “a high potential for abuse” with “no currently accepted medical use in treatment in the United States” and lack “accepted safety for use of the drug [] under medical supervisions,”<sup>23</sup> they may not be dispensed under a prescription, and such substances may be used only for bona fide, federal government-approved research studies.<sup>24</sup> Under the CSA, only doctors licensed by the Drug Enforcement Administration are allowed to prescribe controlled substances listed in Schedules II-V to patients.<sup>25</sup> Federal regulations stipulate that a lawful prescription for a controlled substance may be issued only “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”<sup>26</sup>

The CSA establishes an administrative mechanism for substances to be controlled (added to a schedule); decontrolled (removed from the scheduling framework altogether); and rescheduled or transferred from one schedule to another.<sup>27</sup> Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the DEA, the U.S. Department of Health and Human Services (HHS), or by petition by any interested person.<sup>28</sup> Petitions for rescheduling marijuana have been largely unsuccessful.<sup>29</sup> Congress may also change the scheduling status of a drug or substance through legislation.

<sup>21</sup> The Attorney General delegated his authority under the CSA to the DEA Administrator pursuant to 21 U.S.C. §871(a); 28 C.F.R. §0.100(b).

<sup>22</sup> For more information about these requirements, see CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh.

<sup>23</sup> 21 U.S.C. §812(b)(1).

<sup>24</sup> 21 U.S.C. §823(f).

<sup>25</sup> See 21 C.F.R. §1306.03 (persons entitled to issue prescriptions).

<sup>26</sup> 21 C.F.R. §1306.04; *United States v. Moore*, 423 U.S. 122 (1975).

<sup>27</sup> The procedures for these actions are found at 21 U.S.C. §811.

<sup>28</sup> 21 U.S.C. §811(a).

<sup>29</sup> At one point an administrative law judge did recommend rescheduling, but that represents the high water mark for the petition efforts; see, generally, *Americans for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013); and *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1133 (D.C. Cir. 1994), citing, *National Organization for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974); *National Organization for the Reform of Marijuana Laws v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977); *National Organization for the Reform of Marijuana Laws v. Dept of Health, Ed. and Welfare*, No. 79-1660 (D.C. Cir. Oct. 16, 1980); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936 (D.C. Cir. 1991).



## Penalties

Federal civil and criminal penalties are available for anyone who manufactures, distributes, imports, or possesses controlled substances in violation of the CSA (both “regulatory” offenses as well as illicit drug trafficking and possession).<sup>30</sup>

When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug.<sup>31</sup> Today, marijuana is still categorized as a Schedule I controlled substance and is therefore subject to the most severe restrictions contained within the CSA. Pursuant to the CSA, the unauthorized cultivation, distribution, or possession of marijuana is a federal crime.<sup>32</sup> Although various factors contribute to the ultimate sentence received, the mere possession of marijuana generally constitutes a misdemeanor subject to up to one year imprisonment and a minimum fine of \$1,000.<sup>33</sup> A violation of the federal “simple possession” statute that occurs after a single prior conviction under any federal or state drug law triggers a mandatory minimum fine of \$2,500 and a minimum imprisonment term of 15 days (up to a maximum of two years); if the defendant has multiple prior drug offense convictions at the time of his or her federal simple possession offense, the sentencing court must impose a mandatory minimum fine of \$5,000 and a mandatory minimum imprisonment term of 90 days (up to a maximum term of three years).<sup>34</sup> On the other hand, the cultivation or distribution of marijuana, or the possession of marijuana with the intent to distribute, is subject to more severe penalties, ranging from imprisonment for five years to imprisonment for life.<sup>35</sup> Moreover, property associated with the offense may be confiscated without or with any prior or accompanying criminal conviction.<sup>36</sup>

## Forfeiture

Either in addition to, or in lieu of, bringing criminal prosecutions, the Department of Justice may choose to rely more heavily on the civil forfeiture provisions of the CSA in order to disrupt the operation of marijuana dispensaries and production facilities. Forfeiture is a penalty associated with a particular crime in which property is confiscated or otherwise divested from the owner and

<sup>30</sup> For a detailed description of the CSA’s civil and criminal provisions, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

<sup>31</sup> 21 U.S.C. §812(c).

<sup>32</sup> Very narrow exceptions to the federal prohibition do exist. For example, one may legally use marijuana if participating in a U.S. Federal and Drug Administration-approved study or participating in the Compassionate Investigational New Drug program.

<sup>33</sup> 21 U.S.C. §844(a).

<sup>34</sup> *Id.*

<sup>35</sup> The escalating terms of imprisonment for possession of various amounts of marijuana are as follows: (1) *Less than 50 kilograms (110lbs.)/fewer than 50 plants*: imprisonment for not more than 5 years, 21 U.S.C. §841(b)(1)(D); (2) *Less than 100 kilograms (220lbs) or less than 100 plants*: imprisonment for not more than 20 years, 21 U.S.C. §841(b)(1)(C); (3) *100 kilograms (220lbs) or more /100 plants or more*: imprisonment for not less than 5 years or more than 40 years, 21 U.S.C. §841(b)(1)(B); (4) *1000 kilograms or more/1000 plants or more*: imprisonment for not less than 10 years or more than life, 21 U.S.C. §841(b)(1)(A); (5) *Drug kingpin (over 5 or more others & substantial income)*: imprisonment for not less than 20 years or more than life, 21 U.S.C. §848(a), (c); and (6) *Drug kingpin involving (a) 30,000 kilograms or more/30,000 plants or more, or (b) \$10 million or more in annual gross receipts*: imprisonment for life, 21 U.S.C. §848(b)(2)(emphasis added).

<sup>36</sup> 21 U.S.C. §853 (criminal forfeiture of the proceeds and property derived from a violation as well as property used to facilitate violation); 21 U.S.C. §881 (civil/administrative forfeiture of conveyances and real property used in a violation and the proceeds of a violation and property traceable to the proceeds of a violation).

forfeited to the government, in accordance with constitutionally required due process procedures.<sup>37</sup>

Property forfeiture is used both to enforce criminal laws and to deter crime. Forfeitures are classified as civil or criminal depending on the nature of the judicial procedure which ends in confiscation. Civil forfeiture is ordinarily the product of a civil, *in rem* (against the property) proceeding in which the property is treated as the offender. No criminal charges are necessary against the owner, landlord, or mortgage holder because the guilt or innocence of the property owner, landlord, mortgage holder, or anyone else with a secured interest in the property is irrelevant; it is enough that the property was involved in, or otherwise connected to, an illegal activity (in which forfeiture is authorized).<sup>38</sup> Criminal forfeiture proceedings, on the other hand, are *in personam* (against the person) actions, and confiscation is possible only upon the conviction of the owner of the property and only to the extent of the defendant's interest in the property.<sup>39</sup> Property that is subject to forfeiture includes both the direct and indirect proceeds of illegal activities as well as any property used, or intended to be used, to facilitate that crime.<sup>40</sup>

Section 511 of the CSA (21 U.S.C. §881) makes a wide array of property associated with violations of the CSA subject to seizure by the Attorney General and forfeiture to the United States. Property subject to the CSA's civil forfeiture provision includes any controlled substance that has been manufactured, distributed, dispensed, acquired, or possessed in violation of federal law, as well as any equipment, firearm, money, mode of transportation, or real property *used or intended to be used to facilitate a violation of the CSA*.<sup>41</sup> In order to seize the covered property, the government need only show that the property is subject to forfeiture by a preponderance of the evidence.<sup>42</sup> Once forfeited, the Attorney General may destroy the controlled substances seized, and sell the other property at public auction.<sup>43</sup> After expenses of the forfeiture proceeding are recouped, excess funds are forwarded to the DOJ Asset Forfeiture Fund.<sup>44</sup>

Forfeiture proceedings are generally less resource intensive than a criminal prosecution and have been used in the past against medical marijuana dispensaries.<sup>45</sup> In practice, DOJ would be able to seize and liquidate property, both real and personal, associated with marijuana production,

<sup>37</sup> U.S. CONST. amend. V ("No person shall ... be deprived of ... property, without due process of law ...").

<sup>38</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-90 (1974) (confiscation of a yacht upon which those to whom it was leased smoke marijuana, because the owners failed to show that they had done all they possibly could to avoid the illegal use of their property). In controlled substances cases, there is a limited statutory innocent owner defense if the owner of an interest in the property can show by a preponderance of the evidence that either he "(i) did not know of the conduct giving rise to the forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property," 18 U.S.C. §983(d).

<sup>39</sup> For a more extensive discussion of forfeiture generally, see CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

<sup>40</sup> See, e.g., 21 U.S.C. §881(a)(6)(proceeds), and 21 U.S.C. §881(a)(2)(products and equipment used to facilitate the offense).

<sup>41</sup> 21 U.S.C. §881(a)(emphasis added).

<sup>42</sup> 18 U.S.C. §981(b).

<sup>43</sup> 21 U.S.C. §881(e).

<sup>44</sup> 21 U.S.C. §881(e).

<sup>45</sup> See, e.g., U.S. Dep't of Justice, *Press Release: Federal Authorities Take Enforcement Actions Against Commercial Marijuana Stores in Orange County Cities of Anaheim and La Habra*, August 21, 2012, available at <http://www.justice.gov/usao/cac/Pressroom/2012/111.html>.

distribution, or retail sale facilities, without bringing any criminal action. As explained above, a civil asset forfeiture proceeding is a civil proceeding against the property in question. Although an interested party may object to the seizure, given that such facilities are in clear violation of federal law, so long as the property is indeed being used for marijuana-related activities, it would appear unlikely that many successful challenges to these actions could be waged.<sup>46</sup>

## Developments in the States

Most of the states have legislation modeled after the federal Controlled Substances Act.<sup>47</sup> Over the years, some have reduced possession of small amounts of marijuana to a civil offense under state law,<sup>48</sup> while the District of Columbia went a step further and fully legalized possession of small amounts of marijuana and personal cultivation of a small number of marijuana plants.<sup>49</sup> More than 20 states also have established a state law exception for medical marijuana.<sup>50</sup> Colorado

<sup>46</sup> See David Downs, *City of Oakland Loses Lawsuit Against Department of Justice; Harborside Forfeiture Case Proceeds*, February 15, 2013, EAST BAY EXPRESS, available at <http://www.eastbayexpress.com/LegalizationNation/archives/2013/02/15/city-of-oakland-loses-lawsuit-against-department-of-justice-harborside-forfeiture-case-proceeds> (describing how a federal magistrate judge dismissed the City of Oakland's lawsuit against Attorney General Eric Holder and U.S. Attorney Melinda Haag, which sought to prevent Haag from seizing the building leased by Harborside Health Center, one of the world's largest medical marijuana dispensaries. The judge held that only the dispensary and its landlords have legal standing to challenge the U.S. government's attempted seizure of the property.).

<sup>47</sup> ALA. CODE §§20-2-1 to 20-2-190; ALASKA STAT. §§11.71.010 to 11.71.900, 17.30.010 to 17.30.900; ARIZ. REV. STAT. ANN. §§36-2501 to 36-2553; ARK. CODE ANN. §§5-64-101 to 5-64-608; CAL. HEALTH & SAFETY CODE §§11000 to 11657; COLO. REV. STAT. ANN. §§18-18-101 to 18-18-605; CONN. GEN. STAT. ANN. §§21a-240 to 21a-283; Del. Code Ann. tit.16 §§4701 to 47696; FLA. STAT. ANN. §§893.01 to 893.165; GA. CODE §§16-13-20 to 16-13-65; HAWAII REV. STAT. §§329-1 to 329-128; IDAHO CODE §§37-2701 to 37-2751; 720 ILL. COMP. STAT. ANN. §§570/100 to 570/603; IND. CODE ANN. §§35-48-1-1 to 35-48-7-15; IOWA CODE ANN. §§124.101 to 124.602; KAN. STAT. ANN. §§65-41-1 to 65-4166; KY. REV. STAT. ANN. §§218A.010 to 218A.993; LA. REV. STAT. ANN. §§40:961 to 40:995; ME. REV. STAT. ANN. tit.17-A §§1101 to 1118; MD. CODE ANN. Crim. Law §§5-101 to 5-1101; MASS. GEN. LAWS ANN. ch. 94C §§1 to 48; Mich. Comp. Laws Ann. §§333.7101 to 333.7545; MINN. STAT. ANN. §§152.01 to 152.20; MISS. CODE ANN. §§41-29-101 to 41-29-185; MO. ANN. STAT. §§195.010 to 195.320; MONT. CODE ANN. §§50-32-101 to 50-32-405; NEB. REV. STAT. §§28-401 to 28-457; NEV. REV. STAT. §§453.011 to 453.740; N.H. REV. STAT. ANN. §§318-B:1 to 318-E:1; N.J. STAT. ANN. §§2C:35-1 to 2C:35-24, 2c:36-1 to 2C:36-10, 24:21-1 to 24-21-54; N.MEX. STAT. ANN. §§30-31-1 to 30-31-41; N.Y. PUBLIC HEALTH LAW §§3300 to 3396; N.C. GEN. STAT. §§90-86 to 90-113.8; N.D. CENT. CODE §§19-03.1-01 to 19-03.1-46; OHIO REV. CODE ANN. §§3719.01 to 3719.99; OKLA. STAT. ANN. tit.63 §§2-101 to 2-610; ORE. REV. STAT. §§475.005 to 475.295, 475.940 to 475.999; 35 PA. STAT. ANN. §§780-101 to 780-144; R.I. GEN. LAWS §§21-28-1.01 to 21-28-6.02; S.C. CODE ANN. §§44-53-110 to 44-53-590; S.D. COD. LAWS §§34-20B-1 to 34-20B-114; TENN. CODE ANN. §§39-17-401 to 39-17-434, 53-11-301 to 53-11-452; TEX. HEALTH & SAFETY CODE ANN. §§481.001 to 481.005; UTAH CODE ANN. §§58-37-1 to 58-37-21; VA. CODE §§54.1-3400 to 54.1-3472; WASH. REV. CODE ANN. §§69.50.101 to 69.50.609; W.VA. CODE ANN. §§60A-1-101 to 60A-6-605; WIS. STAT. ANN. §§961.001 to 961.62; WYO. STAT. §§35-7-1001 to 35-7-1062. Vermont has a Regulated Drugs Act that roughly corresponds to the Controlled Substances Act, Vt. STAT. ANN. tit.18 §§4201 to 4254.

<sup>48</sup> E.g., ALASKA STAT. §§11.71.190, 11.71.060, 12.55.135(j) (max. fine \$500/less than 1 oz.); CAL. HEALTH & SAFETY CODE §11357(b) (max. fine \$100/28.5 grams or less); CONN. GEN. STAT. ANN. §21a-279a (max. fine \$150/ less than .5 oz.); ME. REV. STAT. ANN. tit. 22 §2383(1)(A)(max. fine \$600/1.25 oz. or less); MASS. GEN. LAWS ANN. ch. 94C §32L (max. fine \$100/1 oz. or less); MINN. STAT. ANN. §§152.027[subd.4(a)], 152.01 [subd. 16] (max fine \$200/42.5 grams or less); MISS. CODE ANN. §41-29-139(c)(2)(A); NEB. REV. STAT. §28-416(13)(a) (max. fine \$300/1 oz. or less); NEV. REV. STAT. §453.336(4)(max. fine \$600/1 oz. or less); N.Y. PENAL LAW §130.35; N.C. GEN. STAT. §§90-95(d)(4)(max. \$200 fine—10 days imprisonment/.5 oz. or less); OHIO REV. CODE ANN. §§2925.11(C)(3), 2929.28(A)(2)(a)(v)(max. fine \$150/100 grams or less); ORE. REV. STAT. §475.864(3)(max. fine \$650/1 oz. or less); R.I. GEN. LAWS §§21-28-4.01(c)(2)(iii)(max. fine \$150/1 oz. or less); VT. STAT. ANN. tit.18 §4230a (max. fine \$200/1 oz. or less).

<sup>49</sup> D.C. CODE §48-901.01(a)(1). There is some uncertainty about whether a provision of the 2015 Consolidated Appropriations Act, P.L. 113-235, prohibits the implementation of the measure during FY2015. See CRS Legal Sidebar WSLG1182, *The Antideficiency Act as an Impediment to D.C.'s Marijuana Legalization Initiative?*, by Brian T. Yeh.

<sup>50</sup> ALASKA STAT. §§17.37.010 to 17.37.080; ARIZ. REV. STAT. ANN. §§36-2801 to 36-2819; CAL. HEALTH & SAFETY (continued...)

and Washington have enacted legislation authorizing the retail and personal growth, sale, and possession of marijuana under state law.<sup>51</sup> Alaska and Oregon have enacted similar retail marijuana laws; however, they were not fully operational as of the publication date of this report.<sup>52</sup>

### Medical Marijuana Laws

State medical marijuana laws follow a general pattern, although most have some individual characteristics and the manner in which they are enforced can differ considerably. Some of their features are attributable to the CSA and a case from the United States Court of Appeals for the Ninth Circuit, *Conant v. Walters*.<sup>53</sup>

Conant, a California physician, sought to enjoin the federal government from revoking his authority to prescribe controlled substances at all in retaliation for his recommending marijuana to some of his patients.<sup>54</sup> Then, as now, the CSA permits the Attorney General, acting through the Drug Enforcement Administration, to withdraw a physician's authority to prescribe controlled substances upon a failure to comply with the demands of the CSA.<sup>55</sup>

The Ninth Circuit acknowledged the prospect of criminal liability if the doctor were doing more than engaging in an abstract discussion with his patient: "A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana."<sup>56</sup> Yet, "[h]olding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting."<sup>57</sup> On the other hand, such doctor-patient discussions do

(...continued)

CODE §§11362.5 to 11362.9; COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; CONN. GEN. STAT. ANN. §§21a-408 to 21a-408q; DEL. CODE ANN. tit.16 §§4901A to 4926A; D.C. CODE §§7-1671.01 to 7-1671.13; HAWAII REV. STAT. §§329-121 to 329-128; 410 ILL. COMP. STAT. ANN. §§130/10 to 130/140; ME. REV. STAT. ANN. tit. 22 §§2421 to 2430-B; MD. CODE ANN. HEALTH-GEN. §§13-3301 to 13-3316; MASS. GEN. LAWS ANN. ch. 94C App. §§1-1 to 1-17; MICH. COMP. LAWS ANN. §§333.26421 to 333.26430; MONT. CODE ANN. §50-46-301 to 50-46-344; NEV. REV. STAT. §§453A.010 to 453A.810; MINN. STAT. §§125.22 to 152.37; N.H. REV. STAT. ANN. §§126-X:1 to 126-X:11; N.J. STAT. ANN. §§24:61-1 to 24:61-16; N.MEX. STAT. ANN. §§26-2B-1 to 26-2B-7; ORE. REV. STAT. §§475.300 to 475.346; R.I. GEN. LAWS §§21-28.6-1 to 21-28.6-13; N.Y. PUB. HEALTH §§3360 to 3369-E.; VT. STAT. ANN. tit.18 §§4471 to 4474; WASH. REV. CODE ANN. §69-51A.005 to 69-51A.903. The Supreme Court in *Oakland Cannabis Buyers' Cooperative* held that the federal Controlled Substances Act does not contain an implicit medical marijuana exception, *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 495 (2001).

<sup>51</sup> COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; WASH. REV. CODE ANN. §§69-50.325 to 69-50.369.

<sup>52</sup> ALASKA STAT. §§17.38.010 to 17.38.900; 43.61.010 to 43.61.030; Oregon Ballot Measure 91, *Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act* (hereinafter Oregon Ballot Measure 91).

<sup>53</sup> 309 F.3d 629 (9<sup>th</sup> Cir. 2002).

<sup>54</sup> *Id.* at 632.

<sup>55</sup> 21 §823(f) ("The Attorney General shall register practitioners (including pharmacies ...) to dispense ... controlled substances.... The Attorney General may deny an application for such registration ... [in] the public interest. In determining the public interest, the following factors shall be considered: ... (4) Compliance with applicable State, Federal, or local laws relating to controlled substances....").

<sup>56</sup> *Id.* at 636 (internal citations omitted).

<sup>57</sup> *Id.* (emphasis in the original).

implicate First Amendment free speech principles. The Ninth Circuit therefore affirmed the district court's order which had enjoined any DEA enforcement action.<sup>58</sup>

As a consequence of the CSA and the *Conant* decision, the state medical marijuana laws are predicated upon a doctor's recommendation, rather than a prescription and the medicine is dispensed other than through a pharmacy.<sup>59</sup> In addition, the laws afford registered patients, care givers, cultivators, and distributors immunity from the consequences of state criminal laws.<sup>60</sup>

### Patients

Physicians may recommend medical marijuana only for patients suffering from one or more statutorily defined “debilitating,” or “qualifying” medical conditions. The typical list would include the following:

“Debilitating medical condition” means one or more of the following:

(a) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis c, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions.

(b) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.

(c) Any other medical condition or its treatment added by the department pursuant to section 36-2801.01.<sup>61</sup>

The list usually includes a condition such as “severe pain,” or “chronic pain,” or “severe and chronic pain” that is easy to claim, difficult to diagnose, and grounds for potential abuse. Some states seek to limit the scope of the term by statute or by regulation.<sup>62</sup> In many jurisdictions, a

<sup>58</sup> *Id.* at 636-39.

<sup>59</sup> ALASKA STAT. §§17.37.010 to 17.37.080; ARIZ. REV. STAT. ANN. §§36-2801 to 36-2819; CAL. HEALTH & SAFETY CODE §§11362.5 to 11362.9; CONN. GEN. STAT. ANN. §§21a-408 to 21a-408q; COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; DEL. CODE ANN. tit.16 §§4901A to 4926A; D.C. CODE §§7-1671.01 to 7-1671.13; HAWAII REV. STAT. §§329-121 to 329-128; 410 ILL. COMP. STAT. ANN. §§130/10 to 130/140; MD. CODE ANN. HEALTH-GEN. §§13-3301 to 13-3316; ME. REV. STAT. ANN. tit. 22 §§2421 to 2430-B; MASS. GEN. LAWS ANN. ch. 94C App. §§1-1 to 1-17; MICH. COMP. LAWS ANN. §§333.26421 to 333.26430; MINN. STAT. §§125.22 to 152.37; MONT. CODE ANN. §§50-46-301 to 50-46-344; NEV. REV. STAT. §§453A.010 to 453A.810; N.H. REV. STAT. ANN. §§126-X:1 to 126-X:11; N.J. STAT. ANN. §§24:61-1 to 24:61-16; N.MEX. STAT. ANN. §§26-2B-1 to 26-2B-7; N.Y. PUB. HEALTH §§3360 to 3369-E.; ORE. REV. STAT. §§475.300 to 475.346; R.I. GEN. LAWS §§21-28.6-1 to 21-28.6-13; VT. STAT. ANN. tit.18 §§4471 to 4474; WASH. REV. CODE ANN. §§69-51A.005 to 69-51A.903.

<sup>60</sup> ALASKA STAT. §17.37.030; ARIZ. REV. STAT. ANN. §36-2811; CAL. HEALTH & SAFETY CODE §§11362.71(e), 11362.765, 11362.775; CONN. GEN. STAT. ANN. §§21a-408a to 21a-408c; DEL. CODE ANN. tit.16 §4903A; D.C. CODE §§7-1671.02; HAWAII REV. STAT. §§329-122; 410 ILL. COMP. STAT. ANN. §130/25; MD. CODE ANN. HEALTH-GEN. §13-3313; ME. REV. STAT. ANN. tit. 22 §§2423-A to 2423-D; MASS. GEN. LAWS ANN. ch. 94C App. §§1-4, 1-5; MICH. COMP. LAWS ANN. §§333.26424; MINN. STAT. §152.32; MONT. CODE ANN. §50-46-319; NEV. REV. STAT. §453A.310; N.H. REV. STAT. ANN. §126-X:2; N.J. STAT. ANN. §24:61-6; N.MEX. STAT. ANN. §26-2B-4; N.Y. PUB. HEALTH §§3369; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8; VT. STAT. ANN. tit.18 §4474b; WASH. REV. CODE ANN. §69-51A.030.

<sup>61</sup> ARIZ. REV. STAT. ANN. §36-2801[3].

<sup>62</sup> *E.g.*, DEL. CODE ANN. tit. 16 §4902A(3)(b)(“... severe, debilitating pain, that has not responded to previously (continued...)”).

qualified patient must be a resident of the jurisdiction.<sup>63</sup> Most states and the District of Columbia restrict the amount of marijuana a patient may possess for medical purposes. The limit is usually an amount less than three ounces.<sup>64</sup> Medical marijuana statutes ordinarily do not allow patients to use marijuana in public.<sup>65</sup>

### Caregivers

Typically, caregivers must register and be designated by one or more registered medical marijuana patients.<sup>66</sup> Many medical marijuana laws also afford caregivers the same immunity and impose the same limitations upon them as apply to patients.<sup>67</sup>

### Dispensaries

Some state medical marijuana laws contemplate cultivation exclusively by the patient or his or her caregiver.<sup>68</sup> Most, however, establish a regulatory scheme for dispensaries.<sup>69</sup>

(...continued)

prescribed medication or surgical measures for more than 3 months or for which other treatment options produced serious side effects....”).

<sup>63</sup> *E.g.*, CONN. GEN. STAT. ANN. §21a-408(10); D.C. CODE §7-1671.01(19); MICH. COMP. LAWS ANN. §333.26424(a)(6); MONT. CODE ANN. §50-46-307(1)(d); N.H. REV. STAT. ANN. §126-X:1[X], [XVI]; N.J. STAT. ANN. §24:61-3; N.MEX. STAT. ANN. §26-2B-3 [G]; R.I. GEN. LAWS §21-28.6-3(10); VT. STAT. ANN. tit.18 §4472(12); *but see* NEV. REV. STAT. §453A.364 (recognition of nonresident cards).

<sup>64</sup> *E.g.*, ALASKA STAT. §17.37.040(a)(4)(1 oz.); DEL. CODE ANN. tit.16 §4903A(a)(6 oz.); D.C. CODE §7-1671.03(a)(2 oz.); 410 ILL. COMP. STAT. ANN. §130/10(a)(1), 130/25(a)(2.5 oz.); ME. REV. STAT. ANN. tit. 22 §§2423-A[1][A](2.5 oz.); MICH. COMP. LAWS ANN. §333.26424(2.5 oz.); MONT. CODE ANN. §50-46-319 (1 oz.); NEV. REV. STAT. §453A.200 (1 oz.); N.H. REV. STAT. ANN. §126-X:2[I](2 oz.); ORE. REV. STAT. §475.320 (24 oz.); R.I. GEN. LAWS §21-28.6-4 (2.5 oz.).

<sup>65</sup> *E.g.*, ALASKA STAT. §17.37.040(a)(2); CONN. GEN. STAT. ANN. §21a-408a(b)(2); DEL. CODE ANN. tit.16 §4904A(3); D.C. CODE §7-1671.03; 410 ILL. COMP. STAT. ANN. §130/30(3)(F); MICH. COMP. LAWS ANN. §333.26427(b)(3)(B); N.H. REV. STAT. ANN. §126-X:3[II](c); N.MEX. STAT. ANN. §26-2B-5[A](3)(d); ORE. REV. STAT. §§475.316(1)(b).

<sup>66</sup> *E.g.*, ALASKA STAT. §17.37.010(e); ARIZ. REV. STAT. ANN. §36-2804.02; CONN. GEN. STAT. ANN. §21a-408b; DEL. CODE ANN. tit.16 §4909A; 410 ILL. COMP. STAT. ANN. §130/55; ME. REV. STAT. ANN. tit. 22 §§2425; MASS. GEN. LAWS ANN. ch. 94C App. §1-1; MONT. CODE ANN. §50-46-308; NEV. REV. STAT. §453A.210; N.H. REV. STAT. ANN. §126-X:4; N.J. STAT. ANN. §24:61-4; N.MEX. STAT. ANN. §26-2B-7; ORE. REV. STAT. §§475.309, 475.312; R.I. GEN. LAWS §21-28.6-4; VT. STAT. ANN. tit.18 §4474.

<sup>67</sup> *E.g.*, ARIZ. REV. STAT. ANN. §36-2811; CAL. HEALTH & SAFETY CODE §§11362.77, 11362.775; CONN. GEN. STAT. ANN. §21a-408b; DEL. CODE ANN. tit.16 §4903A; 410 ILL. COMP. STAT. ANN. §130/25; MASS. GEN. LAWS ANN. ch. 94C App. §§1-4, 1-5; MICH. COMP. LAWS ANN. §333.26424; MONT. CODE ANN. §50-46-319; NEV. REV. STAT. §453A.200; N.H. REV. STAT. ANN. §126-X:2; N.J. STAT. ANN. §24:61-6; N.MEX. STAT. ANN. §26-2B-4; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8; VT. STAT. ANN. tit.18 §4474b.

<sup>68</sup> *E.g.*, ALASKA STAT. §17.37.030; HAWAII REV. STAT. §329-122; MICH. COMP. LAWS ANN. §333.26424; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8.

<sup>69</sup> *E.g.*, ARIZ. REV. STAT. ANN. §36-2804; CAL. HEALTH & SAFETY CODE §11362.8; CONN. GEN. STAT. ANN. §21a-408h; DEL. CODE ANN. tit.16 §4914A; D.C. CODE §7-1671.06; HAWAII REV. STAT. §329-122; 410 ILL. COMP. STAT. ANN. §§130/85 to 130/130; ME. REV. STAT. ANN. tit. 22 §2428; MASS. GEN. LAWS ANN. ch. 94C App. §§1-9; MONT. CODE ANN. §§50-46-308, 5-46-309; NEV. REV. STAT. §§453A.320 to 453A.344; N.H. REV. STAT. ANN. §126-X:8; N.J. STAT. ANN. §24:61-7; N.MEX. STAT. ANN. §26-2B-7; ORE. REV. STAT. §475.304; VT. STAT. ANN. tit.18 §4474g.

## Retail Marijuana

Four states, Washington, Colorado, Oregon, and Alaska, have established retail marijuana regimes. Each regulates the distribution of marijuana without a necessary medical nexus, but raises many of the same federal-state conflict issues found in the medical marijuana statutes. Much like the medical marijuana regimes, each recreational marijuana regime shares general patterns, but they also each have some unique characteristics. In some instances, for example Washington, the statutory authority establishing the retail regime is fairly specific. In others, such as Colorado, the statute provides only a broad framework while authorizing a state regulatory agency to fill in the details through regulations.

### *Decriminalization of Personal Possession and Consumption*

Each of the retail marijuana laws decriminalizes the consumption and possession of varying amounts and forms of marijuana by individuals at least 21 years of age within the state. The laws, however, prohibit consumption of marijuana in public and maintain a prohibition on driving vehicles under the influence of marijuana, even if it was acquired and consumed in compliance with the state law.<sup>70</sup>

Washington Initiative 502, for example, legalizes marijuana possession by amending state law to provide that the possession of small amounts of marijuana “is not a violation of this section, this chapter, or any other provision of Washington law.”<sup>71</sup> Under the Initiative, individuals over the age of 21 may possess up to one ounce of dried marijuana, 16 ounces of marijuana-infused product in solid form, or 72 ounces of marijuana infused product in liquid form.<sup>72</sup> However, marijuana must be used in private, as it is unlawful to “open a package containing marijuana ... or consume marijuana ... in view of the general public.”<sup>73</sup>

Colorado voters approved an amendment to the Colorado Constitution (Amendment 64) to ensure that it “shall not be an offense under Colorado law or the law of any locality within Colorado” for an individual 21 years of age or older to possess, use, display, purchase, consume, or transport one ounce of marijuana; or possess, grow, process, or transport up to six marijuana plants.<sup>74</sup> Unlike Initiative 502, which permits only state-licensed facilities to grow marijuana, Amendment 64 allows any individual over the age of 21 to grow small amounts of marijuana (up to six plants) for personal use.<sup>75</sup> In similar fashion to Washington’s Initiative 502, marijuana may not be consumed “openly and publicly or in a manner that endangers others” under Colorado law.<sup>76</sup>

Oregon Ballot Measure 91 decriminalizes personal possession, for individuals of at least 21 years old, of up to eight ounces of “homegrown marijuana,” up to 16 ounces of “homegrown marijuana

<sup>70</sup> E.g., Washington Initiative 502 §31, amending RCW 69.50.4013 and 2003 c 53 s 334, available at [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf) (*hereinafter* Washington Initiative 502).

<sup>71</sup> *Id.* at §20.

<sup>72</sup> *Id.* at §15.

<sup>73</sup> *Id.* at §21.

<sup>74</sup> Colorado Amendment 64, Amending Colo. Const. Art. XVIII §16(3), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251834064719&ssbinary=true> (*hereinafter* Colorado Amendment 64).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

products in solid form,” and up to 72 ounces of “homegrown marijuana in liquid form.” It also decriminalizes cultivation of up to four marijuana plants.<sup>77</sup> Ballot Measure 91 also explicitly prohibits “the use of marijuana items in a public place,”<sup>78</sup> as well as the production and storage of marijuana or marijuana products where they “can be readily seen by normal unaided vision from a public place.”<sup>79</sup>

Alaska law allows individuals of at least 21 years old to possess up to one ounce of marijuana and six (but no more than three that are mature and flowering) marijuana plants.<sup>80</sup> The public consumption and cultivation of marijuana is prohibited under Alaska law.<sup>81</sup>

### *Licensing Regime for Retail Production, Distribution, and Sale*

Another common feature of recreational marijuana laws is the establishment of licensing regimes for the retail production, distribution, and sale of marijuana. Although the specifics vary, each retail marijuana regime establishes license application processes, qualification standards, and license maintenance standards that are to be implemented and overseen by a state regulatory agency.

Washington Initiative 502 provides that the “possession, delivery, distribution, and sale” by a validly licensed producer, processor, or retailer, in accordance with the newly established regulatory scheme administered by the state Liquor Control Board (LCB), “shall not be a criminal or civil offense under Washington state law.”<sup>82</sup> The Initiative establishes a three-tiered production, processing, and retail licensing system that permits the state to retain regulatory control over the commercial life cycle of marijuana. Qualified individuals must obtain a producer’s license to grow or cultivate marijuana, a processor’s license to process, package, and label the drug, or a retail license to sell marijuana to the general public.<sup>83</sup>

Initiative 502 also establishes various restrictions and requirements for obtaining the proper license and directs the state LCB to adopt procedures for the issuance of such licenses. On October 16, 2013,<sup>84</sup> the LCB adopted detailed rules for implementing Initiative 502. These rules describe the marijuana license qualifications and application process, application fees, marijuana packaging and labeling restrictions, recordkeeping and security requirements for marijuana facilities, and reasonable time, place, and manner advertising restrictions.<sup>85</sup>

The licensing standards in Colorado were implemented through a combination of statutes and regulations enacted to supplement Amendment 64. The Colorado General Assembly passed three bills that were signed into law by Governor Hickenlooper on May 28, 2013.<sup>86</sup> On September 9,

<sup>77</sup> Oregon Ballot Measure 91 §6.

<sup>78</sup> *Id.* at §54.

<sup>79</sup> *Id.* at §56.

<sup>80</sup> ALASKA STAT. §17.38.020.

<sup>81</sup> ALASKA STAT. §17.38.020 and §17.38.030.

<sup>82</sup> Washington Initiative 502 §4.

<sup>83</sup> *Id.*

<sup>84</sup> Joel Millman, *Washington State Sets Pot-Sales Rules*, WALL ST. JOURNAL, October 16, 2013.

<sup>85</sup> Washington State Liquor Control Board, *Marijuana Licenses, Application Process, Requirements, and Reporting*, available at <https://lcb.app.box.com/adopted-rules>.

<sup>86</sup> See Colorado Dep’t of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code*, September 9, (continued...)



2013, the Colorado Department of Revenue and State Licensing Authority adopted regulations to implement licensing qualifications and procedures for retail marijuana facilities.<sup>87</sup> The regulations establish procedures for the issuance, renewal, suspension, and revocation of licenses; provide a schedule of licensing and renewal fees; and specify requirements for licensees to follow regarding physical security, video surveillance, labeling, health and safety precautions, and product advertising.<sup>88</sup>

Alaska's recreational marijuana law establishes a licensing and registration regime for cultivation facilities, manufacturing facilities, and retail stores.<sup>89</sup> A state Marijuana Control Board is authorized to issue regulations to implement the licensing and registration regime, including rules that establish license application and renewal processes, qualification standards, labeling requirements, and advertising limitations.<sup>90</sup>

Oregon Ballot Measure 91 empowers the Oregon Liquor Control Commission to issue regulations establishing similar licensing standards.<sup>91</sup>

### ***Taxation Authority***

Each of the retail marijuana laws also imposes taxes on recreational marijuana. These taxing measures vary in size and applicability and establish different purposes for which the revenue generated through these taxes will be used.

For example, in accordance with adopted regulations, Washington will impose an excise tax of 25% of the selling price on each marijuana sale within the established distribution system.<sup>92</sup> The state excise tax will, therefore, be imposed on three separate transactions: the sale of marijuana from producer to processor, from processor to retailer, and from retailer to consumer. All collected taxes are deposited into the Dedicated Marijuana Fund and distributed, mostly to social and health services, as outlined in the Initiative.<sup>93</sup>

Similarly, Colorado voters approved a 25% tax on retail marijuana transactions (a 15% excise tax that would raise revenues generally to be used for public school capital construction, and an additional 10% sales tax that predominately would generate revenues to fund the enforcement of the retail marijuana regulations).<sup>94</sup>

(...continued)

2013, available at [https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> ALASKA STAT. §17.38.70.

<sup>90</sup> ALASKA STAT. §17.38.90.

<sup>91</sup> Oregon Ballot Measure 91 §7.

<sup>92</sup> See Colorado Dep't of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code*, September 9, 2013, available at [https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf) at 20-21.

<sup>93</sup> Washington Initiative 502 §26.

<sup>94</sup> Colorado Legislative Council Staff, *Fiscal Impact Statement: Proposition AA, Retail Marijuana Taxes*, September 24, 2013, available at [http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/c3e37fa33a36873887257b6c0077ac93/\\$FILE/](http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/c3e37fa33a36873887257b6c0077ac93/$FILE/) (continued...)

Under Oregon Ballot Measure 91, marijuana producers will be taxed \$5 for each immature marijuana plant, \$10 for each ounce of marijuana leaves, and \$35 for each ounce of flowers.<sup>95</sup> The revenue generated will be used first to offset the costs of implementing the state's marijuana regime and remaining monies will be distributed to a variety of existing state funds, including the state's Common School Fund and the Mental Health Alcoholism and Drug Services Account.<sup>96</sup>

Alaska law imposes an excise tax of \$50 per ounce marijuana for each transaction between a marijuana cultivation center and either a processor or retail store.<sup>97</sup>

### Local Control

Another issue relevant to each retail marijuana law is the question of whether local governments within the state are permitted to ban or otherwise regulate marijuana businesses within their local jurisdictions. Colorado Amendment 64 expressly permits local governments within Colorado to regulate or prohibit the operation of such facilities.<sup>98</sup> The Alaska recreational marijuana law also expressly provides local governments with certain authority to ban recreational marijuana businesses from operating and otherwise restrict “the time, place, manner, and number of marijuana establishment operations” with their respective jurisdictions.<sup>99</sup> Oregon Ballot Measure 91 also expressly authorizes localities to impose “reasonable time, place, and manner” restrictions on marijuana businesses.<sup>100</sup> Washington’s Initiative 502, on the other hand, does not expressly allow Washington cities to ban marijuana stores from opening within their borders, and there is uncertainty about the degree to which such local prohibitions or moratoriums on the operation of recreational marijuana businesses may be enforced.<sup>101</sup>

### Justice Department Memoranda

The Department of Justice is not required, and realistically lacks the resources, to prosecute every single violation of the CSA. Pursuant to the doctrine of “prosecutorial discretion,” federal law

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Retail%20Marijuana%20Taxes\_FN.pdf. A provision of the Colorado Constitution may affect the disbursements of marijuana-related tax revenue. See Jack Healy, *In Colorado, Marijuana Taxes May Have to Be Passed Back*, N.Y. TIMES, April 1, 2015, available at [http://www.nytimes.com/2015/04/02/us/colorado-lawmakers-scramble-to-keep-millions-in-marijuana-taxes.html?\\_r=0](http://www.nytimes.com/2015/04/02/us/colorado-lawmakers-scramble-to-keep-millions-in-marijuana-taxes.html?_r=0).

<sup>95</sup> Oregon Ballot Measure 91 §33.

<sup>96</sup> *Id.* §44.

<sup>97</sup> ALASKA STAT. §43.61.010.

<sup>98</sup> Colorado Amendment 64 §16(5)(f). See also Dan Frosch, *Colorado Localities Make Own Rules Before Final Decision on Marijuana Sales*, N.Y. TIMES, June 12, 2013; John Ingold, *Colorado Marijuana Stores Likely to be Concentrated in Few Cities*, THE DENVER POST, July 25, 2013.

<sup>99</sup> ALASKA STAT. §17.38.110.

<sup>100</sup> Oregon Ballot Measure 91 §58.

<sup>101</sup> See *Chelan County Judge Agrees with Attorney General’s Opinion, Holds that Local Governments Can Ban Marijuana Businesses*, Wash. State Off. of the Attorney Gen. Press Release, Oct. 17, 2014, available at <http://www.atg.wa.gov/news/news-releases/chelan-county-judge-agrees-attorney-general-s-opinion-holds-local-governments-can>; Jake Ellison, *City/County Bans, Moratoriums, and Zoning Approvals for Marijuana Businesses in Washington*, SEATTLE POST INTELLIGENCER, December 12, 2013, available at <http://blog.seattlepi.com/marijuana/2013/12/12/bans-moratoriums-and-zoning-approvals-for-marijuana-businesses-as-far-as-we-know/#18853101=0&18413103=0>; Gene Johnson, *No Welcome Yet for Pot Shops in Many Wash. Cities*, SEATTLE POST INTELLIGENCER, January 1, 2014.

enforcement officials have “broad discretion” as to when, whom, and whether to prosecute for violations of the CSA.<sup>102</sup> Courts have recognized that the “decision to prosecute is particularly ill-suited to judicial review,” as it involves the consideration of factors, such as the strength of evidence, deterrence value, and existing enforcement priorities, “not readily susceptible to the kind of analysis the courts are competent to undertake.”<sup>103</sup>

Through the exercise of prosecutorial discretion, DOJ is able to develop a policy outlining what marijuana-related activities will receive the most attention from federal authorities. DOJ has issued four memoranda since 2009 that explain the Obama Administration’s position regarding state-authorized marijuana activities, as described in the following sections.

### The 2009 Ogden Memorandum

In 2009, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana.<sup>104</sup> Citing a desire to make “efficient and rational use of its limited investigative and prosecutorial resources,” the memorandum stated that while the “prosecution of significant traffickers of illegal drugs, including marijuana ... continues to be a core priority,” federal prosecutors “should not focus federal resources [] on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>105</sup> The memorandum made clear, however, that “this guidance [does not] preclude investigation or prosecution, even where there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.”<sup>106</sup> Nevertheless, the Ogden Memorandum was widely considered an assurance that DOJ would not prosecute any marijuana cultivation, distribution, or possession, as long as those activities complied with state law.<sup>107</sup>

At about the same time, it became apparent the state medical marijuana programs had consequences that were perhaps unintended. In some states, the affliction most easily claimed and most difficult to diagnose—chronic pain—accounted for 90% of all physicians’

<sup>102</sup> *United States v. Goodwin*, 457 U.S. 368, 380 (1982).

<sup>103</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>104</sup> Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009 (hereinafter Ogden Memorandum) available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

<sup>105</sup> *Id.* at 1-2.

<sup>106</sup> *Id.* at 3.

<sup>107</sup> Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 3 (2013) (“While the Ogden Memo reaffirmed the illegality of all forms of medical marijuana at the federal level, it made clear that the federal executive policy with regards to medical marijuana permissible at the state level would be for the most part hands-off.”); Karen O’Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L. & POL’Y 39, 51 (2013) (“On October 19, 2009, Deputy Attorney General David Ogden issued a memorandum memorializing the new federal policy.... This memo was widely interpreted as meaning that the federal government would not be targeting medical marijuana providers.”); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 ORE. L. REV. 869, 881 (2013) (“In states that had adopted [Medical Marijuana] provisions, the memo was seen as a green light to the open sale of marijuana.”); Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1037 (2012) (“The *New York Times* ran a front-page article about the memo under the headline U.S. Won’t Prosecute in States That Allow Medical Marijuana reporting that ‘[p]eople who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law, the Justice Department said Monday in a directive with far-reaching political and legal implications.’”).

recommendations.<sup>108</sup> It was said that Los Angeles alone had somewhere between 500 and 1,000 medical marijuana dispensaries.<sup>109</sup> No one knew how many for sure, but all agreed there were more dispensaries than there were Starbucks coffee shops.<sup>110</sup> Rather than the old and infirm, “[r]emarkably the age distribution of medical marijuana users seem[ed] to mimic that of recreational users in its concentration of young persons.”<sup>111</sup>

### The 2011 Cole Memorandum

DOJ reiterated and clarified its position in a subsequent memorandum in 2011 drawing a clear distinction between the potential prosecutions of individual patients who require marijuana in the course of medical treatment and “commercial” dispensaries.<sup>112</sup> After noting that several jurisdictions had recently “enacted legislation to authorize multiple large-scale, privately operated industrial marijuana cultivation centers,” DOJ stated that

The Ogden memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.<sup>113</sup>

The surge in enforcement activity proximate to the release of the 2011 Cole Memorandum<sup>114</sup> caught unawares many of those who considered the Ogden Memorandum a green light for marijuana entrepreneurship.<sup>115</sup>

<sup>108</sup> Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 130, 136-37 (2012) (“Statewide, more than 70% of doctors recommendations were written by fewer than 15 physicians in Colorado, and severe or chronic pain, a catchall category, accounted for ninety-four percent of all reported conditions.... [In] Oregon, fewer than ten percent of the roughly 35,000 patients holding cards suffered from cancer, multiple sclerosis, glaucoma, or the other specific debilitating conditions cited in the legislation. Ninety percent of registered cardholders cited chronic pain as their qualifying debilitating disease. Nevada’s percentages are nearly identical. Montana’s are slightly lower, with seventy-one percent of all medical marijuana users suffering from chronic pain.”).

<sup>109</sup> Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise*, 91 ORE. L. REV. 1029, 1036 n.33 (2013).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 135.

<sup>112</sup> Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, June 29, 2011 (hereinafter *Cole 2011 Memorandum*), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

<sup>113</sup> *Id.* at 2.

<sup>114</sup> Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 ORE. L. REV. 869, 881-83 (2013) (“In the fall of 2011, California’s four United States Attorneys announced that a federal grand jury had returned indictments against several marijuana cooperative owners throughout the state, charging them with violations of the CSA. In addition, the United States Attorneys sent cease and desist letters to both dispensary owners and their landlords, giving them forty-five days to move their operations or else face arrest. In addition to the clear threat of criminal prosecution, this action made clear that the threat of civil enforcement—explicit in the Cole memo—was not an empty one. For a federal government with limited enforcement resources, the specter of civil forfeiture is an incredibly powerful tool. Similar crackdowns have since taken place in Washington state, Colorado, and Montana.”).

<sup>115</sup> See, e.g., *Montana Caregivers Association, LLC v. United States*, 841 F.Supp.2d 1147, 1148 (D.Mont. 2012) (“The plaintiffs describe themselves as ‘caregivers: growers and distributors of medical marijuana to qualified patients within the State of Montana.’ They filed their complaint after federal authorities raided their facilities in March 2011 and (continued...)”).

### The 2013 Cole Memorandum

The Obama Administration's official response to the Colorado and Washington initiatives was provided on August 29, 2013, when Deputy Attorney General James M. Cole sent a memorandum to all U.S. Attorneys intended to guide the "exercise of investigative and prosecutorial discretion" when it comes to civil and criminal enforcement of the federal Controlled Substances Act within all states, including those that have legalized marijuana for medicinal or recreational use.<sup>116</sup> The memorandum expresses DOJ's position that, although marijuana is a dangerous drug that remains illegal under federal law, the federal government will not pursue legal challenges against jurisdictions that authorize marijuana in some fashion, assuming those state and local governments maintain strict regulatory and enforcement controls on marijuana cultivation, distribution, sale, and possession that limit the risks to "public safety, public health, and other law enforcement interests." This DOJ decision has received both praise<sup>117</sup> and criticism.<sup>118</sup>

The memorandum instructs federal prosecutors to prioritize their "limited investigative and prosecutorial resources to address the most significant [marijuana-related] threats" and identified the following eight activities as those that the federal government wants most to prevent: (1) distributing marijuana to children; (2) revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels; (3) diverting marijuana from states that have legalized its possession to other states that prohibit it; (4) using state-authorized marijuana activity as a pretext for the trafficking of other illegal drugs; (5) using firearms or violent behavior in the cultivation and distribution of marijuana; (6) exacerbating adverse public health and safety consequences due to marijuana use, including driving while under the influence of marijuana; (7) growing marijuana on the nation's public lands; and (8) possessing or using marijuana on federal property.<sup>119</sup> The memorandum advises U.S. Attorneys and federal law enforcement to devote their resources and efforts toward any individual or organization involved in any of these activities, regardless of state law. Furthermore, the memorandum recommends that jurisdictions that have legalized some form of marijuana activity "provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities."<sup>120</sup> However, the memorandum cautions that, to the extent that state enforcement efforts fail to sufficiently protect against the eight harms listed above, the federal government retains the right to challenge those states' marijuana laws.

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seized live marijuana plants, dried marijuana, and related equipment. The plaintiffs claim the raids were unlawful because (1) Montana law allowed them to grow and produce marijuana for medical consumption and (2) the United States Department of Justice represented that they would not actively prosecute medical marijuana caregivers."); *United States v. Washington*, 887 F.Supp.2d 1077, 1090-91 (D. Mont. 2012) ("All of the pending motions to dismiss on estoppel grounds rely on the common underlying principle that the federal government, having stated several times that it would not initiate federal drug prosecutions of sellers or users of medical marijuana acting in compliance with the laws of their respective states, should now be estopped from pursuing this federal prosecution in contradiction of those statements. The most prominent of the federal government's various pronouncements on the topic of medical marijuana is what has become known as the 'Ogden memo.'").

<sup>116</sup> Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013 (*hereinafter* 2013 Cole Memorandum), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>117</sup> See, e.g., New York Times Editorial, *A Saner Approach on Drug Laws*, N.Y. TIMES, September 1, 2013.

<sup>118</sup> See, e.g., Wall Street Journal Editorial, *The Beltway Choom Gang*, WALL ST. J., September 5, 2013.

<sup>119</sup> 2013 Cole Memorandum, at 1-2.

<sup>120</sup> *Id.* at 2-3.

Two additional points made in the memorandum are worth highlighting. First, the memorandum acknowledges a change in Administration policy with respect to “large scale, for-profit commercial enterprises” that may ease the concerns of potential state-licensed marijuana distributors and retailers in Colorado and Washington.<sup>121</sup> In previous guidance issued to U.S. Attorneys in states with medical marijuana laws, DOJ had suggested that large-scale marijuana enterprises were more likely to be involved in marijuana trafficking, and thus could be appropriate targets for federal enforcement actions.<sup>122</sup> In the guidance, DOJ directs prosecutors “not to consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities ...”<sup>123</sup>

The memorandum suggests that a state with a robust regulatory system for the control of recreational marijuana “is less likely to threaten [] federal priorities ...” than a state that lacks such controls. This statement may inform the long-running debate over the extent to which state marijuana regulatory and licensing laws (as opposed to mere penalty exemptions) conflict with federal law. Some courts have suggested, for example, that whereas a state is generally free to remove state penalties for marijuana use, the more robust a state’s licensing and regulatory program, the more likely the law is to be preempted by federal law.<sup>124</sup> The Oregon Supreme Court, for instance, has suggested that states may not “affirmatively authorize” an individual to participate in conduct prohibited by federal law.<sup>125</sup>

The memorandum makes no statements with regard to the application of various federal money laundering and banking laws that have hampered the ability of commercial marijuana establishments to obtain the necessary financing and financial services to establish and grow their businesses.<sup>126</sup>

### The 2014 Cole Memorandum

The 2014 Cole memorandum, however, did address banking and money laundering laws.<sup>127</sup> It recited eight priority points listed in the 2013 memorandum and explained that the same considerations should guide the allocation of investigation and prosecution resources to marijuana-related offenses involving financial transactions—money laundering, money transfers, and Bank Secrecy Act transgressions, discussed later in this report.

<sup>121</sup> *Id.* at 3.

<sup>122</sup> 2011 Cole Memorandum, at 1-2.

<sup>123</sup> 2013 Cole Memorandum, at 3.

<sup>124</sup> See discussion *supra* pp. 14-19.

<sup>125</sup> *Emerald Steel Fabricators, Inc., v. Bureau of Labor and Indus.*, 348 Ore. 159, 230 P.3d 518 (2010).

<sup>126</sup> For more information about this topic, see CRS Legal Sidebar WSLG682, *Banking Difficulties for State-Legalized Marijuana Dispensaries*, by M. Maureen Murphy; see also Reuters, *Easier Pot Policy Won’t Relieve Dispensaries’ Banking Woes*, CNBC.com, September 5, 2013, available at <http://www.cnbc.com/id/101011966>; Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, January 11, 2014.

<sup>127</sup> Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Related Financial Crimes*, February 14, 2014 (*hereinafter* 2014 Cole Memorandum), available at <http://www.justice.gov/usao/wae/news/2014/2014-02-14-FinCin.html>.

## Preemption

To what extent does the CSA trump or preempt state medical and recreational marijuana laws? The preemption doctrine stands at the threshold of the federal-state marijuana debate. The preemption doctrine is grounded in the Supremacy Clause of Article VI, cl. 2, which states that “[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land.”<sup>128</sup> The Supremacy Clause, therefore, “elevates” the U.S. Constitution, federal statutes, federal regulations, and treaties<sup>129</sup> above the laws of the states.<sup>130</sup> As a result, where federal and state law are in conflict, the state law is generally preempted, leaving it void and without effect.<sup>131</sup>

Preemption is a matter of Congress’s choice when it operates within its constitutionally enumerated powers. In some instances, Congress has exercised its authority so pervasively as to preclude the possibility of state activity within the same legislative field.<sup>132</sup> On the other hand, where Congress prefers the co-existence of state and federal law, state law must give way only when it conflicts with federal law in either of two ways: (1) if it is “physically impossible” to comply with both the state and federal law (“impossibility preemption”); or (2) if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (“obstacle preemption”).<sup>133</sup>

What constitutes an obstacle for preemption purposes is a matter “to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>134</sup> When Congress acts within an area traditionally within the purview of the states, it will be assumed not to have intended to give its words preemptive force unless a contrary purpose is manifestly clear.<sup>135</sup>

The Controlled Substances Act contains an explicit statement of the extent of Congress’s preemptive intent. Section 903 provides that

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>136</sup>

<sup>128</sup> U.S. CONST., Art. VI, cl. 2.

<sup>129</sup> See discussion of preemptive effect of treaties *infra*.

<sup>130</sup> *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1145 (8<sup>th</sup> Cir. 1971).

<sup>131</sup> See, e.g., *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S.Ct. 2466, 2473 (2013) (“Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”).

<sup>132</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012) (“[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent may be inferred from a framework of regulation so pervasive ... that Congress has left no room for the states to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”).

<sup>133</sup> *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013).

<sup>134</sup> *Arizona v. United States*, 132 S.Ct. at 2501.

<sup>135</sup> *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013).

<sup>136</sup> 21 U.S.C. §903.

Several state courts have addressed the preemption challenges to state medical marijuana laws with mixed results. For example, appellate courts in Colorado, California, and Michigan have concluded that at least some aspects of the medical marijuana laws in those states survive both impossibility and obstacle preemption analysis. In two instances, they have held that the language in Section 903 evidences an intent to preempt state laws only under impossibility preemption and *not* under obstacle preemption.<sup>137</sup>

The Colorado case, *People v. Crouse*, arose when a defendant, acquitted of cultivation charges on the basis of immunity under the state medical marijuana law, petitioned the trial court to order police to return marijuana plants they had seized in connection with his prosecution.<sup>138</sup> The state questioned whether the CSA precluded such an action. The Court of Appeals of Colorado determined that a state marijuana law is only in “positive conflict” with the CSA when it is “physically impossible” to simultaneously comply with the state and federal law. It held that in order to preempt the CSA Section 903 “demands more than that the state law ‘stands as an obstacle to the accomplishment and execution’ of the federal law.”<sup>139</sup> Thus, the language of the CSA “cannot be used to preempt a state law under the obstacle preemption doctrine.”<sup>140</sup> The decision in *Crouse* adopted<sup>141</sup> the reasoning of *County of San Diego v. San Diego NORML*, a California state court decision that also determined that obstacle preemption should not be applied in determining whether a state marijuana law is preempted by the CSA.<sup>142</sup>

In both instances, however, the court supplied an alternative, obstacle preemption explanation. In *Crouse*, the court noted Section 885(d) of the CSA “carves out a specific exemption for distribution of controlled substances by law enforcement officers.”<sup>143</sup> Thus, if the officers returned (“distributed”) the marijuana to Crouse they would not be obstructing the CSA but acting in a manner which it authorized.<sup>144</sup>

In *San Diego NORML*, the California law required local governments to issue medical marijuana cards to qualified applicants.<sup>145</sup> In the eyes of the California appellate court, the medical marijuana statute posed no obstacle to the CSA, because “[t]he purpose of the CSA is to combat recreational drug use, not to regulate a state’s medical practices.”<sup>146</sup>

The Michigan case, *Beek v. City of Wyoming*, involved a Wyoming City property owner and medical marijuana registrant who sought a declarative judgment against a city ordinance which proscribed the use of his property in a manner contrary to federal law including the CSA.<sup>147</sup> Beek

<sup>137</sup> See, e.g., *County of San Diego v. San Diego NORML*, 165 Cal.App. 4<sup>th</sup> 798 (2008) (holding that a state law conflicts with the CSA only where it is impossible to comply with both the state and federal law).

<sup>138</sup> 2013 Colo.App. LEXIS 1971 (December 19, 2013).

<sup>139</sup> *Id.* at \*4.

<sup>140</sup> *Id.* at \*11.

<sup>141</sup> *Id.* at \*4 (“We consider County of San Diego well-reasoned and follow it here.”)

<sup>142</sup> *Cnty. of San Diego v. San Diego NORML*, 165 Cal.App. 4<sup>th</sup> 798 (2008).

<sup>143</sup> 2013 Colo.App. LEXIS 1971 at \*4.

<sup>144</sup> *Id.* at \*5.

<sup>145</sup> *Cnty. of San Diego v. San Diego NORML*, 165 Cal.App.4<sup>th</sup> at 808.

<sup>146</sup> *Id.* at 826. The court also found that the California law was not vulnerable to impossibility preemption since the CSA did not outlaw the issuance of the medical marijuana cards that the California law required. Thus, it was not impossible for an individual to honor both the CSA and the California card law. *Id.* at 819-21.

<sup>147</sup> 495 Mich. 1, 24-25 (Mich. 2014).



argued that the Michigan Medical Marihuana Act (MMMA), which immunized an individual's cultivation of marijuana for medical purposes, invalidated the city ordinance. The City argued that the CSA preempted the MMMA. The Michigan Supreme Court held that the CSA did not preempt the MMMA, but also that the ordinance must yield to the MMMA.<sup>148</sup> As understood by the court, the MMMA escaped impossibility preemption because it was permissive and therefore did not command the performance of an act prohibited by federal law: "impossibility results when state law requires what federal law forbids, or vice versa."<sup>149</sup> The MMMA escaped obstacle preemption because it merely conveyed immunity from the consequences of state law: "the MMMA's limited state-law immunity for [medical marijuana] use does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished.... [T]his immunity does not purport to alter the CSA's federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition."<sup>150</sup>

The Oregon Supreme Court understood obstacle preemption a little differently in *Emerald Steel*.<sup>151</sup> State regulators had charged Emerald Steel with disability discrimination for firing an employee for medical marijuana use. The Oregon court concluded, based on its interpretation of U.S. Supreme Court precedent, that "[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."<sup>152</sup> Thus, "[t]o the extent that [the Oregon statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection leaving it without effect."<sup>153</sup>

The continued viability of *Emerald Steel* may be open to question. While the Oregon Supreme Court has not overturned its earlier decision, it has observed in *Willis* that *Emerald Steel*'s "affirmative authorization" obstacle preemption test may have been an overgeneralization: "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted. Rather it reflects this court's attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of whether the statute contains an affirmative authorization is not straightforward, the analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule."<sup>154</sup>

<sup>148</sup> *Id.* at 24.

<sup>149</sup> *Id.* at 12.

<sup>150</sup> *Id.* at 14-15.

<sup>151</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (2010).

<sup>152</sup> *Id.* at 529 ("To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Cannors* did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in *Michigan Cannors* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case"), *citing*, *Michigan Cannors & Freezers Assoc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 478 (1984).

<sup>153</sup> *Id.* at 529.

<sup>154</sup> *Willis v. Winters*, 253 P.3d 1058, 1064 n.6 (2011). In *Willis*, the court held that the federal statute that outlawed firearm possession by a user of controlled substances did not preempt the Oregon statute that authorizes sheriffs to issue "concealed carry" permits to otherwise qualified applications who were users of medical marijuana. *Id.* at 1065-66.

Finally, in what is one of the few reported statements by a federal court relating to preemption of state marijuana laws, in *In re: Rent-Rite Super Kegs West LTD*,<sup>155</sup> a bankruptcy court noted (in what was clearly dicta) that “conflict preemption is not an issue here. Colorado constitutional amendments for both medical marijuana, and the more recent amendment legalizing marijuana possession and usage generally, both make it clear that their provisions apply to state law only. Absent from either enactment is any effort to impede the enforcement of federal law.”<sup>156</sup>

## Other Constitutional Considerations

Other colorable constitutional issues involving the CSA and state medical or recreational marijuana statutes have arisen on a number of occasions. The Supreme Court resolved one of them when it found that Congress’s constitutional authority to regulate interstate and foreign commerce enabled it to craft the CSA so as to categorically outlaw the cultivation and possession of marijuana.<sup>157</sup>

Congress’s Commerce Clause authority, however, does not include the power to compel a state legislature to act at its bidding or a state official to enforce its will.<sup>158</sup> From time to time, medical marijuana litigants have invoked this limitation in an effort to shield themselves from the CSA. Because the CSA makes no demands of state legislatures or officials, those efforts have been to no avail.<sup>159</sup> The related Tenth Amendment argument that the CSA intrudes upon those police powers reserved to the states has enjoyed no greater success.<sup>160</sup>

<sup>155</sup> *In re: Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799 (December 19, 2012). Whether the debtor was engaged in criminal activity was an issue in the case because “a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime.” *Id.* at 805.

<sup>156</sup> *Id.* at 805 (“The fact that there is a difference in legislative philosophy creates no conflict that requires an analysis of federal preemption under the Supremacy Clause.”). Part of the confusion over the proper application of obstacle preemption to state marijuana laws may stem from an apparent disagreement over the nature of the obstacle that is required to trigger preemption. As previously noted, the Supreme Court has held that a state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hillman v. Maretta*, 133 S.Ct. at 1950 (emphasis added). Most courts that have rejected preemption challenges to state medical marijuana laws have interpreted “the full purposes and objectives of Congress” in relation to the federal government’s ability to enforce federal law. As such, these courts have generally held that because the state law does not create a shield or otherwise immunize state residents from federal criminal prosecutions, the law does not constitute an obstacle to “the enforcement of federal law.” To the contrary, the Oregon Supreme Court reasoned that the fact that the state law in no way inhibited federal prosecutions did not mean that the law did not otherwise create an obstacle to the Congress’s chief objective in enacting the CSA; that of curtailing drug use. *Emerald Steel Fabricators, Inc. v. Bureau of Labor Indus.*, 230 P.3d at 529.

<sup>157</sup> *Gonzales v. Raich*, 545 U.S. 1, 5, 22 (2005) (“The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution, ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ its authority to ‘regulate Commerce with foreign Nations, and among the several States’ includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.... Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, ... we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, ... Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce ... among the several States.’”).

<sup>158</sup> *New York v. United States*, 505 U.S. 144, 161 (1981) (“Congress may not commandeer the legislative process of the States by directly compelling them to enact and enforce a regulatory program.”). *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may [not] ... command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

<sup>159</sup> *United States v. Washington*, 887 F.Supp.2d 1077, 1101 (D.Mont. 2012); *United States v. Stacy*, 696 F.Supp.2d (continued...)

Of course, the purported exercise of an explicit constitutional power such as the Commerce Clause will be defeated, if the exercise is beyond the scope of the asserted power or is contrary to some other explicit or implicit constitutional limitation. In the case of the fundamental rights of the people, the Tenth Amendment, the Ninth Amendment, and the substantive due process components of the Fifth and Fourteenth Amendments all impose limits on the federal or state legislative powers.<sup>161</sup> Here too, litigants generally have been unable to convince the courts that the limitations entitle them to relief. Tenth Amendment reservations with respect to the rights of the people disappear once it is established that the Constitution has expressly delegated a power to the United States, as in the case of the Necessary and Proper Clause and the CSA.<sup>162</sup> A limitation on intrusion upon the rights of the people, however, may flow from the Ninth Amendment and the Due Process Clauses' implicit prohibition on governmental encroachment on a fundamental right.

Fundamental rights are those “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>163</sup> The courts have thus far declined to find such a fundamental right in the possession, use, or cultivation of marijuana, even for medicinal purposes.<sup>164</sup>

Due process and equal protection challenges have surfaced both in cases questioning the CSA and those contesting application of the various state marijuana laws. At the federal level, several courts have rejected the suggestion that the government is estopped from enforcing the CSA by virtue of misleading or inconsistent statements in the Ogden Memorandum and elsewhere.<sup>165</sup>

(...continued)

1141, 1145 (S.D.Cal. 2010); *Raich v. Gonzales*, 500 F.3d 850, 867 n.17 (9<sup>th</sup> Cir. 2007).

<sup>160</sup> *Sacramento Nonprofit Collective v. Holder*, 855 F.Supp.2d 1100 (E.D.Cal. 2012)(“[I]t is well established under United States Supreme Court authority that if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. Since the power to regulate the intrastate possession, manufacturing, and distribution of marijuana is delegated to Congress through the Commerce Clause, *Raich I*, 545 U.S. at 15, [the] allegation that the power to regulate marijuana in California was reserved to California through the Tenth Amendment is foreclosed by United States Supreme Court precedent.”). *Montana Caregivers Association, LLC v. United States*, 841 F.Supp.2d 1147, 1149-150 (D.Mont. 2012)(to the same effect).

<sup>161</sup> U.S. Const. amend. X (emphasis added)(“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); amend. V (“No person shall ... be deprived of life, liberty, or property without due process of law.... ”); amend. XIV, §1 (“... No State shall ... deprive any person of life, liberty, or property without due process of law.... ”).

<sup>162</sup> Cf., *Raich v. Gonzales*, 500 F.3d 850, (9<sup>th</sup> Cir. 2007)(“The Supreme Court held in *Gonzales v. Raich* that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act, *See* 125 S.Ct. at 2215. Thus, after *Gonzales v. Raich*, it would seem that there can be no Tenth Amendment violation in this case.”).

<sup>163</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)(internal citations omitted).

<sup>164</sup> *Raich v. Gonzales*, 500 F.3d at 861-66; *United States v. Fry*, 787 F.2d 903, 905 (4<sup>th</sup> Cir. 1986); *United States v. Fogarty*, 692 F.2d 542, 547 (8<sup>th</sup> Cir. 1982); *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d 1142, 1156-157 (N.D.Cal. 2011); *Kuromiya v. United States*, 37 F.Supp.2d 717, 725-27 (E.D.Pa. 1999).

<sup>165</sup> *United States v. Washington*, 887 F.Supp.2d 1077 (D.Mont. 2012)(“Estoppel by official misleading statement ... applies where the defendant had a reasonable belief that his conduct was sanctioned by the government. [It] requires the accused to show that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable. The Defendants assert the defense of estoppel by official misleading statement based on the Ogden memo; statements made to the press or to Congress by then-presidential-candidate Barack Obama, his campaign spokesman, his White House spokesman, and United States Attorney General Eric Holder; the characterizations of those statements in news media; the government’s (continued...)

Some of these same cases have rejected the contention that placement of marijuana in Schedule I of the CSA is irrational and consequently constitutes a violation of equal protection.<sup>166</sup>

Municipal zoning or land use ordinances set the stage for most of the state marijuana-related due process cases. State laws vary as to whether municipalities may ban or restrict marijuana-related activities within their jurisdictions.<sup>167</sup> Where they may do so, the regulatory scheme must comply with due process requirements.<sup>168</sup>

## Banking

The federal banking laws are designed to shield financial institutions from individuals and entities that deal in controlled substances. Congress has crafted several of them to enlist financial institutions in the investigation and prosecution of those who violate the CSA. As a consequence, medical marijuana providers have experienced difficulty securing banking services.<sup>169</sup> On

(...continued)

entry into the stipulation in Santa Cruz; and statements made to at least one Defendant by Flathead Tribal Police drug investigator Arlen Auld. None of these statements justifies dismissal on a theory of estoppel by official misleading statement.”); *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d at 1155-156; *Sacramento Nonprofit Collective v. Holder*, 855 F.Supp.2d at 1111; *United States v. Stacy*, 696 F.Supp.2d at 1146-148; *United States v. Schafer*, 625 F.3d 629, 637-38 (9<sup>th</sup> Cir. 2010).

The Second Circuit has rejected the contention that the Ogden memo constituted a rescheduling of marijuana. *United States v. Canori*, 737 F.3d 181, 184-85 (2d Cir. 2013).

<sup>166</sup> *United States v. Washington*, 887 F.Supp.2d at 1102-103 (“The Ninth Circuit squarely rejected a rational basis challenge to the classification of marijuana as a schedule I substance in *United States v. Miroyan*, 577 F.2d 489, 495 (9<sup>th</sup> Cir. 1978). Although Fleming argues that since Miroyan, additional studies and changes in state law have called into question the rationality of Congress’ policy, there remains sufficient debate regarding the public benefits and potential for harmful consequences of marijuana use to find a rational basis to uphold the continued classification of marijuana as a schedule I controlled substance.”); *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d at 1146-147 (“There is no right under the Constitution to have a law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere”)(responding to plaintiffs’ equal protection challenge that prosecutors’ threatened to take legal action against them as the landlords of marijuana dispensaries’ but visited no similar threats upon the landlords of Colorado dispensaries); *Sacramento Nonprofit Collective v. Holder*, 855 F.Supp.2d at 1109-110 (same equal protection challenge; same result).

<sup>167</sup> *Beek v. City of Wyoming*, 2014 Mich. LEXIS 194 (Mich. 2014)(Michigan Medical Marijuana Act precludes any absolute municipal ban on cultivating marijuana within city limits); *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 300 P.3d 494, 499 (Cal. 2013)(City may use its municipal powers to ban marijuana dispensaries within the city); *Giuliani v. Jefferson County Board of County Commissioners*, 303 P.3d 131, 135 (Colo.App. 2012)(municipal officials may ban the cultivation or sale of marijuana within the county).

<sup>168</sup> *Santa Barbara Patients’ Collective Health Coop. v. City of Santa Barbara*, 911 F.Supp. 884, 892-93 (C.D.Cal. 2012)(pre-ordinance permit holder enjoyed a vested right to operate a marijuana dispensary that could not be curtailed without due process of law); *Conejo Wellness Center, Inc. v. City of Agoura Hills*, 214 Cal.App.4<sup>th</sup> 1534, 1562 (2013) (pre-ordinance dispensary operator had no vested liberty right requiring procedural due process to extinguish).

<sup>169</sup> See, e.g., Deirdre Fernandes, *Banks Shun Fledgling Marijuana Firms in Mass*, THE BOSTON GLOBE (“Elsewhere in the country, legal marijuana businesses have run into the same problems ... Some marijuana businesses have found ways to get a bank account by, for example, setting up separate holding companies that avoid any reference in the names to marijuana. Even then, once banks get a whiff of where the money comes from, they close the accounts”), available at <http://www.bostonglobe.com/business/2014/01/29/medical-marijuana-firms-face-cash-economy-banks-steer-clear/88RUTUbcaYvZfA7fpuENN/story.htm>; *Legal Marijuana Market Exceeds Tax Hopes, Creating Opportunities*, MARKET WATCH (“The Denver Post reported Wednesday that banks holding commercial loans on properties that lease to Colorado marijuana businesses say they don’t plan to refinance those loans when they come (continued...)”).

February 14, 2014, the Department of Justice and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance with respect to marijuana-related financial crimes.<sup>170</sup> FinCEN's guidance specifically addresses the obligations to file suspicious activity reports (SARs).

Banks must file SARs with FinCEN relating to any transaction involving \$5,000 or more that they have reason to suspect are derived from illegal activity.<sup>171</sup> Willful failure to do so is punishable by imprisonment for not more than five years (not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity).<sup>172</sup> Breaking up a transaction into two or more transactions to avoid the reporting requirement subjects the offender to the same 5/10 year maximum terms of imprisonment.<sup>173</sup> Banks must also establish and maintain anti-money laundering programs,<sup>174</sup> designed to ensure that bank officers and employees will have sufficient knowledge of the banks' customers and of the business of those customers to identify the circumstances under which filing SARs is appropriate.<sup>175</sup>

Suspicion aside, banks must file currency transaction reports (CTRs) with FinCEN relating to transactions involving \$10,000 or more in cash.<sup>176</sup> Willful failure to do so is punishable by imprisonment for not more than five years (not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity).<sup>177</sup> Again, structuring a transaction to avoid the reporting requirement exposes the offender to the same 5/10 year maximum terms of imprisonment.<sup>178</sup>

Banks, their officers, employees, and customers may also face criminal liability under the money laundering statutes for marijuana-related financial transactions. Section 1957 makes it a federal crime to deposit or withdraw \$10,000 or more in proceeds derived from the distribution of marijuana and any other controlled substances.<sup>179</sup> Section 1956 makes it a federal crime to engage in a financial transaction involving such proceeds conducted with an eye to promoting further offenses, for example, by withdrawing marijuana-generated funds in order to pay the salaries of medical marijuana dispensary employees.<sup>180</sup>

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due. Banks say property used as collateral for those loans theoretically is subject to federal drug-seizure laws, which makes the loans a risk. Colorado's two largest banks, Wells Fargo Bank and First Bank, say they won't offer new loans to landowners with preexisting leases with pot businesses. And Wells Fargo and Vestra Bank have told commercial loan clients they either have to evict marijuana business or seek refinancing elsewhere."), available at <http://www.marketwatch.com/story/legal-marijuana-market-exceeds-tax-hopes-creating-opportunities-2014-02-27/?reflink=MW-news-stmp>.

<sup>170</sup> 2014 Cole Memorandum; Department of the Treasury, *Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Business*, FIN-2014-G001 (Feb. 14, 2014) (herein after FinCEN guidance), available at [http://www.fincen.gov/sstatutes\\_regs/guidance/pdf/FIN-2014-G002.pdf](http://www.fincen.gov/sstatutes_regs/guidance/pdf/FIN-2014-G002.pdf).

<sup>171</sup> 21 U.S.C. §5318(g); 31 C.F.R. §1020.320.

<sup>172</sup> 31 U.S.C. §5322.

<sup>173</sup> 31 U.S.C. §5324(d).

<sup>174</sup> 31 U.S.C. §5318(h); 12 U.S.C. §1818(s); 12 U.S.C. §1786(q)(1).

<sup>175</sup> 31 C.F.R. §§1020.200-1020.220.

<sup>176</sup> 31 U.S.C. §5313; 31 C.F.R. subpt.1020C; 31 C.F.R. subpt.1010 C.

<sup>177</sup> 31 U.S.C. §5322.

<sup>178</sup> 31 U.S.C. §5324(d).

<sup>179</sup> 18 U.S.C. §§1957(a), (d).

<sup>180</sup> 18 U.S.C. §1956(a)(1)(A)(i).

Section 1956 violations are punishable by imprisonment for not more than 20 years.<sup>181</sup> Section 1957 violations are punishable by imprisonment for not more than 10 years.<sup>182</sup> Conspiracy to violate either section carries the same maximum penalties,<sup>183</sup> as does aiding and abetting the commission of either offense.<sup>184</sup> Moreover, any real or personal property involved in, or traceable to, a transaction proscribed by either statute is subject to confiscation under either civil or criminal forfeiture.<sup>185</sup>

Federally insured state- and federally chartered depository institutions that engage in illegal or unsafe banking practices also run the risk of being assessed civil money penalties and even losing deposit insurance coverage, which would result in the termination of their status as an insured depository institution.<sup>186</sup>

In its recent guidance, FinCEN addressed banks' SAR reporting requirements. FinCEN began its guidance by emphasizing the point made in the accompanying 2014 Cole Memorandum, that the Justice Department's investigation and prosecution of financial crimes would be focused on activities that conflict with any of several federal priorities:

- preventing the distribution of marijuana to minors;
- preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;<sup>187</sup>
- preventing the diversion of marijuana from states where it is legal under state law in some form to other states;<sup>188</sup>
- preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- preventing violence and the use of firearms in cultivation and distribution of marijuana;<sup>189</sup>
- preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

<sup>181</sup> 18 U.S.C. §1956(a)(1).

<sup>182</sup> 18 U.S.C. §1957(a).

<sup>183</sup> 18 U.S.C. §1956(b).

<sup>184</sup> 18 U.S.C. §2. *E.g.*, *United States v. Lyons*, 740 F.3d 702, 715 (1<sup>st</sup> Cir. 2014)(internal citations omitted)(“An aider and abettor is punishable as a principal if, first, someone else actually committed the offense and, second, the aider and abettor became associated with the endeavor and took part in it, intending to ensure its success. The central requirement for the second element is a showing that the defendant consciously shared the principal’s knowledge of the underlying criminal act, and intended to help the principal.”).

<sup>185</sup> 18 U.S.C. §§981(a)(1)(A), 982(a)(1).

<sup>186</sup> 12 U.S.C. §1818.

<sup>187</sup> This presumably does not include enterprises, gangs, or cartels that possess or distribute marijuana in violation of the CSA but in compliance with applicable state law.

<sup>188</sup> This would seem to serve as a warning to interstate marijuana tourists and the businesses that serve them.

<sup>189</sup> Given the value of the product, violence may be an inescapable attribute of marijuana cultivation and sale, *see e.g.*, Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 McGEORGE L. REV. 109, 121 (2012).

- preventing the growing of marijuana on public lands and attendant public safety and environmental dangers posed by marijuana production on public lands;<sup>190</sup> and
- preventing marijuana possession or use on federal property.<sup>191</sup>

FinCEN advised financial institutions that in providing services to a marijuana-related business they must file one of three forms of special SARs: a marijuana limited SAR, a marijuana priority SAR; or a marijuana termination SAR. The marijuana limited SAR is appropriate when the bank determines, after the exercise of due diligence, that its customer is not engaged in any of the activities that violate state law or that would implicate any of the Justice Department investigation and prosecution priorities listed in the 2014 Cole Memorandum.<sup>192</sup> A marijuana priority SAR must be filed when the bank believes its customer is engaged in such activities.<sup>193</sup> A bank files a marijuana termination SAR when it finds it necessary to sever its relationship with a customer in order to maintain an effective anti-money laundering program.<sup>194</sup>

FinCEN also provides examples of “red flags” that may indicate that a marijuana priority SAR is appropriate:

- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
- The business is unable to demonstrate the legitimate source of significant outside investments.
- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a “consulting,” “holding,” or “management” company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
- Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or

<sup>190</sup> *Id.* at 122 (“About seventy percent or more of marijuana eradicated in California every year comes from public lands.”); Marijuana Crops in California Threaten Forests and Wildlife, *The New York Times*, available at <http://www.nytimes.com/2013/06/21/us/marijuana-crops-in-california-threaten-forests-and-wildlife.html>.

<sup>191</sup> FinCEN guidance, at 2.

<sup>192</sup> *Id.* at 3-4.

<sup>193</sup> *Id.* at 4.

<sup>194</sup> *Id.* at 4-5.

otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- A marijuana-related business's proximity to a school is not compliant with state law.
- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).
- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include the following:
  - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
  - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
  - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
  - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
  - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.
  - Deposits apparently structured to avoid Currency Transaction Report ("CTR") requirements.
  - Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
  - Deposits by third parties with no apparent connection to the account holder.
  - Excessive commingling of funds with the personal account of the business's owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
  - Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
  - Financial statements provided by the business to the financial institution are inconsistent with actual account activity.



- A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.”<sup>195</sup>

The FinCEN guidance ends with the observation that a bank is not absolved of its obligation to file a currency transaction report for any financial transaction involving more than \$10,000 in cash, regardless of how it resolves its marijuana SAR obligations.<sup>196</sup>

## Other Federal Law Consequences

### Employment

The use of marijuana, medicinal or otherwise, may have adverse employment consequences.<sup>197</sup> Both state and federal courts have upheld firing an employee for medical marijuana use.<sup>198</sup> Employee challenges have cited in vain state medical marijuana laws as well as federal and state anti-discrimination laws. The state medical marijuana laws ordinarily immunize medical marijuana users from the adverse consequences of the law, but do not give them a right that can be used affirmatively against a private entity.<sup>199</sup> The Americans with Disabilities Act (ADA) and similar state anti-discrimination in employment statutes are predicated upon discrimination based on *lawful* activity and the CSA has consequently proven to be an insurmountable obstacle.<sup>200</sup>

They differ somewhat in the case of nongovernment employees, because, among other things, federal, state, and local government employees enjoy Fourth Amendment protections. The Fourth Amendment, binding on government employers, does not give employees the right to use marijuana, medical or otherwise, but it limits the likelihood that their employers will discover their use. The Fourth Amendment’s proscription on unreasonable governmental searches means

<sup>195</sup> *Id.* at 5-7.

<sup>196</sup> *Id.* at 7.

<sup>197</sup> See, generally, Matthew D. Macy, *Employment Law and Medical Marijuana*, 41 COLORADO LAWYER 57 (2012).

<sup>198</sup> *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo.App. 2013); *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6<sup>th</sup> Cir. 2012); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d at 518; *Ross v. RagingWire Telecomm., Inc.*, 42 Cal.4<sup>th</sup> 920 (2008).

<sup>199</sup> *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d at 435 (internal citations omitted)(emphasis in the original)(“[T]he MMMA [Michigan Medical Marijuana Act] does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse action *by the state*.... MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses”); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d at 169 n.7, citing, *Roe v. TeleTech Customer Car Management*, 152 Wash.App. 388, 216 P.3d 1055 (2009); *Ross v. RagingWire Telecommunications*, 42 Cal.4<sup>th</sup> 920 (2008) (“Both the California and Washington courts have held that, in enacting their states’ medical marijuana laws, the voters did not intend to affect an employer’s ability to take adverse employment actions based on the use of medical marijuana.”).

<sup>200</sup> *Coats v. Dish Network, LLC*, 303 P.3d at 149-53 (The Colorado Civil Rights Act (CCRA) outlaws firing employees for “lawful” out of work activities. Use of marijuana as permitted by the Colorado medical marijuana but in violation of the CSA was not a lawful activity for purposes of the CCRA); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d at 535 (Because the employee was fired for illegal use of marijuana under the CSA, the state employment discrimination statute, modelled after the ADA, does not apply); see also *James v. City of Lake Forest*, 700 F.3d 394, 397 n.3 (9<sup>th</sup> Cir. 2012)(“[T]he ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use.”).

that federal, state, or local entities must have either reasonable suspicion or a constitutionally recognized special need in order to conduct employee drug testing.<sup>201</sup>

## Government

A significant number of government employees, however, must undergo random drug testing because the nature of their duties places them in a “special needs” category. For example, random drug testing is a fact of life and continued condition of employment for anyone with access to classified or similarly sensitive information.<sup>202</sup>

In the case of employees of state or local governmental entities, the “lower courts have allowed drug testing in other safety-sensitive occupation” such as “aviation personnel, railroad safety inspectors, highway and motor carrier safety specialists, lock and dam operators, forklift operators, tractor operators, engineering operators, and crane operators.”<sup>203</sup>

More generally, federal contractors may face the loss of federal funding or could be subject to administrative fines if they do not maintain and enforce policies aimed at achieving a drug-free, safe workplace. The federal Drug-Free Workplace Act of 1988 (DFWA)<sup>204</sup> imposes a drug-free workplace requirement on any entity that receives federal contracts with a value of more than \$150,000 or that receives any federal grant.<sup>205</sup> DFWA requires these entities to make ongoing,

<sup>201</sup> *Maryland v. King*, 133 S.Ct. 1988, 1969 (2013)(internal citations and quotation marks omitted)(“In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred some quantum of individualized suspicion ... as a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion. In some circumstances, such as when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable.”). *See, generally*, CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

<sup>202</sup> 50 U.S.C. §3343(b)(“After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance....”); 50 U.S.C. §3343(a)(2)(“The term covered person means: (A) an officer or employee of a Federal Agency; (B) a member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status; and (C) an officer or employee of a contractor of a Federal Agency”); *e.g.*, 51 U.S.C. §31102(b)(“1) Employees of administration.-The Administrator shall establish a program applicable to employees of the Administration whose duties include responsibility for safety-sensitive, security, or national security functions. Such program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance.... (2) Employees of contractors.-The Administrator shall, in the interest of safety, security, and national security, prescribe regulations. Such regulations shall establish a program that requires Administration contractors to conduct preemployment, reasonable suspicion, random, and post-accident testing of contractor employees responsible for safety-sensitive, security, or national security functions (as determined by the Administrator) for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance.... (3) Suspension, disqualification, or dismissal.-In prescribing regulations under the programs required by this subsection, the Administrator shall require, as the Administrator considers appropriate, the suspension, disqualification, or dismissal of any employee to which paragraph (1) or (2) applies, in accordance with the provisions of this section, in any instance where a test conducted and confirmed under this section indicates that such employee has used, in violation of applicable law or Federal regulation, alcohol or a controlled substance.”). *See also* 49 U.S.C. §20140(Program of required preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions).

<sup>203</sup> *Barrett v. Claycomb*, 705 F.3d 315, 322 (8<sup>th</sup> Cir. 2013), referring to cases collected in *Kreig v. Seybold*, 481 F.3d 512, 518 (7<sup>th</sup> Cir. 2007).

<sup>204</sup> 41 U.S.C. §§8101, *et seq.*

<sup>205</sup> 41 U.S.C. §§8102, 8103; 2 C.F.R. pt.182; 48 C.F.R. §§23.500, *et seq.*; 48 C.F.R. §2.101 (simplified acquisition threshold). U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements*, available at <http://www.dol.gov/> (continued...)

good faith efforts to comply with the drug-free workplace requirement in order to qualify, and remain eligible, for federal funds.<sup>206</sup>

### Private

Absent status as a federal contractor and grantee status or some other federal influence,<sup>207</sup> employers are relatively free to establish their own drug-free workplaces and to fire employees who test positive for marijuana use, medical or otherwise.<sup>208</sup> Although an occasional medical marijuana statute will shield employees,<sup>209</sup> more often the statute is silent and thought not to cabin at-will employment status, as noted earlier.<sup>210</sup> Depending upon the factual situation and the

(...continued)

[elaws/asp/drugfree/screenr.htm](http://www.dol.gov/elaws/asp/drugfree/screenr.htm).

<sup>206</sup> 41 U.S.C. §§8102, 8103. There are slightly different requirements for individuals and organizations that receive federal contracts or grants. 41 U.S.C. §§8102, 8103. See U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Individuals*, available at [http://www.dol.gov/elaws/asp/drugfree/req\\_ind.htm](http://www.dol.gov/elaws/asp/drugfree/req_ind.htm) ("Any individual who receives a contract or grant from the Federal government, regardless of dollar value, must agree not to engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of this contract/grant."), and U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Organizations*, available at <http://www.dol.gov/elaws/asp/drugfree/require.htm> ("All organizations covered by the Drug-Free Workplace Act of 1988 are required to provide a drug-free workplace by ... [publishing] and [giving] a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy).

<sup>207</sup> Due to their potential impact on public safety, commercial pilots, truckers, bus drivers and the like are subject to periodic drug testing which the United States Department of Transportation has recently made clear does not excuse a positive drug test for either medical or recreational marijuana use, U.S. Dep't of Transp., *Fact Sheet: DOT 'Medical' Marijuana Notice* (Feb. 23, 2013), citing 49 C.F.R. 40.151, available at [http://www.dot.gov/sites/dot.gov/files/docs/ODAPC\\_medicalmarijuanadotice.pdf](http://www.dot.gov/sites/dot.gov/files/docs/ODAPC_medicalmarijuanadotice.pdf) ("The Department of Justice (DOJ) issued guidelines for Federal prosecutors in states that have enacted laws authorizing the use of 'medical marijuana.' We have had several inquiries about whether the DOJ advice to Federal prosecutors regarding pursuing criminal cases will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees—pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others. We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors."). DOT issued a similar notice with regard to recreational marijuana, U.S. Department of Transportation, *DOT 'Recreational' Marijuana Notice* (Feb. 22, 2013), available at <http://www.dot.gov/odapc/dot-recreational-marijuana-notice>.

<sup>208</sup> See, generally, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619 (2008).

<sup>209</sup> E.g., R.I. GEN. LAWS §22-28.6-4(c) ("No school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder."); ARIZ. REV. STAT. ANN. §36-2813[B] ("Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a cardholder. 2. A registered qualified patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.").

<sup>210</sup> *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d at 435; *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d at 169 n.7, citing *Roe v. TeleTech Customer Car Management*, 152 Wash.App. 388, 216 P.3d 1055 (2009); *Ross v. RagingWire Telecommunications*, 42 Cal.4th 920 (2008).

state unemployment statute in play, employees fired for marijuana use may also be ineligible for unemployment benefits.<sup>211</sup>

## Taxation

Income from any source is ordinarily subject to federal taxation.<sup>212</sup> This is so even when the activity that generates the income is unlawful.<sup>213</sup> Marijuana merchants, however, operate under a special federal tax disadvantage.<sup>214</sup> Section 280E of the Internal Revenue Code provides:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.<sup>215</sup>

As a result of this provision, marijuana merchants, unlike most businesses,<sup>216</sup> may not deduct their operating expenses (e.g., general labor, rent, and utilities) when computing their federal income tax liability. Section 280E does not, however, apply to the cost of goods sold (COGS), which means marijuana sellers may subtract COGS when determining gross income.<sup>217</sup> Courts and the IRS have interpreted Section 280E to apply to marijuana so long as it is a controlled substance under the CSA, regardless of whether the purchase and use are allowed under state law.<sup>218</sup> The customers of a medical marijuana merchant cannot deduct the amounts spent on marijuana as medical expenses.<sup>219</sup>

<sup>211</sup> Under some state laws, eligibility for unemployment compensation turns on proof the marijuana use occurred on the job or had job-related consequences. *Compare*, *Peace River Distributing, Inc. v. Florida Unemployment Appeals Commission*, 80 So.3d 461, 464 (Fla.App. 2012)(discharged employee who tested positive for marijuana use was not entitled to unemployment compensation); *Virginia Employment Commission v. Comty. Alternatives, Inc.*, 705 S.E.2d 530, (Va.App. 2011)(same); *Maskerines v. Unemployment Comp. Bd. of Review*, 13 A.3d 553, 560 (Pa.Comm. 2011)(employer need not show job nexus where discharged employee had agreed to comply with employer's drug free policy); *Div. of Emp. Sec. v. Comer*, 199 S.W.3d 915, 921 (Mo.App. 2006); *with*, *Johnson v. So Others Might Eat, Inc.*, 53 A.3d 323, (D.C.App. 2012); *Cusack v. Williams*, 286 S.W.3d 180, 182 (Ark.App. 2008)(employer need not show job nexus where bus driver's off duty marijuana use made him ineligible for the commercial driver's license, a reasonable condition of employment). *See also* *Desilet v. Glass Doctor*, 132 P.3d 412, 415-16 (Idaho 2006)(off-duty marijuana use is presumed job-related if the employer followed state approved testing guidelines; otherwise the employer must show a job nexus).

<sup>212</sup> 26 U.S.C. §61.

<sup>213</sup> *James v. United States*, 366 U.S. 213, 218-20 (1961).

<sup>214</sup> For more information on this subject, *see* CRS Report WSLG1101, *Federal Taxation of Marijuana Sellers*, by Erika K. Lunder.

<sup>215</sup> 26 U.S.C. §280E. *See also* *Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r*, 128 T.C. 173 (2007); *Olive v. Comm'r*, 139 T.C. 19 (2012).

<sup>216</sup> Taxpayers are generally allowed to deduct all "ordinary and necessary" business expenses. *See* 26 U.S.C. §162(a).

<sup>217</sup> *See CHAMP*, 128 T.C. at 178 n.4; *Olive*, 139 T.C. at 20 n.2; *Peyton v. Comm'r*, T.C. Memo 2003-146, \*15 (2003); *Franklin v. Comm'r*, T.C. Memo. 1993-184, \*28 n.3 (1993).

<sup>218</sup> *See CHAMP*, 128 T.C. at 182; *Olive*, 139 T.C. at 38.; I.R.S. Information Letter 2011-0005 (Mar. 25, 2011), available at <http://www.irs.gov/pub/irs-wd/11-0005.pdf>.

<sup>219</sup> *See* Rev. Rul. 97-9, 1997-1 C.B. 77. In this ruling, the IRS held that an amount paid to obtain marijuana for medical care was not a deductible medical expense even though the purchase and use was allowed under state law. This is because Treasury regulations deny a deduction for illegally procured drugs and illegal treatments. *See* 26 C.F.R. §1.213-1(e)(1)(ii) and (2). The IRS reasoned that marijuana obtained in violation of the CSA is not legally procured (continued...)

## Possession of Firearms

It is a federal crime punishable by imprisonment for not more than 10 years for an unlawful user of a controlled substance to possess a firearm or ammunition.<sup>220</sup> Federal regulations define an “unlawful user” to include “any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.”<sup>221</sup> The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has made it clear that “any person who uses ... marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of ... a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.”<sup>222</sup>

Those associated with a marijuana-cultivation or -sales operation may incur additional firearm-related criminal liability. In addition to the penalties for growing or selling, anyone who provides security for the operation and possesses a firearm in furtherance of that enterprise is subject to a series of mandatory terms of imprisonment.<sup>223</sup> The offender and any accomplices face an additional five-year mandatory minimum term of imprisonment for possession of a firearm; a seven-year mandatory term if he brandishes the firearm; and a 10-year mandatory term if discharges it.<sup>224</sup>

## Federally Assisted Housing

“Illegal drug users” are ineligible for federally assisted housing.<sup>225</sup> Public housing agencies and owners of federally assisted housing must establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any applicant or tenant who is an illegal drug user.<sup>226</sup> An agency or an owner can take these actions if a determination is made, pursuant to the standards established, that an individual is “illegally using a controlled substance,” or if there is reasonable cause to believe that an individual has a “pattern of illegal use” of a controlled substance that could “interfere with the health, safety, or right to a peaceful enjoyment of the premises by other residents.”<sup>227</sup> Thus, any individual whom the housing authority reasonably believes is using marijuana could be denied access to, or evicted from, federally assisted housing.

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(...continued)

and constitutes an illegal treatment, regardless of how the purchase and use may be treated under state law, and therefore the amounts could not be deducted as medical expenses.

<sup>220</sup> 18 U.S.C. §§922(g)(3), 924(a)(2).

<sup>221</sup> 27 C.F.R. §478.11.

<sup>222</sup> See Open Letter to All Federal Firearm Licensers, September 21, 2011, available at <http://www.atf.gov/files/press/releases/2011/09/092611-atf-open-letter-to-all-fms-marijuana-for-medicinal-purposes.pdf>.

<sup>223</sup> 18 U.S.C. §924(c), 21 U.S.C. §841.

<sup>224</sup> 18 U.S.C. §§924(c)(1)(A)(i) to (iii), 2. Co-conspirators are subject to imprisonment for not more than 20 years, 18 U.S.C. §924(o).

<sup>225</sup> 42 U.S.C. §§13661-13662. See, generally, *Medical Marijuana and the Effect of State Laws on Federally Subsidized Housing*, 57 WAYNE L. REV. 1437 (2011).

<sup>226</sup> 42 U.S.C. §§13661-13662.

<sup>227</sup> *Id.*

With respect to medical marijuana, the Department of Housing and Urban Development previously concluded that public housing agencies or owners “must deny *admission*” to applicants who are using medical marijuana, but “have statutorily-authorized discretion with respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana.”<sup>228</sup>

The question of whether marijuana users may be excluded from federally assisted housing is not the same as whether applicants for such housing may be required to undergo drug testing. The Eleventh Circuit’s *Lebron* decision, decided in another context, would seem to preclude such preliminary testing in the absence of some individualized suspicion.<sup>229</sup>

## Ethical Considerations

Rule 1.2(d) of the American Bar Association’s Model Rules of Professional Conduct, adopted in virtually every jurisdiction, states that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.”<sup>230</sup>

Bar officials in several states—Arizona, Colorado, Connecticut, Maine, and Washington, among them—have issued ethics opinions addressing ethical constraints arising out of the conflict between state and federal marijuana laws.<sup>231</sup>

The Arizona State Bar concluded in Opinion 11-01 that the Ogden Memorandum had created a “safe harbor” for those that operated within the confines of the state’s medical marijuana statute.<sup>232</sup> In its view, Arizona lawyers may counsel and assist their clients in any activity permitted under the Arizona medical marijuana law as long as their clients were made fully aware of the consequences under federal law.<sup>233</sup>

<sup>228</sup> Memorandum from Helen R. Kanoovsky, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing*, January 20, 2011, available at [http://www.scribd.com/doc/47657807/](http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing)

HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing. See also *Assenberg v. Anacortes* Hou. Auth., 268 Fed.Appx. 643 (9<sup>th</sup> Cir. 2008) (Under the Fair Housing Act, tenant in publicly assisted housing is not entitled to medical necessity defense and termination of lease based on tenant’s drug use did not violate HUD policy).

<sup>229</sup> In *Lebron v. Sec. of the Fla. Dep’t of Children and Families*, 772 F.3d 1352 (11<sup>th</sup> Cir. 2014), the U.S. Court of Appeals upheld, on Fourth Amendment grounds, a challenge to a state requirement that applicants for Temporary Assistance for Needy Families (TANF) benefits submit to drug testing. See CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

<sup>230</sup> A second Rule, Rule 8.4(b) provides that, “it is professional misconduct for a lawyer to ... (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” See, generally, Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 OR. L. REV. 869 (2013).

<sup>231</sup> A sample of ethics opinions was chosen for illustrative purposes. This report does not provide an exhaustive analysis of all state bar association ethics opinions on the issue.

<sup>232</sup> State Bar of Arizona Ethics Opinion 11-01 (Feb. 2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

<sup>233</sup> “• If a client or potential client requests an Arizona lawyer’s assistance to undertake the specific actions that the [Arizona medical marijuana] Act expressly permits; and • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek (continued...) ”

In contrast, Opinion 199 of the Maine Professional Ethics Commission advised attorneys that, absent an amendment to either the Rules of Professional Conduct or the CSA, a member of the Maine bar “may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law,” but “the Rule forbids attorneys from counseling a client to engage in the [marijuana] business or to assist a client in doing so.”<sup>234</sup> The Commission declined to provide more specific advice, but warned that significant risks attended practice in the area.

The Connecticut Bar Association offered much the same advice.<sup>235</sup> Lawyers may advise their clients about the features of the state medical marijuana statute, but they may not assist clients in a violation of the CSA.

While the Arizona, Maine, and Connecticut opinions are relatively general and relatively terse, the Colorado opinion provides far more examples of its view of the permissible and impermissible.<sup>236</sup> It concluded that, consistent with Rule 1.2(d) and the CSA, a Colorado attorney might (1) represent and advise a client concerning the consequences of marijuana-related activities for purposes of criminal law, family law, or labor law; (2) as a government attorney advise a client in a matter involving the establishing, interpreting, enforcing, or amending zoning relations, local ordinances, or legislation;<sup>237</sup> or (3) advise a client on the tax obligations incurred when cultivating or selling marijuana.

It concluded, on the other hand, that a Colorado attorney may not (1) draft or negotiate contracts, leases, or other agreements to facilitate the cultivation, distribution, or consumption of marijuana; or (2) provide tax planning assistance with an eye to violating federal law. The Opinion points out that providing such assistance while aware of a client’s intent is “likely to constitute aiding and abetting the violation of or conspiracy to violate federal law.”

Washington State attorneys have the advantage of not one, but two bar advisories. Both take a position similar to the Arizona opinion: attorneys transgress no ethical boundaries if their professional conduct is consistent with state law and perhaps with federal enforcement priorities. The Bar Association of King County (Seattle and environs) opined that an attorney who advises and assists a client to establish and maintain a marijuana dispensary is not subject to discipline, as long as his client’s conduct is permitted under state marijuana law and as long as he makes his client aware of the provisions of the CSA including the Cole Memorandum.<sup>238</sup>

(...continued)

other legal counsel regarding those issues and limits the scope of his or her representation; and • The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.”

<sup>234</sup> Maine Professional Ethics Commission, Opinion #199 (July 7, 2010), available at [http://www.mebareverseers.org/attorney\\_services/opinion.html?id=110134](http://www.mebareverseers.org/attorney_services/opinion.html?id=110134).

<sup>235</sup> Connecticut Bar Association, Professional Ethics Committee, Informal Opinion 2013-02 (Jan. 16, 2003), available at [http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics\\_Opinions/Informal\\_Opinion\\_2013-02.pdf](http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf).

<sup>236</sup> Colorado Bar Association Ethics Committee, Formal Opinion 125 (Oct. 21, 2013), 42 COLO. LAWYER 19 (Dec. 2013).

<sup>237</sup> Here, the Opinion finds support in 21 U.S.C. §885(d) which affords federal, state, and local law enforcement officers immunity for enforcement of federal, state, and local controlled substance laws.

<sup>238</sup> King County Bar Association, *KCBA Ethics Advisory Opinion on I-502 & Rules of Professional Conduct* (Oct. 2013), available at [http://www.kcba.org/judicial/legislative/pdf/i502\\_ethics\\_advisory\\_opinion\\_october\\_2013.pdf](http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf).

Moreover, in the opinion of the King County Bar Association, an attorney is likewise not subject to discipline merely because he owns an interest in a marijuana dispensary. Although such activity may constitute a crime under the CSA, it is not “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer,” in the eyes of the County Bar Association.

The second Washington opinion is a proposed advisory opinion which the Washington State Bar Association submitted to the Washington Supreme Court along with a proposal to add a comment to Rule 1.2 of the Washington Rules of Professional Conduct.<sup>239</sup> In its proposed opinion, a lawyer would be free to advise a client as to the nuances of state marijuana law as long as he did not do so in furtherance of an effort to violate or mask a violation of state marijuana law. A lawyer would also be free to advise and assist a client to establish and maintain a dispensary within the bounds of state law at least until such time as federal enforcement policies change. Finally, under the proposed opinion and accompanying proposed comment, a lawyer would be free to engage in a marijuana business without offending the Rule that condemns criminal conduct that reflects adversely on a lawyer’s fitness to practice.<sup>240</sup>

## Marijuana Research Under Federal Law

The federal government retains strict controls over the use of marijuana for research purposes. Under the CSA, the Attorney General, as delegated to the Drug Enforcement Agency, is authorized to register “practitioners” to “dispense, or conduct research with” controlled substances.<sup>241</sup> In instances where the practitioner seeks to conduct research on a schedule I drug, such as marijuana, that application is forwarded to the Secretary of Health and Human Services “who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol.”<sup>242</sup> The Secretary is also directed to “consult” with the Attorney General to ensure “effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use.”<sup>243</sup> As of May 2014, the DEA has registered approximately 237 practitioners to conduct marijuana

<sup>239</sup> Washington State Bar Association, Committee on Professional Ethics, *Proposed Advisory Opinion 2232* (Jan. 8, 2014), available at [http://www.wsba.org/~media/Files/Legal%20Community/Committees\\_Boards\\_Panels/Committee%20on%20Professional%20Ethics/CPE%20Report%201-8-14\\_Attachmnts.ashx](http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/Committee%20on%20Professional%20Ethics/CPE%20Report%201-8-14_Attachmnts.ashx) (The proposed comment would state: “Since the passage of I-502 by Washington voters in November 2012, both the federal and state government have devoted considerable resources to allowing I-502 [relating to recreational marijuana] to come into effect without regard to federal controlled substances laws, as long as certain stated federal concerns regarding matters such as sales to minors and other unlawful conduct are addressed. *See, e.g.*, Washington State Bar Association Advisory Opinion 2232 and sources cited. At least until there is a subsequent change of federal enforcement policy, a lawyer who counsels or assists a client regarding conduct permitted under I-502 does not, without more, violate RPC 1.2(d). *See also* Washington Comment [7] to RPC 8.4 [related criminal acts committed by attorneys].”).

<sup>240</sup> *Proposed Advisory Opinion 2232*. The proposed comment to accompany Rule 8.4 would state: “A unique circumstance was presented by the November 2012 passage by Washington voters of I-502, which allows for the creation of a state-regulated system for the production and sale of marijuana for recreational purposes. At least until there is a subsequent change of federal enforcement policy, a lawyer who engages in conduct permitted under I-502, does not, without more, violate RPC 8.4(g), (i), (k), or (n). *See also* Washington Comment [18] at RPC 1.2.”

<sup>241</sup> 21 U.S.C. §823(f).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*



research, including 16 “approved to conduct research with smoked marijuana on human subjects.”<sup>244</sup>

Practitioners obtain marijuana for approved research through the National Institute on Drug Abuse (NIDA) drug supply program. Under the CSA, the Attorney General is authorized to register applicants to manufacture or grow marijuana “if he determines that such registration is consistent with the public interest and with United States obligations under international treaties ...”<sup>245</sup> Currently, the National Center for Natural Products Research (NCNPR) at the University of Mississippi is the only organization registered to manufacture marijuana.<sup>246</sup> NIDA administers the federal contract with the NCNPR and therefore acts as the “single official source” through which researchers may obtain marijuana for research purposes.<sup>247</sup>

## Congressional Response

Several statutory provisions were enacted late in the 113<sup>th</sup> Congress and a number of legislative proposals have been introduced in the 114<sup>th</sup> concerning marijuana and state legalization initiatives.

<sup>244</sup> See *The Dangers and Consequences of Marijuana Abuse*, U.S. Dept. of Justice, Drug Enforcement Admin., at p. 4, May 2014, available at <http://www.dea.gov/docs/dangers-consequences-marijuana-abuse.pdf>. Researchers have reportedly encountered difficulties obtaining the marijuana necessary for their research. See, e.g., Gardiner Harris, *Researchers Find Study of Medical Marijuana Discouraged*, N.Y. Times, January 18, 2010.

<sup>245</sup> 21 U.S.C. §823(a). In evaluating whether granting a registration is in the “public interest” the Attorney General must consider:

- (1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;
- (2) compliance with applicable State and local law;
- (3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;
- (4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;
- (5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and
- (6) such other factors as may be relevant to and consistent with the public health and safety.

*Id.* With respect to the CSA’s reference to the nation’s “obligations under international treaties,” the Single Convention on Narcotic Drugs establishes that “any signatory nation that ‘permits the cultivation of [marijuana or opium]’ must designate one or more agencies to: license cultivators and designate where plants may be grown; purchase and take physical possession of each year’s crops; and have the exclusive right of importing, exporting, wholesale trading and maintaining stocks other than those held by manufacturers of opium alkaloids, medicinal opium or opium preparations.” *Craker v. Drug Enforcement Admin.*, 714 F.3d 17, 20 (1<sup>st</sup> Cir. 2013).

<sup>246</sup> *Craker v. Drug Enforcement Admin.*, 714 F.3d 17, 20 (1<sup>st</sup> Cir. 2013).

<sup>247</sup> See NIDA’s Role in Providing Marijuana for Research, available at <http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research>.

## Enacted Marijuana-Related Measures

**P.L. 113-235 §809(b), 2015 Consolidated and Further Continuing Appropriations Act.** This provision was enacted with the apparent attempt of preventing the implementation of Initiative 71, D.C.’s recreational marijuana law. However, there is some uncertainty regarding the legal effect of the provision.<sup>248</sup> It states: “[n]one of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801, et seq.) or any tetrahydrocannabinols derivative for recreational purposes.” Some argue that this provision bars D.C. employees from using FY2015 appropriated funds to implement Initiative 71 and that any employee who takes official acts to implement the law could be subject to civil or criminal liability under the Antideficiency Act.<sup>249</sup> Others, including D.C.’s attorney general, argue that the provision does “not prevent the District from using FY15 appropriated local funds to implement Initiative 71” because the marijuana law was enacted before the enactment of the 2015 Consolidated and Further Continuing Appropriations Act.

**P.L. 113-79 (H.R. 2642), Agricultural Act of 2014.** This public law has two marijuana-related sections. One relates to the Supplemental Nutrition Assistance Program (SNAP) (formerly, food stamps), and the other relates to industrial hemp. Eligibility for the receipt of SNAP benefits is governed in part by a means test. Only individuals below a certain income level are eligible. Section 4005 of P.L. 113-79 (7 U.S.C. §2014(e)(5)(C)) instructs the Secretary of Agriculture to promulgate rules to ensure that the costs of medical marijuana are not treated as a deduction in that calculation. Section 7606 of P.L. 113-79 authorizes institutions of higher education and state departments of agriculture to grow and cultivate industrial hemp for research purposes.

## Legislative Proposals in the 114<sup>th</sup> Congress

**P.L. 113-235 §538, 2015 Consolidated and Further Continuing Appropriations Act.** This provision prohibits the Department of Justice from using FY2015 appropriated funds “to prevent [32 listed states and the District of Columbia] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” There appears to be disagreement regarding the breadth of this appropriations language. The Department of Justice reportedly argues that it only prevents the Department from using appropriations to restrict a named state’s administrative implementation of state medical marijuana laws. Others maintain that it should be interpreted much more broadly to even bar the Department from enforcing the CSA against individuals who were acting in compliance with a named state’s medical marijuana laws.<sup>248</sup>

**S. 683/H.R. 1538, Compassionate Access, Research Expansion, and Respect of States Act of 2015.** This bill, also referred to as the CARERS Act, would exempt from the CSA “any person acting in compliance with State law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marihuana.”<sup>249</sup> It also would reclassify marijuana as a Schedule II substance, meaning that marijuana would be

<sup>248</sup> See Erik Eckholm, *Medical Marijuana Dispensers Trapped by Conflicting Laws*, N.Y. TIMES, April 8, 2015, available at <http://www.nytimes.com/2015/04/09/us/medical-marijuana-dispensers-trapped-by-conflicting-laws.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news>.

<sup>249</sup> S. 683/H.R. 1538 §2.

recognized under federal law as having medical benefits and could be prescribed to patients for legitimate medical reasons in accordance with the CSA.<sup>250</sup> The CARERS Act also would provide legal protections to depository institutions (i.e., banks, thrifts, and credit unions) that provide financial services to marijuana businesses, including by adding a provision stating that “[a] Federal banking regulator may not prohibit, penalize, or otherwise discourage a depository institution from providing financial services to a marijuana-related legitimate business” (i.e., one that is in compliance with a state or local marijuana regulatory regime).<sup>251</sup> The bill also would attempt to further alleviate BSA reporting burdens beyond that which is provided by the February 2014 FinCEN guidance discussed above.<sup>252</sup>

The bill also would attempt to make it easier for individuals to be able to conduct research on marijuana and for entities to obtain approval from the Drug Enforcement Agency to cultivate marijuana for medical research use.<sup>253</sup> Finally, Section 8 of the CARERS Act would authorize Department of Veterans Affairs health care providers to offer recommendations and opinions regarding veterans’ use of marijuana in compliance with state medical and recreational marijuana regimes.<sup>254</sup>

**S. 134/H.R. 525, Industrial Hemp Farming Act of 2015.** This bill would remove industrial hemp from the definition of “marihuana” under the CSA.<sup>255</sup>

**H.R. 262, States’ Medical Marijuana Property Rights Protection Act.** This bill would amend the civil forfeiture provisions of the CSA<sup>256</sup> to provide that no real property may be subject to civil forfeiture to the United States due to medical marijuana-related activities that are performed in compliance with state law.<sup>257</sup>

**H.R. 667, Veterans Equal Access Act.** This bill would authorize Department of Veterans Affairs health care providers to offer recommendations and opinions regarding veterans’ use of marijuana in compliance with state medical and recreational marijuana regimes.<sup>258</sup>

**H.R. 1013, Regulate Marijuana Like Alcohol Act.** This bill, among other things, would require the Attorney General to remove marijuana from all schedules of the CSA and would amend other federal laws to regulate marijuana like alcohol.<sup>259</sup>

**H.R. 1014, Marijuana Tax Revenue Act of 2015.** This bill would amend the Internal Revenue Code to impose an excise tax on the sale of marijuana by the producer or importer of the drug, at a rate of 10% for the first two years after the law goes into effect and increasing by 5% each year until maxing out at 25% from the fifth year on.<sup>260</sup> The bill would provide certain exemptions to the taxation, including “on the distribution or sale of marijuana for medical use in accordance

<sup>250</sup> *Id.* §3.

<sup>251</sup> *Id.* §6.

<sup>252</sup> *Id.* §6(d).

<sup>253</sup> *Id.* §7.

<sup>254</sup> *Id.* §8.

<sup>255</sup> 21 U.S.C. §881.

<sup>256</sup> H.R. 262 §3, amending 21 U.S.C. §881(a)(7).

<sup>257</sup> H.R. 667 §2.

<sup>258</sup> H.R. 1013 §101, amending 21 U.S.C. §§801, et seq. and §201, amending 27 U.S.C. §§201, et seq..

<sup>259</sup> H.R. 1014 §2(a), adding new 26 U.S.C. §5901.

with State law.<sup>260</sup> In addition, the bill would require anyone engaged in a “marijuana enterprise”<sup>261</sup> to pay an occupational tax of \$1,000 per year for marijuana producers, manufacturers and importers, and \$500 per year for other marijuana enterprisers.<sup>262</sup> The bill would require all marijuana enterprises to obtain a permit from the Secretary of the Treasury.<sup>263</sup> Finally, the bill would impose civil and criminal penalties for violation of the duty to pay the new marijuana-related taxes, engaging in business as a marijuana enterprise without obtaining the requisite permit, and for otherwise violating the provisions of the bill.<sup>264</sup> The bill does not amend the CSA, thus its provisions would remain in effect.

**H.R. 1635, Charlotte’s Web Medical Access Act of 2015.** This bill would remove cannabidiol and cannabidiol-rich plants from coverage under the CSA and the Federal Food, Drug, and Cosmetic Act, subject to a three-year sunset date from the date of enactment.

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<sup>260</sup> *Id.* §2(a), adding new 26 U.S.C. §5902.

<sup>261</sup> The bill defines “marijuana enterprise” as “a producer, importer, manufacturer, distributor, retailer, or any person who transports, stores, displays, or otherwise participates in any business activity that handles marijuana or marijuana products.” *Id.* §2(a), adding new 26 U.S.C. §5904(8).

<sup>262</sup> *Id.* §2(a), adding new 26 U.S.C. §5911.

<sup>263</sup> *Id.* §2(a), adding new 26 U.S.C. §5912.

<sup>264</sup> *Id.* §2(a), adding new 26 U.S.C. §§5921, 5922.



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## **The Marijuana Policy Gap and the Path Forward**

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## Summary

Under federal law, the cultivation, possession, and distribution of marijuana are illegal, except for the purposes of sanctioned research. States, however, have established a range of laws and policies regarding marijuana's medical and recreational use. Most states have deviated from an across-the-board prohibition of marijuana, and it is now more so the rule than the exception that states have laws and policies allowing for some cultivation, sale, distribution, and possession of marijuana—all of which are contrary to the federal Controlled Substances Act (CSA). As of March 2017, nearly 90% of the states, as well as Puerto Rico and the District of Columbia, allow for the *medical use* of marijuana in some capacity. Also, eight states and the District of Columbia now allow for some *recreational use* of marijuana. These developments have spurred a number of questions regarding their potential implications for federal law enforcement activities and for the nation's drug policies as a whole.

Thus far, the federal response to state actions to decriminalize or legalize marijuana largely has been to allow states to implement their own laws on marijuana. The Department of Justice (DOJ) has nonetheless reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of states' positions on marijuana. Rather than targeting individuals for drug use and possession, federal law enforcement has generally focused its counterdrug efforts on criminal networks involved in the drug trade.

While the majority of the American public supports marijuana legalization, some have voiced apprehension over possible negative implications. Opponents' concerns include, but are not limited to, the potential impact of legalization on (1) marijuana use, particularly among youth; (2) road incidents involving marijuana-impaired drivers; (3) marijuana trafficking from states that have legalized it into neighboring states that have not; and (4) U.S. compliance with international treaties. Proponents of legalization have been encouraged by potential outcomes that could result from marijuana legalization, including a new source of tax revenue for states and a decrease in marijuana-related arrests. Many of these potential implications are yet to be fully measured.

Given the current marijuana policy gap between the federal government and many of the states, there are a number of issues that Congress may address. These include, but are not limited to, issues surrounding availability of financial services for marijuana businesses, federal tax treatment, oversight of federal law enforcement, allowance of states to implement medical marijuana laws and involvement of federal health care workers, and consideration of marijuana as a Schedule I drug under the CSA. The marijuana policy gap has widened each year for some time. It has only been a few years since states began to legalize recreational marijuana, but over 20 years since they began to legalize medical marijuana. In addressing state-level legalization efforts and considering marijuana's current placement on Schedule I, Congress could take one of several routes. It could elect to take no action, thereby upholding the federal government's current marijuana policy. It may also decide that the CSA must be enforced in states and not allow them to implement conflicting laws on marijuana. Alternatively, Congress could choose to reevaluate marijuana's placement as a Schedule I controlled substance.

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## Introduction

Marijuana is the most commonly used illicit drug in the United States.<sup>1</sup> It is a psychoactive drug that generally consists of leaves and flowers of the cannabis sativa plant. Its history dates back thousands of years, but in the United States, it became popular as a recreational drug in the early 20<sup>th</sup> century.<sup>2</sup> The THC<sup>3</sup> content of marijuana is dependent on both the variety of the cannabis plant and the part used.<sup>4</sup> Under federal law, cannabis and its derivatives are classified as Schedule I controlled substances—thus prohibiting their possession, cultivation, or distribution—under the Controlled Substances Act (CSA), regardless of its THC content, unless specifically exempted or listed in another schedule (see “Controlled Substances Act”).

The percentage of the population 12 and older currently using (past month use of) marijuana has generally increased over the last several years—from 6.9% in 2010 to 8.3% in 2015.<sup>5</sup> The rate of past-month marijuana use among youth (aged 12-17), however, has remained relatively unchanged over this period (7.0%).<sup>6</sup> Youth also generally perceive that obtaining marijuana—if they desire it—is relatively easy.<sup>7</sup> Indeed, marijuana is available throughout the United States; 34% of state and local law enforcement agencies that were surveyed by the Drug Enforcement Administration (DEA) reported an increase in availability over the last year, and 62% reported that availability had remained the same.<sup>8</sup>

This report provides a background on federal marijuana policy and an overview of state trends with respect to marijuana decriminalization and legalization—for both medical and recreational

<sup>1</sup> In 2015, an estimated 22.2 million individuals in the United States aged 12 or older (8.3% of this population) were current (past month) users of marijuana. See Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from the 2015 National Survey on Drug Use and Health: Detailed Tables*, September 2016, Tables 1.1A and 1.1B, <http://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015.htm>. Hereinafter, *Results from 2015 NSDUH*.

<sup>2</sup> David F. Musto, *The American Disease: Origins of Narcotic Control*, 3<sup>rd</sup> ed. (New York: Oxford University Press, 1999), p. 219.

<sup>3</sup> THC stands for delta-9-tetrahydrocannabinol, the primary psychoactive chemical compound, or cannabinoid, in marijuana.

<sup>4</sup> Industrial hemp is a variety of the cannabis plant that has low THC content and is cultivated for use in the production of a wide range of products. THC levels for hemp are generally less than 1%. For further information about hemp, see CRS Report R1.32725, *Hemp as an Agricultural Commodity*, by Renée Johnson. While hemp is mentioned in this report, it largely focuses on marijuana.

<sup>5</sup> For each year from 2010 to 2014, the estimated percentage of the population currently using marijuana was 6.9%, 7.0%, 7.3%, 7.5%, and 8.4% respectively. The difference between each year's estimate (2010 – 2013) and the 2014 estimate (8.4%) is statistically significant at the .05 level. For 2014 to 2015, however, the percentage dropped from 8.4% to 8.3%; this change is not statistically significant at the .05 level. See Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from 2015 NSDUH*; and *Results from the 2014 National Survey on Drug Use and Health: Summary of National Findings*, September 2015, p. 6 (hereinafter, *Results from 2014 NSDUH*). Of note, some warn of potential bias in drug usage survey data because of misreporting by respondents. See Beau Kilmer, Jonathan P. Caulkins, and Gregory Midgette, et al., *Before the Grand Opening: Measuring Washington State's Marijuana Market in the Last Year Before Legalized Commercial Sales*, RAND Drug Policy Research Center, 2013.

<sup>6</sup> Results from 2015 NSDUH, Table 1.2B; and *Results from 2014 NSDUH*.

<sup>7</sup> Nearly half of surveyed youth indicated that marijuana would be “fairly easy” or “very easy” to obtain if desired. *Results from the 2015 NSDUH*, Table 3.1B.

<sup>8</sup> Based on assessments from 1,444 local, state, and tribal law enforcement agencies that responded to the DEA's 2016 National Drug Threat Survey. U.S. Drug Enforcement Administration, *2016 National Drug Threat Assessment Summary*, DEA-DCT-DIR-001-17, November 2016 (hereinafter, *2016 National Drug Threat Assessment Summary*).

uses. It then analyzes relevant issues for federal law enforcement and the implications of state marijuana legalization. The report also outlines a number of related policy questions that Congress may confront, including legalization in the District of Columbia, financial services for marijuana businesses, the medical nature of marijuana, oversight of federal law enforcement, and evaluation of marijuana as a Schedule I drug.

## Controlled Substances Act

Marijuana is currently listed as a Schedule I controlled substance under the CSA.<sup>9</sup> This indicates that the federal government has determined that

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.<sup>10</sup>

### Controlled Substances Act (CSA)

The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>11</sup> It regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. Under the CSA, there are five schedules under which substances may be classified—Schedule I being the most restrictive. Substances placed onto one of the five schedules are evaluated on

- actual or relative potential for abuse;
- known scientific evidence of pharmacological effects;
- current scientific knowledge of the substance;
- history and current pattern of abuse;
- scope, duration, and significance of abuse;
- risk to public health;
- psychic or physiological dependence liability; and
- whether the substance is an immediate precursor of an already scheduled substance.

U.S. federal drug control policies—specifically those positions relating to marijuana—continue to generate debates among policymakers, law enforcement officials, scholars, and the public. Even before the federal government’s move in 1970 to criminalize the manufacture, distribution, dispensation, and possession of marijuana,<sup>12</sup> there were significant discussions over marijuana’s place in American society.

## Evolution of Public Opinion

Changes in state and local marijuana laws are coupled with a general shift in public attitudes toward the substance. In 1969, 12% of the surveyed population supported legalizing marijuana;

<sup>9</sup> For more information on the CSA, see the text box, “Controlled Substances Act (CSA).”

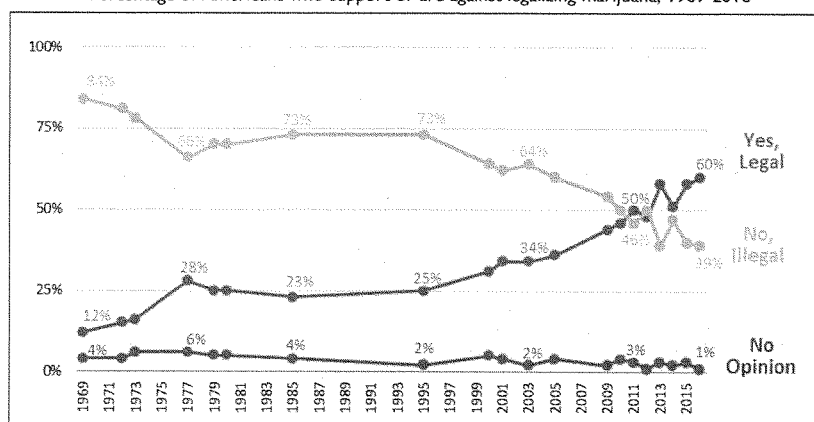
<sup>10</sup> 21 U.S.C. §812(b)(1).

<sup>11</sup> P.L. 91-513; 21 U.S.C. §801 et. seq. For additional information on the CSA, see CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh; and CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

<sup>12</sup> 21 U.S.C. §§812 and 841.

today, 60% of surveyed adults feel that marijuana should be legalized.<sup>13</sup> Support for legalization has more than doubled over the last 20 years. In addition, nearly 60% of respondents indicate that the federal government should not enforce federal marijuana prohibition laws in those states that allow for its use.<sup>14</sup>

**Figure 1. Views on Legalization of Marijuana**  
Percentage of Americans who support or are against legalizing marijuana, 1969-2016



**Source:** CRS presentation of Gallup data. Gallup News Service, *Gallup Poll Social Series: Crime*, <http://www.gallup.com>.

**Notes:** Question: "Do you think marijuana should be made legal or not?" Sample sizes vary from year to year. 2016 data are based on telephone interviews conducted October 5-9, 2016, with a random sample of 1,017 adults aged 18 and older living in the United States.

## Marijuana as Medicine

As mentioned, marijuana's placement on Schedule I of the CSA means that it has no currently accepted medical use according to the federal government. Under federal law, marketing a drug as medicine requires approval from the Food and Drug Administration (FDA).<sup>15</sup> While most states have laws allowing for medicinal use of marijuana, the FDA has not approved marijuana, any drug containing marijuana, or any drug containing a plant-derived chemical constituent of marijuana for medicinal use. The FDA has, however, approved two drugs containing synthetic

<sup>13</sup> The poll question is "Do you think marijuana should be made legal or not?" See Art Swift, *Support for Legal Marijuana Use Up to 60% in U.S.*, Gallup, October 19, 2016 (based on poll data from October 2016). For purposes of this question, it does not distinguish between medical and recreational marijuana. Of note, in August 2016, the Pew Research Center found similar levels of support for marijuana legalization among American adults. See Abigail Geiger, *Support for marijuana legalization continues to rise*, Pew Research Center, article based on Aug. 23-Sept. 2 Pew Research Center survey, October 12, 2016, <http://www.pewresearch.org>.

<sup>14</sup> Pew Research Center for the People & the Press, *In Debate Over Legalizing Marijuana, Disagreement Over Drug's Dangers*, April 14, 2015 (based on poll data from March 2015).

<sup>15</sup> Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. §§301 et seq.). For more information CRS Report R41983, *How FDA Approves Drugs and Regulates Their Safety and Effectiveness*, by Susan Thaul.

THC.<sup>16</sup> In addition, drugs containing plant-derived THC and/or cannabidiol (CBD, a nonpsychoactive chemical component of marijuana) are in the drug development and approval process.<sup>17</sup> See **Appendix A** for further discussion of these drugs.

Individuals use marijuana to treat medical issues such as lack of appetite, nausea, chronic pain, spasticity, anxiety, and other maladies; however, the efficacy of this treatment is unclear from available scientific evidence.<sup>19</sup> While some individuals report (both anecdotally and in scientific studies) benefits and alleviation of symptoms from use of marijuana, reports are inconsistent. Some have argued that the scientific field has been unable to robustly determine the medicinal value and merits of marijuana due to regulatory restrictions on quality, quantity, and use of marijuana in scientific research.<sup>20</sup>

### Scientific Evaluations of Medical Marijuana Effects

Recent evaluations conducted separately by the FDA and the National Academies of Sciences, Engineering, and Medicine (the National Academies) illustrate the challenge of meeting the required standard of evidence for demonstrating effective medical use. While taking different approaches to their evaluations, both the FDA and the National Academies have found that the current evidence base falls short. According to the FDA, “no published studies conducted with marijuana meet the criteria of an adequate and well-controlled efficacy study,” and “the criteria for adequate safety studies [have] also not been met.”<sup>21</sup> According to the National Academies,

#### Risks Associated with Marijuana Use

The FDA’s eight-factor analysis includes an assessment of risks associated with marijuana use. Marijuana is known to affect the central nervous system, the cardiovascular system, the respiratory system, and the immune system. Its effects may vary according to how it is consumed (e.g., inhaled or ingested), how much of it is consumed, how often it is consumed, and over what time frame it is consumed.

Some of marijuana’s most widely recognized effects are among the reasons people use it recreationally: it can reduce inhibition, improve mood, enhance sensory perception, and heighten imagination (among other effects). Some common effects are more problematic: it can cause dizziness, confusion, ataxia (i.e., uncoordinated movements), delusions, and agitation (among other effects). Marijuana’s acute effects can impair an individual’s ability to perform daily activities, such as studying or driving. Chronic use of marijuana can lead to abuse or dependence and, in the case of heavy chronic use, the potential for withdrawal (with symptoms like insomnia, weight loss, and irritability).<sup>18</sup>

<sup>16</sup> These drugs are Nabilone, an antiemetic (to reduce nausea or prevent vomiting) for patients receiving chemotherapy for cancer, and Dronabinol, both an antiemetic for patients on chemotherapy and an appetite stimulant for patients with AIDS-related weight loss. See **Appendix A** for additional information regarding FDA-approved drugs.

<sup>17</sup> Department of Health and Human Services, Food and Drug Administration, *FDA and Marijuana: Questions and Answers*, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm#determinations>. For an explanation of the FDA’s drug development and approval process, see <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/default.htm>.

<sup>18</sup> Department of Justice, Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53687-53766 and 53767-53845, August 12, 2016.

<sup>19</sup> Penny F. Whiting, Robert F. Wolff, and Sophan Deshpande, et al., “Cannabinoids for Medical Use,” *Journal of the American Medical Association*, vol. 313, no. 24 (June 2015), pp. 2456-2473.

<sup>20</sup> See, for example, Chapter 15 of National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. S-1, doi: 10.17226/24625.

<sup>21</sup> Department of Justice, Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53687-53766 and 53767-53845, August 12, 2016. The criteria for adequate and well-controlled studies are defined under 21 C.F.R. §314.126.

“conclusive evidence regarding the short- and long-term health effects (harms and benefits) of cannabis use remains elusive.”<sup>22</sup> These studies are discussed in more detail in **Appendix A**.

### Federal Regulation of Marijuana Research

Individuals who seek to conduct research on any controlled substance must do so in accordance with the CSA and other federal laws.<sup>23</sup> For all controlled substances, individuals must obtain a registration issued by the Attorney General, as delegated to the DEA<sup>24</sup> in accordance with associated rules and regulations issued by the Attorney General.<sup>25</sup> Also, DEA regulations require *all* registrants to comply with strict storage requirements for controlled substances.<sup>26</sup>

Some have argued that federal regulation of marijuana research unnecessarily impedes the clinical trials that are required for FDA approval, and the Obama Administration simplified some small steps within the larger process. In recent years, the federal government has attempted to make marijuana research easier.

- In June 2015, HHS eliminated one step in obtaining research-grade marijuana for research that is not funded by the National Institutes of Health.<sup>27</sup>
- In December 2015, the DEA announced a waiver to make it easier for researchers conducting clinical trials with CBD to modify their research protocols and obtain more CBD than was initially approved.<sup>28</sup>
- In August 2016, the DEA announced a new policy intended to increase the number of approved sources of research-grade marijuana.<sup>29</sup>

Prior to the August 2016 change, some contended that marijuana provided to researchers was “both qualitatively and quantitatively inadequate.”<sup>30</sup> The DEA’s recent policy change

<sup>22</sup> National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. S-1, doi: 10.17226/24625.

<sup>23</sup> For regulatory requirements under the CSA, see CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh.

<sup>24</sup> As authorized under 21 U.S.C. §871, the Attorney General may delegate any of his/her control and enforcement functions under the CSA to any officer or employee of the Department of Justice—many of these functions are performed by the DEA.

<sup>25</sup> See 21 U.S.C. §822. This requirement is also described under 21 CFR 1301.11(a): Every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration unless exempted by law or pursuant to §§1301.22 through 1301.26.

<sup>26</sup> For the purposes of ensuring the secure storage and distribution of *all* controlled substances, all applicants and registrants must generally “provide effective controls and procedures to guard against theft and diversion of controlled substances.” See 21 C.F.R. §1301.71.

<sup>27</sup> Department of Health and Human Services, “Announcement of Revision to the Department of Health and Human Services Guidance on Procedures for the Provision of Marijuana for Medical Research as Published on May 21, 1999,” 80 *Federal Register* 35960-35961, June 23, 2015.

<sup>28</sup> Department of Justice, Drug Enforcement Administration, “DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol,” press release, December 23, 2015.

<sup>29</sup> Department of Justice, Drug Enforcement Administration, “Applications to Become Registered under the Controlled Substances Act to Manufacture Marijuana to Supply Researchers in the U.S.,” 81 *Federal Register* 53846-53848, August 12, 2016.

<sup>30</sup> Marc Kaufman, “Federal Marijuana Monopoly Challenged,” *Washington Post*, December 12, 2005; and Department of Justice, Drug Enforcement Administration, “Lyle E. Craker; Denial of Application,” 74 *Federal Register* 2101, January 14, 2009.

may appease those researchers seeking better quality and quantity of marijuana. For broader discussion of this issue, see **Appendix A**.

## Current Federal Status of Marijuana and the Policy Gap with States

While the federal government maintains marijuana's current placement as a Schedule I controlled substance, states have established a range of laws and policies regarding its medical and recreational use. These developments have spurred a number of questions regarding potential implications for federal drug enforcement activities and for the nation's drug policies as a whole. In 1970, the CSA placed the control of marijuana under federal jurisdiction *regardless* of state regulations and laws, and its status has remained unchanged under federal law for nearly 50 years. For more background on federal marijuana policy and the history of how marijuana came to be illegal in the United States, see **Appendix B**.

### Select Consequences of Marijuana Use Under Federal Law

Marijuana use may subject an individual to a number of consequences under federal law regardless of whether that individual has been convicted of a marijuana-related offense. For example, marijuana users may lose their ability to purchase and possess a firearm, or be barred from living in public housing. Under the Gun Control Act, it is unlawful to possess, ship, transport, receive, or dispose of any firearm or ammunition to any person "who is an unlawful user of or addicted to any controlled substance" as defined by the CSA.<sup>31</sup> In addition, federal law also establishes that "illegal drug users" are ineligible for federally assisted housing.<sup>32</sup> The law requires public housing agencies and owners of federally assisted housing to establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any such applicant or tenant.<sup>33</sup>

## DEA Rejection of Petitions to Reschedule

There has been mounting public pressure for the DEA to reevaluate marijuana as a Schedule I controlled substance. Over the years, several entities have submitted petitions to reschedule marijuana.<sup>34</sup> In August 2016, after a five-year evaluation process done in conjunction with the Food and Drug Administration (FDA), the DEA rejected two petitions submitted by two state governors and a New Mexico health provider, respectively, to move marijuana to a less-restrictive schedule under the CSA.<sup>35</sup> Consistent with past practice,<sup>36</sup> the rejections were based on a conclusion by both the FDA and DEA that marijuana continues to meet the criteria for inclusion

<sup>31</sup> See 18 U.S.C. §§922(g)(3), 924(a)(2) and 27 C.F.R. §478.11.

<sup>32</sup> 42 U.S.C. §§13661-13662.

<sup>33</sup> For a broader discussion of legal consequences of marijuana use, see CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey, Charles Doyle, and David H. Carpenter.

<sup>34</sup> Any interested party may petition the Administrator of the DEA to initiate rulemaking proceedings to reschedule a controlled substance. See 21 U.S.C. §811(a) and 21 C.F.R. §1308.43(a) for relevant rules and regulations.

<sup>35</sup> In 2011, the governors of Rhode Island and Washington petitioned the DEA to have marijuana and "related items" removed from Schedule I of the CSA and rescheduled as medical cannabis in Schedule II. In 2009, Bryan Krumm, a health provider in New Mexico, petitioned the DEA to have marijuana removed from Schedule I of the CSA and rescheduled in any schedule other than Schedule I.

<sup>36</sup> The DEA has previously denied petitions to reschedule marijuana. For example, in 2002 a petition was filed to have marijuana removed from Schedule I and rescheduled as cannabis in Schedule III, IV, or V. In 2011, the DEA rejected the petition. See Drug Enforcement Administration, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 76 *Federal Register* 40552-40589, July 8, 2011.

on Schedule I—namely that it has a high potential for abuse, has no currently accepted medical use, and lacks an accepted level of safety for use under medical supervision.<sup>37</sup>

It is important to note that both Congress and the Administration have the power to alter marijuana's status as a Schedule I substance. Congress could amend the CSA to move marijuana to a lower schedule or remove it entirely from control. The Administration could also make such changes on its own, though it is bound by the CSA to evaluate a substance prior to altering its scheduling status.<sup>38</sup>

## Trends in States

Over the past few decades, most states have deviated from an across-the-board prohibition of marijuana, and as of March 2017, nearly 90% of the states, as well as Puerto Rico and the District of Columbia, allowed for the *medical use* of marijuana in some capacity.<sup>39</sup> Also, eight states and the District of Columbia now allow for the *recreational use* of marijuana.<sup>40</sup> It is now more so the rule than the exception that states have laws and policies allowing for some manufacturing, sale, distribution, and possession of marijuana—all of which are contrary to the CSA, except for the purposes of sanctioned research.<sup>41</sup> Evolving state-level positions on marijuana include decriminalization initiatives, legal exceptions for medical use, and legalization of certain quantities for recreational use. See **Figure 2** at the end of this section for the various marijuana policies of states.

Decriminalization and legalization initiatives in the states reflect growing public support for the legalization of marijuana. As mentioned, just prior to passage of the CSA in 1970, 12% of surveyed individuals aged 18 and older felt that marijuana should be made legal. In 2016, more than half (60%) of surveyed U.S. adults expressed that marijuana should be legalized.<sup>42</sup>

## Decriminalization

Marijuana *decriminalization* differs markedly from *legalization*. A state decriminalizes conduct by removing the accompanying criminal penalties; however, civil penalties remain. If, for instance, a state decriminalizes the possession of marijuana in small amounts,<sup>43</sup> possession of it

<sup>37</sup> See Drug Enforcement Administration, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53767-53845, August 12, 2016; and Drug Enforcement Administration, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53687-53766, August 12, 2016.

<sup>38</sup> Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the Attorney General (through the DEA), by the Secretary of Health and Human Services, or by petition from any interested person; 21 U.S.C. §811(a). Congress may change the scheduling status of a drug or substance through legislation.

<sup>39</sup> National Conference of State Legislatures, *State Medical Marijuana Laws*, November 2016. Some states allow broad access to medical marijuana while others have more narrow conditions under which access is granted. For example, in Alabama medical marijuana may only be dispensed by the University of Alabama and only to treat a person with an epileptic condition under certain conditions. Also, some states allow cannabidiol (CBD)-only medical marijuana. CBD is a chemical compound of marijuana.

<sup>40</sup> States have established rules surrounding marijuana use—see "Recreational Legalization" for a discussion of state regulations.

<sup>41</sup> The notable exception is the distribution of marijuana for research purposes.

<sup>42</sup> Art Swift, *Support for Legal Marijuana Use Up to 60% in U.S.*, Gallup, October 19, 2016 (based on poll data from October 2016).

<sup>43</sup> Typically one ounce or less, but the amount varies from state to state.

still violates state law, but possession of quantities within the specified *small amount* is considered a civil offense and subject to a civil penalty, not criminal prosecution. By decriminalizing possession of marijuana in small amounts, states are *not legalizing* its possession. In addition, as these initiatives generally relate to the *possession* (rather than the manufacture or distribution) of small amounts of marijuana, decriminalization initiatives do not impede federal law enforcement's priority of targeting high-level drug offenders, or so-called "big fish," rather than individual users.

Decriminalization initiatives by the states do not appear to be at odds with the CSA because both maintain that possessing marijuana is in violation of the law. For example, individuals in possession of small amounts of marijuana in Nebraska—a state that has decriminalized possession of small amounts—are in violation of both the CSA and Nebraska state law. The difference lies in the associated penalties for these federal and state violations. Under the CSA, a person convicted of simple possession (first offense) of marijuana may be punished with up to one year imprisonment and/or fined not more than \$1,000.<sup>44</sup> Under Nebraska state law, a person in possession (first offense) of an ounce or less of marijuana is subject to a civil penalty of not more than \$300.<sup>45</sup>

In recent years, several states have decriminalized the possession of small amounts of marijuana; however, some of these states continue to treat possession of small amounts of marijuana as a criminal offense under specific circumstances. In New York, for example, the possession of small amounts of marijuana is still considered a crime when it is "open to public view."<sup>46</sup> In 2015, just over 21,000 individuals in New York were arrested for criminal possession of marijuana in the fifth degree, a misdemeanor.<sup>47</sup>

### **Decriminalization in Cities**

Several cities have officially or unofficially decriminalized marijuana possession regardless of what has occurred at the state level. In November 2014, New York City (NYC) Mayor de Blasio and NYC Police Commissioner Bratton announced a change in marijuana enforcement policy; individuals found to be in possession of marijuana (25 grams or less)<sup>48</sup> may be eligible to receive a summons instead of being arrested.<sup>49</sup> The New York City Police Department (NYPD) issues so-called "pot tickets" for those in possession of 25 grams or less. In 2016, however, preliminary data indicated that marijuana possession arrests were increasing in NYC compared to 2015—this increase could be the result of changes in NYPD arrest policies; this remains unclear.<sup>50</sup>

<sup>44</sup> 21 U.S.C. §844.

<sup>45</sup> Also, the judge may order the offender to attend a drug use and abuse education course. See §28-416 of the Nebraska Revised Statutes.

<sup>46</sup> NY Pen. Law §221.10.

<sup>47</sup> State-level arrest data provided to CRS by the New York State Department of Criminal Justice Services.

<sup>48</sup> Under NY Pen. Law §221.10, a person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses "1. marihuana in a public place ... and such marihuana is burning or open to public view; or 2. one or more preparations, compounds, mixtures or substances containing marihuana and... are of an aggregate weight of more than twenty-five grams."

<sup>49</sup> City of New York, *Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy*, November 10, 2014.

<sup>50</sup> City-level arrest data provided to CRS by the New York State Department of Criminal Justice Services. Also see Jennifer Fermino, John Annese, and Ginger Adams Otis, "NYPD cracks down on marijuana possession in NYC, sees big uptick in arrests for carrying pot," *New York Daily News*, June 2, 2016.



Just as there are disparities in state and federal laws and policies, some cities' decriminalization initiatives run contrary to the laws and policies of the states. In Pennsylvania, the state government has not decriminalized marijuana possession, but Pittsburgh, Philadelphia, State College, and Harrisburg have all decriminalized possession in some form. In 2016, Harrisburg's city council unanimously voted to make possession of 30 grams or less of marijuana punishable by a \$75 fine and public use punishable by a \$150 fine.<sup>51</sup>

### Medical Marijuana Exceptions

In 1996, California became the first state to amend its drug laws to allow for the medicinal use of marijuana. As of March 2017, over half of the states, the District of Columbia, Puerto Rico, and Guam have comprehensive policies allowing for the medicinal use of marijuana.<sup>52</sup> Seventeen additional states allow for so-called "limited access medical marijuana," which refers to cannabis with low THC content or CBD oil.<sup>53</sup>

As noted, the CSA does not distinguish between the medical and recreational use of marijuana. Under the CSA, marijuana has "no currently accepted medical use in treatment in the United States,"<sup>54</sup> and states' allowance of its use for medical purposes is at odds with the federal position. Federal law enforcement has investigated, arrested, and prosecuted individuals for medical marijuana-related offenses regardless of whether they are in compliance with state law; however, federal law enforcement emphasizes the investigation and prosecution of growers and dispensers over individual users of medical marijuana. Federal enforcement priorities are discussed further in "Federal Response to State Divergence."

### Recreational Legalization

In contrast to marijuana *decriminalization* initiatives wherein civil penalties remain for violations involving marijuana possession, marijuana *legalization* measures remove all state-imposed penalties for specified activities involving marijuana. Until 2012, the recreational use of marijuana had not been legal in any U.S. state since prior to the passage of the CSA in 1970. In November 2012, citizens of Colorado and Washington voted to legalize, regulate, and tax small amounts of marijuana for recreational use.<sup>55</sup> In November 2014, legalization initiatives also passed in Alaska, Oregon, and the District of Columbia (DC), further expanding the disparities between federal and state marijuana laws. Later, in November 2016, recreational legalization initiatives passed in Massachusetts, California, Maine, and Nevada.

These recreational legalization initiatives all legalized the possession of specific quantities of marijuana by individuals aged 21 and over and (with the exception of DC) set up state-administered regulatory schemes for the sale of marijuana;<sup>56</sup> however, there are variations among

<sup>51</sup> Christine Vendel, "It's official: Harrisburg council reduces penalties for pot possession," *Penn Live*, July 5, 2016; and City of Harrisburg, City Council.

<sup>52</sup> Several states are implementing recently enacted laws. National Conference of State Legislatures, *State Medical Marijuana Laws*, November 2016.

<sup>53</sup> As previously mentioned, CBD is a chemical compound in marijuana. Unlike THC, it does not have a psychoactive component.

<sup>54</sup> 21 U.S.C. §812(b)(1).

<sup>55</sup> For more detail regarding both Washington Initiative 502 and Colorado Amendment 64, see CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh.

<sup>56</sup> Regulatory schemes include restrictions and requirements for licensing the production, processing, and retail of marijuana, and procedures for the issuance of licenses.

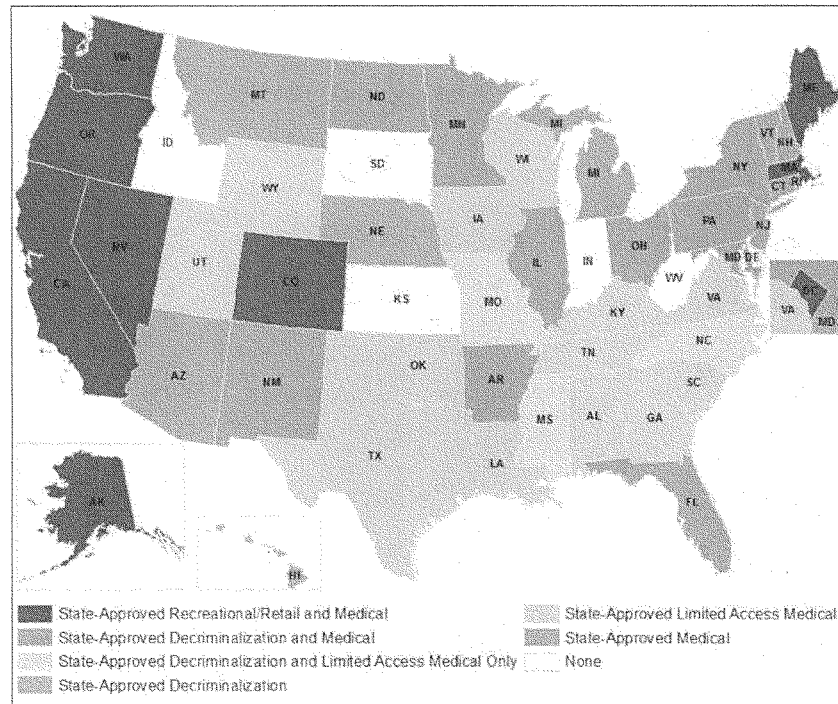
the initiatives. For example, Colorado, Alaska, Oregon, Massachusetts, Nevada, Maine, California, and DC allow for individuals to grow their own marijuana plants while Washington does not. These legalization initiatives also specify that many actions involving marijuana remain crimes. For example, in Washington, as well as other states, the operation of a motor vehicle while under the influence of marijuana remains a crime.<sup>57</sup> In some states such as Colorado, individuals over the age of 21 may grow small amounts of marijuana for personal use, but marijuana may not be consumed “openly and publicly or in a manner that endangers others.”<sup>58</sup> In an example of city-level initiatives breaking from state-level policies, in November 2016, the city of Denver voted to allow designated areas where public consumption of marijuana would be allowed.<sup>59</sup> **Figure 2** highlights the status of marijuana laws by state.

<sup>57</sup> Washington Initiative 502, [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf).

<sup>58</sup> Colorado Amendment 64, [http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/\\$FILE/Amendment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf](http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Amendment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf). For information on the Colorado regulatory system, see the website of the Colorado Department of Revenue, Marijuana Enforcement Division: <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement>.

<sup>59</sup> Denver Initiated Ordinance 300, [https://www.denvergov.org/content/dam/denvergov/Portals/778/documents/VoterInfoSample\\_Ballot/2016GeneralComboSampleBallotWatermark.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/778/documents/VoterInfoSample_Ballot/2016GeneralComboSampleBallotWatermark.pdf).

**Figure 2. Map of State Marijuana Laws**  
March 2017



**Source:** CRS presentation of data from the National Conference of State Legislatures and the Drug Enforcement Administration.

**Notes:** Limited-access medical marijuana refers to cannabis with low THC content or cannabidiol (CBD) oil. "State-approved" refers to either state laws that (1) allow for recreational and/or medical marijuana and/or (2) decriminalize the possession of marijuana in small amounts.

## Federal Response to State Divergence

### Enforcement Focused on Traffickers

Rather than targeting individuals for drug use and possession, federal law enforcement has generally focused its counterdrug efforts on criminal networks involved in the drug trade. Notably, federal policing efforts on marijuana enforcement appear consistent with this position. Federal marijuana enforcement efforts have largely been focused on *traffickers and distributors* of illicit drugs, rather than the low-level users; rather, arrests for marijuana *possession* offenses are largely made by state and local police.<sup>60</sup> President Obama once noted that "[it] would not

<sup>60</sup> For a discussion of drug enforcement in the United States, see CRS Report R43749, *Drug Enforcement in the United*

make sense from a prioritization point of view for us to focus on recreational drug users in a state that has already said that under state law that's legal."<sup>61</sup> While it is not yet clear how the Trump Administration will proceed with drug enforcement priorities, the White House press secretary indicated there may be increased enforcement against recreational marijuana, and stated that there is a "big difference" between medical and recreational marijuana.<sup>62</sup>

### Department of Justice Guidance Memos for U.S. Attorneys

After some states began to legalize the medical use of marijuana, the Department of Justice (DOJ) reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of how individual states may change their laws and positions on marijuana.<sup>63</sup> DOJ has clarified federal marijuana policy through several memos providing direction for U.S. Attorneys in states that allow the medical use of marijuana. In the so-called "Ogden Memo" of 2009, former Deputy Attorney General David Ogden reiterated that combating major drug traffickers remains a central priority and stated:

[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the [Justice] Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.<sup>64</sup>

In a follow-up memorandum to U.S. Attorneys, former Deputy Attorney General James Cole restated that enforcing the CSA remained a core priority of DOJ, even in states that had legalized medical marijuana. He clarified that "[t]he Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."<sup>65</sup>

In his memo, Deputy Attorney General Cole warned those who might assist medical marijuana dispensaries in any way. He stated that "[p]ersons who are in the business of cultivating, selling or distributing marijuana, *and those who knowingly facilitate such activities* [emphasis added], are in violation of the Controlled Substances Act, regardless of state law."<sup>66</sup> This has been interpreted by some to mean, for example, that building owners and managers are in violation of the CSA by allowing medical marijuana dispensaries to operate in their buildings.<sup>67</sup> Deputy

*States: History, Policy, and Trends*, by Lisa N. Sacco.

<sup>61</sup> "Marijuana Not High Obama Priority," *ABC Nightline*, December 14, 2012.

<sup>62</sup> The White House, Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer, 2/23/2017, #15*, February 22, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15>.

<sup>63</sup> United States Attorney's Office, "Statement From U.S. Attorney's Office on Initiative 502," press release, December 5, 2012.

<sup>64</sup> Deputy Attorney General David W. Ogden, *Memorandum for Selected United States Attorneys*, U.S. Department of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Washington, DC, October 19, 2009, pp. 1-2.

<sup>65</sup> Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011, p. 2.

<sup>66</sup> *Ibid.*

<sup>67</sup> Jennifer Medina, "U.S. Attorneys in California Set Crackdown on Marijuana," *New York Times*, October 8, 2011, p.

Attorney General Cole further warned that “[t]hose who engage in transactions involving the proceeds of such activity [cultivating, selling, or distributing of marijuana] may be in violation of federal money laundering statutes and other federal financial laws.”<sup>68</sup> This warning may be one reason why medical marijuana dispensaries have had difficulty accessing bank services.<sup>69</sup> In an August 2013 memorandum, Deputy Attorney General Cole stated that while marijuana remains an illegal substance under the CSA, DOJ would focus its resources on the “most significant threats in the most effective, consistent, and rational way.”<sup>70</sup> The memo outlined eight enforcement priorities for DOJ:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.<sup>71</sup>

In a February 2014 memorandum, Deputy Attorney General Cole further reinforced these enforcement priorities, specifically as they relate to the prosecution of marijuana-related financial crimes. The memo directed the U.S. Attorneys that “in determining whether to charge individuals or institutions with ... [certain financial] offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance.”<sup>72</sup>

In October 2014, DOJ released another memo to the U.S. Attorneys that reiterated the applicability of the eight enforcement priorities to their marijuana efforts in Indian country.<sup>73</sup> It responded to the American Indian tribes’ requests for guidance on CSA enforcement on tribal

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<sup>68</sup> Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011, p. 2.

<sup>69</sup> John Ingold, “Last Bank Shuts Doors on Colorado Pot Dispensaries,” *The Denver Post*, October 1, 2011; Jonathan Martin, “Medical-Marijuana Dispensaries Run Into Trouble at the Bank,” *The Seattle Times*, April 29, 2012.

<sup>70</sup> Deputy Attorney General James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, p. 1.

<sup>71</sup> *Ibid.*, pp. 1-2.

<sup>72</sup> Deputy Attorney General James M. Cole, *Memorandum for All United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Related Financial Crimes, Washington, DC, February 14, 2014, p. 2.

<sup>73</sup> Executive Office for United States Attorneys, *Policy Statement Regarding Marijuana Issues in Indian Country*, October 28, 2014.

lands. DOJ reiterated that the August 2013 Cole memo does not prohibit the federal government from enforcing federal law in Indian Country, and adds the following:

The eight priorities in the Cole Memorandum will guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the *cultivation or use* of marijuana in Indian Country [emphasis added].<sup>74</sup>

Unlike the Cole memo, DOJ did not specifically refer to *distribution* and regulation of marijuana. It was unclear whether distribution of marijuana would be tolerated on tribal lands should tribal governments seek to legalize and distribute marijuana. Despite the lack of clarity, some tribes moved forward with plans to grow and sell marijuana at tribe-owned stores on tribal lands.<sup>75</sup> Since the memo was released, the DEA has led marijuana enforcement actions on tribal lands,<sup>76</sup> but it remains unclear whether legal marijuana will be tolerated on tribal land as it has been tolerated in states.

### Monitoring Enforcement Priorities

In a review of the DOJ memoranda, the Government Accountability Office (GAO) concluded that “DOJ has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Rather, DOJ has left such lower-level or localized marijuana activity to state and local law enforcement authorities through enforcement of their own drug laws.”<sup>77</sup> GAO has recommended that DOJ monitor the effects of state-level marijuana legalization initiatives relative to the eight DOJ enforcement priorities. This evaluation noted that DOJ has used a number of tools to help assess these effects. For instance, DOJ indicated to GAO that U.S. Attorneys were in contact with officials in states such as Colorado and Washington that had legalized marijuana. In addition, DOJ reported that it relies upon information from sources such as “federal surveys on drug use; state and local research; and feedback from federal, state, and local law enforcement.”<sup>78</sup> Notably, DOJ has reportedly not been documenting its specific monitoring process, and GAO has recommended that DOJ develop a “clear plan” for how it will monitor and document the effects of state marijuana legalization on federal enforcement priorities.<sup>79</sup>

<sup>74</sup> Monty Wilkinson, *Memorandum*, U.S. Department of Justice, Policy Statement Regarding Marijuana Issues in Indian Country, Washington, DC, October 28, 2014.

<sup>75</sup> “Native American Tribes Approve Plan to Grow and Sell Marijuana in Oregon,” *The New York Times*, December 19, 2015; Noelle Crombie, “Warm Springs Tribes Launch Ambitious Pot Venture, Hope for Economic Windfall,” *The Oregonian - Oregon Live*, April 29, 2016; John Gillie, “Two Marijuana Retailers Opening Soon in City that Still Bans Cannabis Sales,” *The News Tribune*, January 28, 2017; and Jackie Valley, “Las Vegas Paiutes’ Newest Venture: Medical Marijuana,” *Las Vegas Sun*, March 1, 2016.

<sup>76</sup> Steven Nelson, “DEA Raid on Tribe’s Cannabis Crop Infuriates and Confuses Reformers,” *U.S. News & World Report*, October 26, 2015; and Cary Spivak, “Milwaukee Journal Sentinel,” November 18, 2015.

<sup>77</sup> U.S. Government Accountability Office, *State Marijuana Legalization: DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, December 2015, p. 9.

<sup>78</sup> *Ibid.*, p. 27.

<sup>79</sup> *Ibid.*

## Federal Enforcement in States: Directives through Federal Appropriations<sup>80</sup>

Over the past several years, Congress has included provisions in appropriations acts that prohibit DOJ from using appropriated funds to prevent certain states and the District of Columbia<sup>81</sup> from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>82</sup> The current appropriations provision is in effect until April 28, 2017.<sup>83</sup> Courts have interpreted the appropriation provision to restrict DOJ from using appropriated funds (1) to take legal action directly against states and (2) to initiate criminal prosecutions of state officials for any action related to the implementation of a state medical marijuana law.<sup>84</sup> Several federal courts also have interpreted the provision as prohibiting DOJ from prosecuting individuals who, while strictly complying with the laws of one of the states covered by the appropriations provisions, have allegedly distributed, possessed, or cultivated medical marijuana in violation of federal law.<sup>85</sup> Although the appropriations provision restricts DOJ’s ability to expend funds to enforce federal law, at least one court has made clear that the provision “does not provide immunity from prosecution for federal marijuana offenses.”<sup>86</sup>

<sup>80</sup> This section was contributed by Todd Garvey, Legislative Attorney, Congressional Research Service. For a more detailed analysis of this issue, see CRS Legal Sidebar WSLG1451, *District Court Holds Appropriations Language Limits Enforcement of Federal Marijuana Prohibition*, by Todd Garvey.

<sup>81</sup> The provision specifically lists 43 jurisdictions: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, the District of Columbia, Guam, and Puerto Rico.

<sup>82</sup> See, for example, P.L. 113-235, §538 (2014) and P.L. 114-113, §542 (2015).

<sup>83</sup> P.L. 114-254, §101(1).

<sup>84</sup> See, for example, *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1044 (E.D. Cal. 2015) (citing the DOJ’s interpretation that the appropriation provision prohibits “federal actions that interfere with a state’s promulgation of regulations implementing its statutory provisions, or with its establishment of a state licensing scheme.”).

<sup>85</sup> See, for example, *United States v. McIntosh*, 833 F.3d 1163, 1177 (9<sup>th</sup> Cir. 2016) (holding that the 2015 appropriations restriction “prohibits DOJ from spending funds from relevant appropriations for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws [of California, Oregon, and Washington] and who fully comply with such laws); *United States v. Daleman*, No. 1:11-CR-00385-DAD-BAM, 2017 U.S. Dist. LEXIS 23213 (E.D. Cal. Feb. 17, 2017) (denying defendant’s motion to enjoin the Department of Justice from using funds for his prosecution because defendant failed to establish that he “strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.”) (emphasis in original); *Marin All. for Med. Marijuana*, 139 F. Supp. at 1040 (holding that the 2015 appropriations provision bars DOJ from using appropriated funds to enforce an injunction prohibiting a medical marijuana dispensary from engaging in activities that are compliant with California’s medical marijuana law).

<sup>86</sup> *McIntosh*, 833 F.3d at 1179, n. 5 (“The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur.... Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.”). See also *United States v. Nixon*, 839 F.3d 885, 886 (9<sup>th</sup> Cir. 2016) (per curiam) (holding that the appropriations provision does not “impact[] the ability of a federal district court to restrict the use of a medical marijuana as a condition of probation.”).

## Financial Services for Marijuana Businesses<sup>87</sup>

As explained below, so long as marijuana remains classified as a Schedule I controlled substance under federal law, financial institutions and their directors, officers, employees, and owners could be subject to severe criminal and administrative sanctions<sup>88</sup> for providing financial services to marijuana businesses, even if those businesses are operating in compliance with state law.<sup>89</sup> A consequence of these legal risks is that many financial institutions reportedly have been unwilling to provide financial services to state-authorized marijuana businesses.<sup>90</sup>

## Bank Secrecy Act<sup>91</sup> and Federal Anti-Money Laundering Laws

Federal law classifies marijuana as a Schedule I controlled substance.<sup>92</sup> As a result, it is a federal crime to grow, sell, or merely possess the drug.<sup>93</sup> In addition to facing the prospect of a federal criminal prosecution, imprisonment, and criminal fines, those who violate the federal CSA may suffer a number of additional adverse consequences under federal law.<sup>94</sup> For example, federal authorities may confiscate any property used to grow marijuana or facilitate its sale or use, as well as all proceeds derived from the sale of marijuana.<sup>95</sup> When financial institutions provide financial services to business customers, they generally are not directly involved in the sale, possession, or distribution of their customers' products. However, financial institutions commonly acquire the *proceeds* from the sale of their customers' products. To the extent that a bank acquires such proceeds with the knowledge that they are derived from the sale of marijuana in violation of federal law, the proceeds potentially could be confiscated by federal authorities,<sup>96</sup> even when the underlying actions are permissible under state law.<sup>97</sup> For example, if a bank originates a loan to a

<sup>87</sup> This section was contributed by David H. Carpenter, Legislative Attorney, Congressional Research Service.

<sup>88</sup> See, for example, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 U.S. Dist. LEXIS 92438, 31-38 (E.D. N.Y. July 1, 2013) (approving a deferred prosecution agreement with a financial institution for, among other things, "fail[ing] to implement an effective [anti-money laundering] program to monitor suspicious transactions ... [which] permitted Mexican and Colombian drug traffickers to launder at least \$881 million in drug trafficking proceeds through HSBC Bank USA undetected"; the agreement "imposes upon HSBC significant, and in some respect extraordinary, measures," including the forfeiture of \$1.256 billion, remedial measures, and the admission of criminal violations).

<sup>89</sup> *McIntosh*, 833 F.3d at 1179, n. 5.

<sup>90</sup> Steve Leblanc, "Can Sen. Elizabeth Warren help fix banking issues for the cannabis industry?," *Associated Press*, January 3, 2017, available at <http://www.thecannabist.co/2017/01/03/elizabeth-warren-marijuana-banking/70517/>; Lisa Lambert, "Got bank? Election could create flood of marijuana cash with no place to go," *Reuters*, October 31, 2016, available at <http://www.reuters.com/article/us-usa-marijuana-banks-idUSKBN12V0D5>.

<sup>91</sup> The "Bank Secrecy Act" is commonly used to refer to Titles I and II of the Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114-24 (1970).

<sup>92</sup> 21 U.S.C. §812(c), Sch.I(c)(10).

<sup>93</sup> *Ibid.* §§841-890.

<sup>94</sup> *Ibid.* For a detailed description of the CSA's civil and criminal provisions, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

<sup>95</sup> 18 U.S.C. §§981(a)(1)(A), 982(a)(1). For information on the procedural requirements and potential defenses associated with asset forfeiture, see CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

<sup>96</sup> *Ibid.* §981(a)(1)(C) ("The following property is subject to forfeiture to the United States ... (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to ... any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title) [i.e., the list of predicate offenses for money laundering (18 U.S.C. §1956)], or a conspiracy to commit such offense.").

<sup>97</sup> *McIntosh*, 833 F.3d at 1179, n. 5.



business openly operating as a state-authorized medical marijuana dispensary, then the principal and interest payments earned by the bank on that loan could be subject to forfeiture, if the bank knew that those payments derived from the sale of marijuana in violation of federal law.<sup>98</sup>

In addition to the risk of asset forfeiture, federal anti-money laundering laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize the handling of proceeds that are known to be derived from certain unlawful activities,<sup>99</sup> including the sale and distribution of marijuana.<sup>100</sup> Violators of these anti-money laundering laws may be subject to fines and imprisonment,<sup>101</sup> and any real or personal property involved in or traceable to prohibited transactions is subject to criminal or civil forfeiture.<sup>102</sup> For example, a bank employee could be subject to a 20-year prison sentence and criminal money penalties under Section 1956 for knowingly engaging in a financial transaction involving marijuana-related proceeds that is conducted with the intent to promote a further offense (e.g., withdrawing marijuana-generated funds in order to pay the salaries of medical marijuana dispensary employees).<sup>103</sup> Similarly, a bank officer could face a 10-year prison term and criminal money penalties under Section 1957 for knowingly depositing or withdrawing \$10,000 or more in cash that is derived from the distribution and sale of marijuana.<sup>104</sup>

Furthermore, Congress has crafted laws that affirmatively enlist financial institutions<sup>105</sup> to aid in the investigation and prosecution of those who violate federal laws, including the CSA.<sup>106</sup> For example, financial institutions generally must file suspicious activity reports (SARs)<sup>107</sup> with the

<sup>98</sup> See, for example, *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 104 (2d Cir. 2000) (“In this Circuit, the government’s burden is to show a nexus between the illegal conduct and the seized property. Once the government establishes that there is probable cause to believe that a nexus exists between the seized property and the predicate illegal activity, the burden shifts to the claimant to show by a preponderance of the evidence (1) that the defendant property was not in fact used unlawfully, or (2) that the predicate illegal activity was committed without the knowledge of the owner-claimant, 18 U.S.C. § 981(a)(2), that is, that the claimant is an ‘innocent owner.’”) (internal citations and quotations omitted).

<sup>99</sup> 18 U.S.C. §§1956(c)(7), 1957(f)(3). For a full list of predicate offenses, see the “Specified Unlawful Activities” section of CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>100</sup> 18 U.S.C. §§1956, 1957. For a detailed analysis of federal anti-money laundering laws, see CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>101</sup> Section 1956 violations are punishable by imprisonment for not more than 20 years and fines of up to \$500,000 or twice the value of the property involved, whichever is greater. 18 U.S.C. §1956(a)(1). Section 1957 violations are punishable by imprisonment for not more than 10 years and fines of up to \$250,000 (or \$500,000 for organizations) or twice the value of the property involved in the transaction, whichever is greater. *Ibid.* §§1957(b), 1957(h), 3571, 3559. Conspiracy to violate either section carries the same maximum penalties, as does aiding and abetting the commission of either offense. *Ibid.* §§2, 1956(h). See, for example, *United States v. Lyons*, 740 F.3d 702, 715 (1<sup>st</sup> Cir. 2014). For a detailed description of the penalties for violating these laws, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

<sup>102</sup> 18 U.S.C. §§981(a)(1)(A), 982(a)(1).

<sup>103</sup> *Ibid.* §1956(a)(1)(A)(i). See for example, Department of Justice, “Man Sentenced to 35 Months Imprisonment for Bank Fraud and Money Laundering,” Press Release, July 19, 2013, available at <https://www.justice.gov/usao-edwi/pr/man-sentenced-35-months-imprisonment-bank-fraud-and-money-laundering> (announcing the sentence of an individual who pled guilty to violating 18 U.S.C. §1956 and other criminal laws while working as a bank officer).

<sup>104</sup> *Ibid.* §1957(a), (d).

<sup>105</sup> For the purposes of the Bank Secrecy Act and anti-money laundering laws, the term “financial institution” is defined broadly to include banks, savings associations, credit unions, broker dealers, insurance companies, pawnbrokers, automobile dealers, casinos, cash checkers, travel agencies, and precious metal dealers, among others. 31 U.S.C. §5312(a)(2).

<sup>106</sup> See, for example, 12 U.S.C. §§1951-59; 31 U.S.C. §§5311-32.

<sup>107</sup> Filing SARs are mandatory under certain circumstances, but financial institutions may file SARs even when not

Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding financial transactions<sup>108</sup> suspected to be derived from specified illegal activities,<sup>109</sup> including the sale of marijuana.<sup>110</sup> Depository institutions<sup>111</sup> and certain other financial institutions<sup>112</sup> also must establish and maintain anti-money laundering programs, designed to ensure that the institutions' officers and employees will have sufficient knowledge of their customers and of the businesses of those customers to identify the circumstances under which filing SARs is appropriate.<sup>113</sup> Even in the absence of suspicion, financial institutions must file currency transaction reports (CTRs) with FinCEN relating to transactions involving \$10,000 or more in cash or other "currency."<sup>114</sup> The failure to comply with these reporting requirements can result in fines and imprisonment.<sup>115</sup>

Additionally, financial institutions, their employees, and certain other affiliated parties could be subject to administrative enforcement actions by federal regulators for violating the Bank Secrecy Act or anti-money laundering laws.<sup>116</sup> For example, the federal banking regulators<sup>117</sup> may utilize

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mandated by law. See, for example, 12 C.F.R. §§1020.320(a) (banks); 1022.320(a) (money services businesses).

<sup>108</sup> "Transaction":

means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

31 C.F.R. §1010.100(bbb).

<sup>109</sup> 18 U.S.C. §§1956(c)(7), 1957(f)(3). For a full list of predicate offenses, see the "Specified Unlawful Activities" section of CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>110</sup> 21 U.S.C. §§841-890; 31 U.S.C. §5318(g); 31 C.F.R. §1020.320.

<sup>111</sup> There are several different types of depository institutions, including banks, savings associations, and credit unions. A depository charter can be issued by either a state or federal chartering authority.

<sup>112</sup> Some financial institutions are exempt from establishing anti-money laundering programs. 31 U.S.C. §5318(h)(2); 31 C.F.R. §1010.205.

<sup>113</sup> See generally 31 U.S.C. §5318(h)(1); 31 C.F.R. §§1020.200-1020.220. See also 12 U.S.C. §1786(q)(1) (credit unions); 12 U.S.C. §1818(s) (banks and savings associations). See also CRS Legal Sidebar WSLG1515, *Wake Up Call for Financial Institution Management: Anti-Money Laundering Program Is Your Personal Responsibility*, by M. Maureen Murphy.

<sup>114</sup> 31 U.S.C. §5313; 31 C.F.R. subpt.1020C; 31 C.F.R. subpt.1010C. "Currency" is defined as:

The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

31 C.F.R. §1010.100(m).

<sup>115</sup> 31 U.S.C. §5322. The willful failure to file SARs and CTRs is punishable by imprisonment for not more than five years or not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity. *Ibid.* Structuring a transaction to avoid the reporting requirement exposes the offender to the same maximum terms of imprisonment. *Ibid.* §5324(d). For a detailed description of penalties for violations of Bank Secrecy Act reporting and monitoring requirements, see CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>116</sup> See, for example, 12 U.S.C. §§1786, 1818, 1831o.

<sup>117</sup> For these purposes, the federal banking regulators are: the Office of the Comptroller of the Currency (OCC) for national banks and federal savings associations; the Board of Governors of the Federal Reserve System for domestic operations of foreign banks and state-chartered banks that are members of the Federal Reserve System; the Federal

administrative enforcement powers against depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates that engage in unlawful, marijuana-related activities.<sup>118</sup> The banking regulators have the legal authority, for instance, to issue cease and desist orders, impose civil money penalties, and issue removal and prohibition orders that temporarily or permanently ban individuals from working for any depository institution.<sup>119</sup> The banking regulators also have the authority, under certain circumstances, to revoke an institution's federal deposit insurance coverage and to take control of and liquidate a depository institution.<sup>120</sup> In fact, a criminal conviction for violating the Bank Secrecy Act or anti-money laundering laws is an explicit ground for the appointment of the Federal Deposit Insurance Corporation "as receiver [to] place the insured depository institution in liquidation."<sup>121</sup>

### **FinCEN and DOJ Guidance to Financial Institutions**

In response to state marijuana legalization efforts, FinCEN issued guidance with respect to marijuana-related financial crimes on February 14, 2014.<sup>122</sup> This guidance appears to provide a roadmap for financial institutions seeking to comply with suspicious activity reporting requirements when providing financial services to state-authorized marijuana businesses, while also alerting FinCEN to transactions that might trigger federal enforcement priorities.<sup>123</sup>

The guidance notes that:

[b]ecause federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law) in accordance with this guidance and [FinCEN regulations].<sup>124</sup>

FinCEN advised financial institutions that, in providing services to a marijuana business, they must file one of three types of special SARs:

1. A marijuana limited SAR: The marijuana limited SAR is seen to be appropriate when the bank determines, after the exercise of due diligence, that a customer is not engaged in any activities that violate state law or implicate the investigation

Deposit Insurance Corporation (FDIC) for state savings associations and state-chartered banks that are not members of the Federal Reserve System; and the National Credit Union Administration (NCUA) for federally insured credit unions. Ibid. §§1766, 1813(q).

<sup>118</sup> See, for example, *ibid.* §1786 (credit unions); *ibid.* §§1818, 1831o (banks and savings associations). See also Office of the Comptroller of the Currency, "OCC Assesses \$2.5 Million Civil Money Penalty Against Gibraltar Private Bank and Trust Company for Bank Secrecy Act Violations, Press Release, February 25, 2016, available at <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-20.html> (ordering the payment of a civil money penalty and remedial actions for allegedly "fail[ing] to maintain an effective Bank Secrecy Act/Anti-Money Laundering (BSA/AML) compliance program.").

<sup>119</sup> *Ibid.*

<sup>120</sup> See, for example, *ibid.* §§1786, 1787 (credit unions); *ibid.* §§1818, 1821, 1831o (banks and savings associations).

<sup>121</sup> 12 U.S.C. §1821(c)(5)(M), (d)(2)(E).

<sup>122</sup> Department of the Treasury, *Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Business*, FIN-2014-G001, February 14, 2014, available at <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>. The Administration could reverse or otherwise make significant changes to its enforcement priorities and policies. See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, p. 3.

and prosecution priorities in the 2014 Cole Memorandum (see “Department of Justice Guidance Memos for U.S. Attorneys”);<sup>125</sup>

2. A marijuana priority SAR: A marijuana priority SAR must be filed when the financial institution believes a customer is engaged in activities that implicate DOJ’s investigation and prosecution priorities;<sup>126</sup> and
3. A marijuana termination SAR: A financial institution is instructed to file a marijuana termination SAR when it finds it necessary to sever its relationship with a customer to maintain an effective anti-money laundering program.<sup>127</sup>

FinCEN also provides examples of “red flags” that may indicate that a marijuana priority SAR is appropriate.<sup>128</sup> The FinCEN guidance does not impact financial institutions’ obligations to file currency transaction reports.<sup>129</sup>

## Select Implications of State Marijuana Legalization

While the majority of the American public supports marijuana legalization, some have voiced concern over possible negative implications, particularly with respect to *recreational* legalization. Some concerns were outlined as enforcement priorities by DOJ in monitoring state legalization.<sup>130</sup> These implications include, but are not limited to, the potential impact of legalization on (1) use of marijuana, particularly among youth; (2) traffic-related incidents involving marijuana-impaired drivers; (3) trafficking of marijuana from states that have legalized it into neighboring states that have not; and (4) U.S. compliance with international treaties. On the other hand, some have been encouraged by the potential outcomes from marijuana legalization, including new tax revenue for states and a potential decrease in marijuana-related arrests.

Not all potential implications are discussed in this report, and some are yet to be fully measured. Of note, data on potential effects of marijuana legalization should be interpreted with caution, as they are fairly limited, and not all factors are presented when reporting changes in statistics since state legalization. Further, conclusions about the impact of marijuana legalization would be premature without broader inclusion of both historical data and additional years of post-legalization data, as well as consideration of other factors aside from legalization.

## U.S. Demand for Marijuana

As discussed, marijuana is the most commonly used illicit drug in the United States. In 2015, an estimated 22.2 million individuals aged 12 or older were current (past month) users of marijuana. The percentage of users has gradually increased over the last several years—from 6.9% in 2010

<sup>125</sup> Ibid., pp. 3-4.

<sup>126</sup> Ibid., p. 4.

<sup>127</sup> Ibid., pp. 4-5.

<sup>128</sup> Ibid., pp. 5-7. Some examples of “red flags” noted in the guidance are: “[t]he business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law”; and “[a] customer seeks to conceal or disguise involvement in marijuana-related business activity.” Ibid.

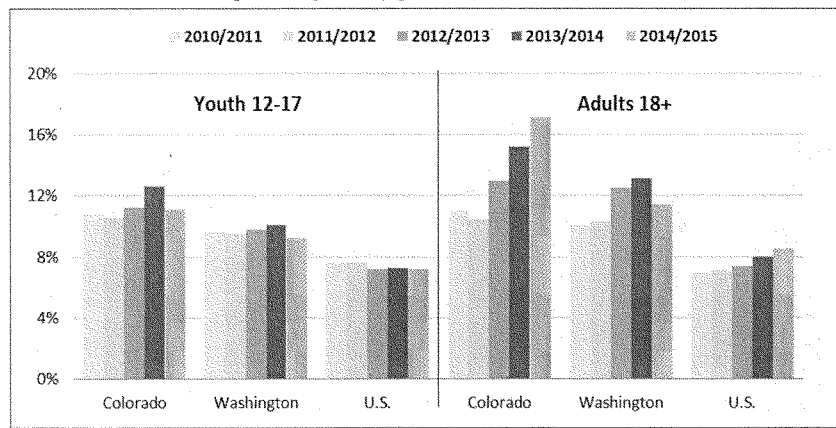
<sup>129</sup> Ibid., p. 7. For a discussion of currency transaction reporting requirements, see *supra* notes 114-115 and surrounding text.

<sup>130</sup> See James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, pp. 1-2.

to 8.3% in 2015.<sup>131</sup> The rate of past-month marijuana use among youth (aged 12 to 17), however, has remained fairly unchanged over this period (7.0%).<sup>132</sup>

**Figure 3. Estimates of Current Marijuana Use in Colorado, Washington, and the United States, 2010-2015**

Percentages Among Youth (Ages 12-17) and Adults (18 and Older)



**Source:** Created by the Congressional Research Service (CRS) based on available population data from the Substance Abuse and Mental Health Services Administration (SAMHSA), *National Survey on Drug Use and Health (NSDUH)*, State Data, 2010/2011, 2011/2012, 2012/2013, 2013/2014, and 2014/2015, <http://www.samhsa.gov/data/>.

**Notes:** This figure presents yearly estimates of marijuana use in Colorado, Washington, and the United States and does not show statistical changes in these data. To review year-to-year, statistically significant changes, if any, see the NSDUH state data reports. The 2015/2016 state data are not yet available from SAMHSA. Annual state-level estimates are based on 2 calendar years of pooled NSDUH data, so two consecutive sets of estimates have a one-year overlap. For more information on the NSDUH methodology, see 2014-2015 National Survey on Drug Use and Health: Guide to State Tables and Summary of Small Area Estimation Methodology. Current use of marijuana is defined as use in the past 30 days.

In the states that legalized recreational marijuana in November 2012 (Washington and Colorado), the percentages of youth (aged 12-17) and adults (aged 18 and older) who are current users have changed in various ways over the 2010-2015 period according to survey data. For adults, the changes generally match national trends over the same time period (see **Figure 3**). Colorado and Washington have higher percentages of use for adults and youth compared to national estimates—both before and after recreational legalization began. Of note, the 2014/2015 percentages of marijuana use among youth are fairly similar to the percentages reported in 2010/2011, while adult percentages are higher than those reported in 2010/2011.<sup>133</sup> Rates of drug use may be

<sup>131</sup> Results from 2015 NSDUH, Tables 1.1A and 1.1B.

<sup>132</sup> Results from 2015 NSDUH, Table 1.2B and Results from the 2014 National Survey on Drug Use and Health: Summary of National Findings.

<sup>133</sup> Substance Abuse and Mental Health Services Administration (SAMHSA), *National Survey on Drug Use and Health (NSDUH)*, State Data, 2010/2011, 2011/2012, 2012/2013, 2013/2014, and 2014/2015, <http://www.samhsa.gov/data/>. The observed differences between estimates were not evaluated in terms of statistical significance—the probability that an observed difference in the population estimates would occur due to random variability if there was no difference in

influenced by many possible factors including availability of the drug, family, peers, school, economic status, and community variables.<sup>134</sup>

Of note, some state government officials in states that have legalized marijuana have monitored changes in drug use patterns and emerging research on the health effects of marijuana. For example, the Colorado Department of Public Health and Environment (CDPHE) was given the responsibility to “monitor changes in drug use patterns, broken down by county and race and ethnicity, and the emerging science and medical information relevant to the health effects associated with marijuana use.”<sup>135</sup>

### Marijuana-Related Traffic Incidents

The recent use of marijuana has been shown to impair driving ability.<sup>136</sup> According to the National Highway Traffic Safety Administration (NHTSA), “[l]ow doses of THC moderately impair cognitive and psychomotor tasks associated with driving, while severe driving impairment is observed with high doses, chronic use and in combination with low doses of alcohol.”<sup>137</sup> Some may be concerned that recreational marijuana legalization could be associated with an increase in marijuana-related traffic incidents. In Colorado, despite limited traffic data, the Department of Public Safety reports the following:

[T]he number of summons issued for Driving Under the Influence [DUI] in which marijuana or marijuana-in-combination<sup>[138]</sup> with other drugs [was recorded] decreased 1% between 2014 and 2015 (674 to 665).

The prevalence of marijuana or marijuana-in-combination identified by CSP [Colorado State Patrol] as the impairing substance increased from 12% of all DUIs in 2014 to 15% in 2015.

The Denver Police Department found summons where marijuana or marijuana-in-combination was recorded increased from 33 to 73 between 2013 and 2015. Citations for marijuana or marijuana-in-combination account for about 3% of all DUIs in Denver. Toxicology results from Chematox Laboratory showed an increase in positive cannabinoid screens for drivers, from 57% in 2012 to 65% in 2014. Of those that tested positive on the initial screen, the percent testing positive for delta-9 Tetrahydrocannabinol (THC) at 2 nanograms/millileter rose from 52% in 2012 to 67% in 2014.

Fatalities with THC-only or THC-in-combination positive drivers increased 44%, from 55 in 2013 to 79 in 2014. Note that the detection of any THC in [the] blood is not an indicator

the estimates being compared. To review year-to-year, statistically significant changes, see the NSDUH state data reports.

<sup>134</sup> National Institute on Drug Abuse, *Preventing Drug Use among Children and Adolescents (In Brief)*, October 2003, <https://www.drugabuse.gov/publications/preventing-drug-abuse-among-children-adolescents/chapter-1-risk-factors-protective-factors/what-are-risk-factors>.

<sup>135</sup> See Colorado Revised Statutes, Title 25, §1.5-110. See the most recent report, CDPHE, Retail Marijuana Public Health Advisory Committee, *Monitoring Health Concerns Related to Marijuana in Colorado: 2016*, 2016.

<sup>136</sup> Blood THC concentrations drop quickly after individuals smoke marijuana. See Rebecca L. Hartman and Marilyn A. Huestis, “Cannabis effects on driving skills,” *Clinical Chemistry*, vol. 59, no. 3 (March 2013), pp. 478-492; and Rebecca L. Hartman, Timothy L. Brown, and Gary Milavetz, et al., “Cannabis effects on driving lateral control with and without alcohol,” *Drug and Alcohol Dependence*, vol. 154 (September 1, 2015), pp. 25-37.

<sup>137</sup> National Highway Traffic Safety Administration, *Drug and Human Performance Fact Sheets: Cannabis/Marijuana (Δ 9 -Tetrahydrocannabinol, THC)*, <https://one.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm>.

<sup>138</sup> In this report, the concept of marijuana “in combination” references marijuana in combination with other drugs.

of impairment but only indicates presence in the system. Detection of delta-9 THC, one of the psychoactive properties of marijuana, may be an indicator of impairment.<sup>139</sup>

In monitoring the impacts of recreational marijuana legalization in Washington State, government researchers report that there was no trend identified in the percentage of drivers testing positive for marijuana (either marijuana only or marijuana in combination with other drugs/alcohol) for those involved in traffic fatalities and who were tested for drugs or alcohol.<sup>140</sup> They also report that “marijuana incidents”<sup>141</sup> on the highways and roads decreased from 2,462 in 2012 to 625 in 2014. Changes in these data may be influenced by many possible factors including changes in enforcement practices and priorities. It is possible that the sharp drop in marijuana incidents may be explained by the legalization of marijuana possession<sup>142</sup> after 2012. For example, many traffic stops involving the smell of marijuana would no longer require further law enforcement investigation unless the individual in question is under the age of 21, there is suspicion of drug trafficking, or other reasons.

## Marijuana Arrests

After the legalization of the possession, sale, manufacturing, and distribution of certain quantities of marijuana for recreational purposes, one might expect the number of marijuana arrests to go down in jurisdictions that have done so. Indeed, Washington State reports that “all criminal activities involving marijuana decreased between 2012 and 2014.”<sup>143</sup> Possession was cited as the most common criminal activity, and the number of marijuana possession arrests decreased from 5,133 in 2012 to 2,091 in 2013, and then to 1,918 in 2014.<sup>144</sup> Additionally, the number of marijuana incidents decreased from 6,336 in 2012 to 2,326 in 2014.<sup>145</sup>

In Colorado, the number of marijuana arrests decreased by nearly half from 12,894 in 2012 to 6,502 in 2013, and then increased to 7,004 in 2014. Of note, the number of marijuana arrests for youth (aged 10-17) increased by 6%, from 3,235 in 2012 to 3,400 in 2014, after a slight decline in 2013.<sup>146</sup>

<sup>139</sup> Jack Reed, *Marijuana Legalization in Colorado: Early Findings: A Report Pursuant to Senate Bill 13-283*, Colorado Department of Public Safety, March 2016, p. 6, (hereinafter, *Marijuana Legalization in Colorado: Early Findings: A Report Pursuant to Senate Bill 13-283*).

<sup>140</sup> Washington State Office of Financial Management, Forecasting and Research Division, *Monitoring the Impacts of Recreational Marijuana Legalization*, 2015 Update Report, January 2016, p. 3, (hereinafter, *Monitoring the Impacts of Recreational Marijuana Legalization*).

<sup>141</sup> OFM relies on the FBI’s definition of the term “incident” and states the following: “an ‘incident’ occurs when any law enforcement officer investigates a scene or situation, whether that investigation results in an arrest or not. Incidents involving multiple illicit drugs or other criminal activities are counted only once, and are included in whichever category is listed first by the local law enforcement agency.” *Ibid.*, p. 4.

<sup>142</sup> Washington State legalized the possession of marijuana in limited amounts by adults.

<sup>143</sup> *Monitoring the Impacts of Recreational Marijuana Legalization*, pp. 3 and 17.

<sup>144</sup> *Ibid.*, p. 17.

<sup>145</sup> Of note, over this same period, the number of incidents increased each year for amphetamines/methamphetamines and heroin, and decreased each year for incident data in which no drug type was provided and drug type was unknown. See *Monitoring the Impacts of Recreational Marijuana Legalization*, p. 14.

<sup>146</sup> *Marijuana Legalization in Colorado: Early Findings: A Report Pursuant to Senate Bill 13-283*, p. 22.

## Marijuana Trafficking

### Transnational Trafficking

Mexican transnational criminal organizations have historically been the primary foreign suppliers of marijuana to the United States, with small amounts also coming from Canada and the Caribbean. While anecdotal reports about the impact of domestic legalization initiatives on the domestic marijuana black market exist, officials have noted that there is an “intelligence gap” with respect to data on exactly how domestic legalization has impacted the amount of Mexican-produced marijuana entering the United States.<sup>147</sup> For one, estimates on domestic marijuana consumption cannot speak to the source of this marijuana. In addition, drug seizure data from the various federal, state, and local law enforcement agencies do not give a sense of the origin of the marijuana. Further, there is no marijuana “signature program,” like there is for cocaine and heroin, that can help determine the geographic origin of cannabis plants used to produce the seized marijuana.<sup>148</sup>

Marijuana cultivation in Mexico has decreased, though it is unclear precisely how this affects or is driven by U.S. demand for Mexican marijuana. One of the tradeoffs has been an increase in production of other drugs. Reportedly, the trafficking organizations have shifted production to more profitable drugs such as heroin and methamphetamine.<sup>149</sup> Consistent with a decline in Mexican marijuana cultivation, there has been a general decline in marijuana seizures along the Southwest border between 2010 and 2015. However, the DEA’s outlook on marijuana trafficking is that “Mexico-produced marijuana will continue to be trafficked into the United States in bulk quantities and will likely increase in quality to compete with domestically-produced marijuana.”<sup>150</sup>

One notable statistic is that since the first states began legalizing marijuana for recreational use in 2012, there has been a “sharp decline” in the number of individuals prosecuted and sentenced for federal marijuana trafficking offenses.<sup>151</sup> As experts have noted, however, this decline could be driven by a number, or combination, of factors such as federal efforts to prosecute marijuana-related drug offenders, efforts by drug traffickers to conceal their illegal contraband entering the United States, and the amount of illegal marijuana being shipped into the United States.<sup>152</sup>

### Trafficking from States that Have Legalized into Other States

Some states have alleged that there has been increased marijuana trafficking from nearby states that have legalized marijuana possession or sale for medical or recreational purposes. For instance, according to DEA testimony, there has been increased marijuana trafficking in states surrounding Colorado since the state legalized recreational use.<sup>153</sup> The Rocky Mountain High

<sup>147</sup> U.S. Drug Enforcement Administration, *2015 National Drug Threat Assessment Summary*, DEA-DCT-DIR-008-16, October 2015, p. 71 (hereinafter, *2015 National Drug Threat Assessment Summary*).

<sup>148</sup> *National Drug Threat Assessment Summary 2016*, p. 116.

<sup>149</sup> Nick Miroff, “Losing Marijuana Business, Mexican Cartels Push Heroin and Meth,” *The Washington Post*, January 11, 2015.

<sup>150</sup> *National Drug Threat Assessment Summary 2016*, p. 125.

<sup>151</sup> U.S. Sentencing Commission, *Quick Facts: Drug Trafficking Offenses*, May 2016.

<sup>152</sup> Christopher Ingraham, “Federal Marijuana Smuggling is Declining in the Era of Legal Weed,” *The Washington Post*, May 26, 2016, referencing statements by Beau Kilmer, a drug policy researcher at RAND Corp.

<sup>153</sup> U.S. Congress, Senate Committee on the Judiciary, *Hearing on Oversight of the Drug Enforcement Administration*, Testimony of Administrator Michele M. Leonhart [transcript], 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 30, 2014. Administrator



Intensity Drug Trafficking Area (HIDTA) reported 394 instances of interdiction of Colorado marijuana destined for 36 other states in 2015.<sup>154</sup> Additionally, the HIDTA's report indicates that interdiction experts estimate these seizures represent about 10% or less of the total amount that is moved across the border undetected.<sup>155</sup>

In December 2014, Nebraska and Oklahoma filed a lawsuit in the U.S. Supreme Court<sup>156</sup> against Colorado claiming that their law enforcement and criminal justice systems had been adversely impacted by Colorado's laws legalizing marijuana.<sup>157</sup> The complaint included claims that Colorado's "statutes and regulations are devoid of safeguards to ensure marijuana cultivated and sold in Colorado is not trafficked to other states."<sup>158</sup> In March 2016, however, the Supreme Court declined to hear the case challenging Colorado's marijuana law.<sup>159</sup>

### **The Changing Domestic Black Market**

There have been reports of changes in the domestic black market for marijuana as states have moved to legalize it for medical and recreational purposes. For instance, the market in Denver, CO, has been described as smaller and less violent than it previously was. In addition, buyers there are said to be purchasing more from "mom-and-pop operations" rather than from entities affiliated with larger cartels.<sup>160</sup> Most of the domestically produced marijuana (other than that which is produced in accordance with various state laws) is cultivated in California.<sup>161</sup> This cultivation is carried out not only by U.S. persons, but also by foreign criminal networks. For instance, Mexican traffickers run large outdoor grow sites in California, which are sometimes established on public lands.

The DEA has indicated that marijuana concentrates—such as hashish, hash oil, and keif—are a growing concern for federal law enforcement. These substances have "potency levels far exceeding those of leaf marijuana."<sup>162</sup> The DEA has also stated that one effect of state marijuana legalization initiatives has been an increase in seizures of marijuana concentrates and an increase in the number of THC extraction laboratories in the United States.<sup>163</sup>

Broadly, there has been a shifting demand for higher-quality marijuana. The marijuana produced in the United States and Canada is generally thought to be of superior quality to the marijuana produced in Mexico. To be responsive to the U.S. demand for high-quality marijuana, Mexican

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Leonhart further stated, "Take for instance, Kansas, and we've talked to our partners in Kansas and they've already been seeing a 61 percent increase in marijuana seizures coming from Colorado."

<sup>154</sup> Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact*, September 2016, p. 4.

<sup>155</sup> *Ibid.*, p. 110.

<sup>156</sup> The Constitution provides the Supreme Court with original jurisdiction over "Controversies between two or more States," meaning such claims can be filed directly with the Supreme Court without first being litigated in the lower federal courts. U.S. CONST., art. III, §2. cl. 1.

<sup>157</sup> Jack Healy, "Nebraska and Oklahoma Sue Colorado Over Marijuana Law," *The New York Times*, December 18, 2014.

<sup>158</sup> *States of Nebraska and Oklahoma v. State of Colorado*, S. Ct., Complaint, p. 3.

<sup>159</sup> *Nebraska, et al. v. Colorado*, 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016); see also David G. Savage, "Supreme Court Rejects Challenge to Colorado Marijuana Law From Other States," *The Los Angeles Times*, March 21, 2016.

<sup>160</sup> Tom James, "The Failed Promise of Legal Pot," *The Atlantic*, May 9, 2016.

<sup>161</sup> *National Drug Threat Assessment Summary 2015*, p. 72.

<sup>162</sup> *National Drug Threat Assessment Summary 2015*, p. v.

<sup>163</sup> *National Drug Threat Assessment Summary 2016*, p. 105.

drug traffickers have tried to improve their product.<sup>164</sup> However, it is not just U.S. consumers who demand higher-quality marijuana. The demand exists in Mexico as well; there have even been anecdotal reports of traffickers moving high-quality marijuana produced in the United States across the Southwest border for sale and distribution in Mexico.<sup>165</sup> U.S. officials have not yet reported data on the quantity or frequency of this southbound smuggling.

### *The Marijuana Gray Market*

In Colorado, state law allows the cultivation of up to 99 marijuana plants for patients and caregivers and up to 6 plants per individual for recreational purposes. In what has been dubbed “the gray market,” marijuana is sometimes being grown legally *but then sold illegally*.<sup>166</sup> In addition to federal and local enforcement actions against gray market actors, Colorado Governor Hickenlooper reportedly is seeking to establish new limits on residential plants and give law enforcement additional resources to combat unlicensed marijuana growers.<sup>167</sup>

### **Legalization Impact on Criminal Networks**

A number of criminal networks rely on profits generated from the sale of illegal drugs—including marijuana—in the United States. Mexican drug trafficking organizations control more of the wholesale distribution of marijuana than other major drug trafficking organizations in the United States.<sup>168</sup> One estimate has placed the proportion of U.S.-consumed marijuana that was imported from Mexico at somewhere between 40% and 67%.<sup>169</sup> While the Mexican criminal networks control the wholesale distribution of illicit drugs in the United States, they “are not generally directly involved in retail distribution of illicit drugs.”<sup>170</sup> In order to facilitate the retail distribution and sale of drugs in the United States, Mexican drug traffickers have formed relationships with U.S. street, prison, and outlaw motorcycle gangs.<sup>171</sup> Although these gangs have historically been involved with retail-level drug distribution, their ties to the Mexican criminal networks have allowed them to become increasingly involved at the wholesale level as well. Trafficking and distribution of illicit drugs is a primary source of revenue for these gangs.<sup>172</sup>

A number of organizations have assessed the potential profits generated from illicit drug sales, both worldwide and in the United States, but “[e]stimates of marijuana ... revenues suffer particularly high rates of uncertainty.”<sup>173</sup> The former National Drug Intelligence Center (NDIC),

<sup>164</sup> Ibid., p. 116.

<sup>165</sup> John Burnett, “Legal Pot In the U.S. May Be Undercutting Mexican Marijuana,” *NPR All Things Considered*, December 1, 2014.

<sup>166</sup> John Frank, “Colorado governor calls marijuana gray market ‘a clear and present danger,’” *The Denver Post*, November 15, 2016.

<sup>167</sup> Brian Eason “The top 10 issues facing Colorado lawmakers Eason and John Frank, in the 2017 session,” *The Denver Post*, January 9, 2017.

<sup>168</sup> *National Drug Threat Assessment Summary 2016*.

<sup>169</sup> Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

<sup>170</sup> Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 18.

<sup>171</sup> *National Drug Threat Assessment Summary 2016*.

<sup>172</sup> Ibid. See also *National Drug Threat Assessment Summary 2015*.

<sup>173</sup> Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, 2013, p. 7.

for instance, estimated that the sale of illicit drugs in the United States generates between \$18 billion and \$39 billion in U.S. wholesale drug proceeds for the Colombian and Mexican drug trafficking organizations annually.<sup>174</sup> The proportion that is attributable to marijuana sales, however, is unknown.<sup>175</sup> Without a clear understanding of (1) actual proceeds generated by the sale of illicit drugs in the United States, (2) the proportion of total proceeds attributable to the sale of marijuana, and (3) the proportion of marijuana sales controlled by criminal organizations and affiliated gangs, any estimates of how marijuana legalization might impact the drug trafficking organizations are purely speculative.

Marijuana proceeds are generated at many points along the supply chain, including production, transportation, and distribution. Experts have debated which aspects of this chain—and the related proceeds—would be most heavily impacted by marijuana legalization. In addition, the potential impact of marijuana legalization in some subset of the states (complicated by varying legal frameworks and regulatory regimes) may be more difficult to model than the impact of federal marijuana legalization. For instance, in evaluating the potential fiscal impact from the 2012 Washington and Colorado legalization initiatives on the profits of Mexican drug trafficking organizations, the Organization of American States (OAS) hypothesized that “[a]t the extreme, Mexican drug trafficking organizations could lose some 20 to 25 percent of their drug export income, and a smaller, though difficult to estimate, percentage of their total revenues.”<sup>176</sup>

Other scholars have based their estimates on a hypothetical federal legalization of marijuana when estimating the potential financial impact of marijuana legalization. Under this scenario, small-scale growers at the start of the marijuana production-to-consumption chain might be put out of business by professional farmers, a few dozen of which “could produce enough marijuana to meet U.S. consumption at prices small-scale producers couldn't possibly match.”<sup>177</sup> Large drug trafficking organizations generate a majority of their marijuana-related income (which some estimates place at between \$1.1 billion to \$2.0 billion) from exporting the drug to the United States and selling it to wholesalers on the U.S. side of the border.<sup>178</sup> This revenue could be jeopardized if the United States were to legalize the production and consumption of recreational marijuana. Of note, the Tax Foundation has estimated that the annual U.S. marijuana market is \$45 billion—0.28% of GDP.<sup>179</sup> Under a legalization regime, some portion of the

<sup>174</sup> U.S. Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2009*, December 2008, p. 49.

<sup>175</sup> A 2006 Office of National Drug Control Policy figure estimated that over 60% of Mexican drug trafficking organizations' revenue could be attributed to marijuana sales. However, a number of researchers and experts have questioned the accuracy of this number and provided other estimates of marijuana proceeds. See, for example, Beau Kilmer, *Debunking the Mythical Numbers about Marijuana Production in Mexico and the United States*, RAND Drug Policy Research Center. See also U.S. Government Accountability Office, *Drug Control: U.S. Assistance has Helped Mexican Counternarcotics Efforts, but Tons of Illicit Drugs Continue to Flow into the United States*, GAO-07-1018, August 2007. Another estimate has placed the proportion of Mexican DTO export revenues attributable to marijuana at between 15% and 26% of total drug revenues. See Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

<sup>176</sup> Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 41.

<sup>177</sup> Jonathan P. Caulkins, Angela Howken, and Beau Kilmer, “How Would Marijuana Legalization Affect Me Personally?” in *Marijuana Legalization: What Everyone Needs to Know* (Oxford University Press, 2012).

<sup>178</sup> Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

<sup>179</sup> Gavin Ekins and Joseph Henchman, *Marijuana Legalization and Taxes: Federal Revenue Impact*, Tax Foundation,

revenue that might have previously been generated by traffickers could be lost to authorized sellers (in the form of profits) and governments (in the form of taxes).

### International Response<sup>180</sup>

Developments in state marijuana laws and policies, particularly those that relate to recreational marijuana activities, have raised some concerns about the United States' compliance with three United Nations (U.N.) drug control treaties that impose certain international obligations relating to marijuana. These treaties generally seek to curb the use of controlled substances while carving out exceptions for medicinal and scientific uses. The United States is a party to the following drug treaties:

- The Single Convention on Narcotic Drugs (Single Convention)<sup>181</sup> requires parties to the convention to “take such legislative and administrative measures as may be necessary ... to limit exclusively to medical and scientific purposes” the manufacture, distribution, trade, use, and possession of “cannabis.”<sup>182</sup>
- The 1971 Convention on Psychotropic Substances requires that specific controls be placed upon THC.<sup>183</sup>
- The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires parties to establish criminal penalties for the possession, purchase, or cultivation of marijuana for nonmedicinal consumption, but only to the extent that such action is consistent with the “constitutional principles and basic concepts of [the country’s] legal system.”<sup>184</sup>

The International Narcotics Control Board (INCB or Board) and the Commission on Narcotic Drugs of the Economic and Social Council (Commission) are responsible for monitoring parties' compliance with these treaties,<sup>185</sup> though they appear to have limited ability to enforce such compliance. For example, the Single Convention provides that the Commission may “call the attention of the Board to any matters which may be relevant to the functions of the Board,”<sup>186</sup> while the Board may take measures that are “most consistent with the intent to further the co-operation of Governments with the Board and to provide the mechanism for a continuing dialogue between Governments and the Board which will lend assistance to and facilitate effective national action to attain the aims of this Convention.”<sup>187</sup>

May 12, 2016.

<sup>180</sup> This section was authored by Brian T. Yeh, Legislative Attorney, Congressional Research Service.

<sup>181</sup> Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, <https://www.unodc.org/unodc/en/treaties/single-convention.html> (last visited January 6, 2017). The Single Convention was amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs.

<sup>182</sup> *Ibid.* at art. 2, 4, 21, 28.

<sup>183</sup> Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543. The convention directs parties to “prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them.”

<sup>184</sup> December 20, 1988, S. Treaty Doc. No. 101-4 (1989).

<sup>185</sup> Single Convention on Narcotic Drugs, art. 5, March 30, 1961, 18 U.S.T. 1407; Convention on Psychotropic Substances, art. 17, 19, February 21, 1971, 32 U.S.T. 543; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 21, 22, December 20, 1988, S. Treaty Doc. No. 101-4 (1989).

<sup>186</sup> Single Convention on Narcotic Drugs, art. 8.

<sup>187</sup> *Ibid.*, at art. 9(5).

It is unclear whether, or to what extent, the enactment of state laws authorizing the use of marijuana for recreational purposes affects the United States' compliance with the drug treaties. Some assert that state-level recreational marijuana legalization (and the federal government response to those state laws) does not conform with the international obligations regarding marijuana, while others disagree with this interpretation. For example, the then-President of the INCB stated in 2013 that recreational marijuana legalization in states is inconsistent with the Single Convention's requirement that parties limit lawful uses of cannabis to medical and scientific purposes.<sup>188</sup> On the other hand, in 2014, the then-Assistant Secretary of State for International Narcotics and Law Enforcement Affairs appeared to express a contrary view when he urged the international community to "accept flexible interpretation of" the U.N. Drug Control Conventions.<sup>189</sup> He appealed to countries "to tolerate different national drug policies, to accept the fact that some countries will have very strict drug approaches; other countries will legalize entire categories of drugs."<sup>190</sup> A Stanford University professor has also opined that the United States is not in violation of the drug control conventions on account of state-level laws,<sup>191</sup> although a Brookings Institution fellow has argued otherwise.<sup>192</sup>

Some observers have raised doubts about claims that the drug treaties contain the "flexibilities" that can accommodate state recreational marijuana laws; they have instead argued for reforms of the treaties to expressly permit them.<sup>193</sup> Yet in September 2014, President Obama disagreed that the international drug control regime needs revision in light of marijuana policy developments.<sup>194</sup> The Trump Administration's stance on this issue has not yet been articulated.

<sup>188</sup> Raymond Yans, INCB President, *Report of the International Narcotics Control Board*, March 11-15, 2013, at 7, [https://www.incb.org/documents/Speeches/Speeches2013/CND\\_2013\\_Speech\\_FINAL\\_ENGLISH\\_120313\\_cl.pdf](https://www.incb.org/documents/Speeches/Speeches2013/CND_2013_Speech_FINAL_ENGLISH_120313_cl.pdf); "INCB has to underline, it is our mandate, the central role of the 1961 Convention which needs to be implemented worldwide, on the national level, but also on the sub-national level."

<sup>189</sup> U.S. Department of State, William R. Brownfield, *Trends in Global Drug Policy*, New York Foreign Press Center Briefing, October 9, 2014.

<sup>190</sup> *Ibid.*

<sup>191</sup> Keith Humphreys, "Can the United Nations Block U.S. Marijuana Legalization?," *Huffington Post*, September 25, 2013 (updated November 25, 2013); "Countries with federated systems of government like the U.S. and Germany can only make international commitments regarding their national-level policies. Constitutionally, U.S. states are simply not required to make marijuana illegal as it is in federal law. Hence, the U.S. made no such commitment on behalf of the 50 states in signing the UN drug control treaties."

<sup>192</sup> Jonathan Rauch, "Marijuana Legalization Poses a Dilemma for International Drug Treaties," *Brookings*, October 14, 2014; quoting Brookings fellow Wells Bennett as saying that "if 10, 15, 20 states enact and operate responsible regimes for the regulation of marijuana—we will be enforcing the Controlled Substances Act less and less in jurisdictions that have regulated, legal marijuana markets. And that will create more and more tension with our international commitments to suppress marijuana. At that point, it will be extraordinarily difficult for the U.S. to maintain that it complies with its obligations."

<sup>193</sup> See, for example, Wells Bennett and John Walsh, "Marijuana Legalization Is an Opportunity to Modernize International Drug Treaties," October 2014, *Brookings*.

<sup>194</sup> The White House, *Presidential Determination—Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015*, September 15, 2014. "The U.N. drug conventions ... allow sovereign nations the flexibility to develop and adapt new policies and programs in keeping with their own national circumstances while retaining their focus on achieving the conventions' aim of ensuring the availability of controlled substances for medical and scientific purposes, preventing abuse and addiction, and suppressing drug trafficking and related criminal activities.... [R]eviving the U.N. drug conventions is not a prerequisite to advancing the common and shared responsibility of international cooperation designed to enhance the positive goals we have set to counter illegal drugs and crime."

## Tax Revenue

All eight of the states that have legalized marijuana for recreational purposes levy some combination of taxes and business licensing fees at the level of marijuana cultivation or retail sales (in addition to general state sales taxes).<sup>195</sup> Tax rates on the cultivation and retail sales are more commonly levied on an *ad valorem* basis, or as a percentage of price.<sup>196</sup> The tax treatment of medical marijuana varies by state. In some states, medical marijuana is indirectly taxed further back the distribution chain at the cultivator level. In addition, states tax the retail sales of medical marijuana differently. In Colorado, for example, medical marijuana sales are exempt from a 10% special excise tax that applies to recreational marijuana sales, but they are still subject to the 2.9% general state sales tax.<sup>197</sup> In Washington, medical marijuana sales are subject to the same 37% excise tax that applies to recreational sales, but they are exempt from the state's 6.5% general sales tax.<sup>198</sup>

While some states utilize marijuana-related revenue streams for general spending purposes, others have approved measures to dedicate a portion of this revenue for spending on education (Colorado and Oregon), criminal justice programs (Alaska), or public health and substance abuse programs (Washington).<sup>199</sup>

Overall, though, these tax and spending regimes have been subject to change, as government officials and voters respond to changes in revenue collections and budget priorities.

## Selected Issues Before Congress—The Path Forward

Given the current federal marijuana policy gap with certain states, there are a number of issues that Congress may address. These include, but are not limited to, issues surrounding financial services for marijuana businesses, federal tax issues for these businesses, oversight of federal law enforcement, allowance of states to implement medical marijuana laws and involvement of federal health care workers, and consideration of marijuana's designation as a Schedule I drug.

### Provision of Financial Services to the Marijuana Industry

In spite of the guidance issued by FinCEN and DOJ, many financial institutions remain reluctant to openly enter relationships with state-authorized marijuana businesses.<sup>200</sup> Some marijuana businesses and marijuana industry proponents have complained that even when marijuana

<sup>195</sup> As mentioned in the "Recreational Legalization" section of this report, Washington, DC, has not legalized the commercial sale of recreational marijuana.

<sup>196</sup> Alaska is the only state that imposes a flat dollar tax rate on marijuana: \$50 per ounce is imposed when marijuana is sold or transferred from a marijuana cultivation facility to a retail marijuana store or marijuana product manufacturing facility. See Alaska Department of Revenue, "Marijuana Tax," accessed January 11, 2017, <http://www.tax.alaska.gov/programs/programs/index.aspx?60000>.

<sup>197</sup> See Colorado Department of Revenue, "Marijuana Taxes," accessed January 11, 2017, <https://www.colorado.gov/pacific/tax/marijuana-taxes-quick-answers>.

<sup>198</sup> See Washington Department of Revenue, "Taxes Due on Marijuana," accessed January 11, 2017, <http://dor.wa.gov/Content/FindTaxesAndRates/marijuana/Default.aspx>.

<sup>199</sup> See Office of Governor Bill Walker, "Governor Walker Signs Historic Criminal Justice Reform Bill," press release, July 11, 2016, at; Laurel Andrews, "Here's Where Half of the Revenue from Alaska's Legal Pot Will Go," *Alaska Dispatch News*, July 14, 2016.

<sup>200</sup> Sophie Quinton, *Why Marijuana Businesses Still Can't Get Bank Accounts*, The PEW Charitable Trusts, March 22, 2016.

businesses are able to open bank accounts or secure other financial services, those customer relationships are frequently terminated in relatively short order, especially when the existence of the relationship between the financial institution and the marijuana business becomes public.<sup>201</sup>

Over the years, several legislative proposals have been designed to jump-start financial relationships with state-authorized marijuana businesses. Some of these proposals would attempt to alleviate BSA reporting burdens beyond the measures detailed in the 2014 FinCEN guidance.<sup>202</sup> These proposals also would amend banking laws to prevent banking regulators from “prohibit[ing], penaliz[ing], or otherwise discourag[ing] a depository institution from providing financial services to a marijuana-related legitimate business” (i.e., one that is in compliance with a state or local marijuana regulatory regime).<sup>203</sup>

While such measures, if enacted, might help around the edges, many financial institutions and their federal regulators may remain apprehensive about ties to the marijuana industry while marijuana is listed as a Schedule I controlled substance under the CSA. In the absence of legislative change to the CSA, financial institutions must proceed with the knowledge that the Administration could reverse or otherwise make significant changes to its enforcement priorities and policies.<sup>204</sup> In other words, while these financial institutions may not be the subject of law enforcement investigations currently, the option remains.

Other legislative proposals<sup>205</sup> would reclassify marijuana as a Schedule II substance—this would legalize marijuana for medical purposes. This would likely do more to ease bank concerns with providing financial services to *medical* marijuana businesses but would not *entirely* eliminate a financial institution’s legal risks, particularly if it associates with medical marijuana businesses that operate in states or localities lacking strong regulatory oversight and enforcement standards. Additionally, the reclassification of marijuana to Schedule II probably would have little impact on the provision of financial services to *recreational* marijuana businesses because they would still be operating in violation of the CSA.

## Federal Tax Treatment

Marijuana producers and retailers may not deduct the costs of selling their product (e.g., payroll, rent, or advertising) for the purposes of the federal income tax filings.<sup>206</sup> The Internal Revenue Code (IRC) Section 280E states that

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

<sup>201</sup> Ibid. See also David Migoya, “Oregon bank opens doors to Colorado marijuana businesses,” *The Denver Post*, January 20, 2015.

<sup>202</sup> See, for example, S. 683, 114<sup>th</sup> Cong.; S. 1726, 114<sup>th</sup> Cong.; H.R. 1538, 114<sup>th</sup> Cong.; and H.R. 2076, 114<sup>th</sup> Cong.

<sup>203</sup> Ibid.

<sup>204</sup> See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

<sup>205</sup> See, for example, S. 683, 114<sup>th</sup> Cong.; H.R. 1538, 114<sup>th</sup> Cong.

<sup>206</sup> For more legal analysis, see CRS Report R44056, *Marijuana and Federal Tax Law: In Brief*, by Erika K. Lunder.

Media reports indicate that the Internal Revenue Service (IRS) has enforced Section 280E in audits of marijuana-related businesses by refusing to accept these businesses' deductions.<sup>207</sup> IRC Section 280E does not prohibit a marijuana business from deducting the costs of cultivating or acquiring marijuana as a "cost of goods sold," though.<sup>208</sup> Effectively this constitutes an implicit tax on marijuana-related businesses equal to the value of the tax benefit of such deductions if these firms had engaged in an industry that was legal under federal law. One such public case involves the Sacramento-based Canna Care marijuana dispensary. The IRS disallowed \$2.6 million in deductions for employee salaries, rent, and other costs over a three-year period, which resulted in the business owing \$875,000 in additional taxes. Canna Care challenged the IRS in U.S. Tax Court, but ultimately the court upheld the IRS ruling.<sup>209</sup>

The discrepancies between federal, state, and local tax treatments of marijuana-related businesses may create economic incentives to engage in the underground economy. In addition to the uncertainty of federal tax enforcement procedures (and costs of any related legal assistance), the inability of marijuana businesses to deduct their business expenses is effectively an implicit tax up to 39.6% (if organized as sole-proprietor or partnership) or 35% (if organized as a C corporation) of the cost of these expenses.<sup>210</sup> These implicit taxes are paid in addition to state and local sales and special excise taxes.<sup>211</sup> The status quo administration of federal tax laws creates an economic advantage for illicit marijuana sellers, who are not subject to direct taxation of their sales.

Past marijuana-related tax proposals have varied in scope.<sup>212</sup> Some would have exempted a business (that conducts marijuana sales in compliance with state law) from the Section 280E prohibition against allowing business-related tax credits or deductions for expenditures in connection with trafficking in controlled substances.<sup>213</sup> In contrast, one bill would have removed marijuana from all lists of controlled substances (and, indirectly, IRC §280E restrictions on marijuana),<sup>214</sup> and another would have imposed a federal excise tax on domestic recreational marijuana retail sales that would begin at 10% of the price and phase in a tax rate of 25% over four years.<sup>215</sup>

<sup>207</sup> For example, see Jeff Daniels, "IRS Said to be Auditing Colorado Marijuana Businesses," *CNBC*, July 12, 2016, <http://www.cnbc.com/2016/07/12/irs-said-to-be-auditing-colorado-marijuana-businesses.html>; and Will Yankowicz, "Marijuana Companies' Biggest Battle Might Be Against the IRS," *Slate*, July 1, 2016, [http://www.slate.com/blogs/moneybox/2016/07/01/legal\\_cannabis\\_businesses\\_pay\\_taxes\\_under\\_a\\_code\\_reserved\\_for\\_illegal\\_drug.html](http://www.slate.com/blogs/moneybox/2016/07/01/legal_cannabis_businesses_pay_taxes_under_a_code_reserved_for_illegal_drug.html).

<sup>208</sup> See CRS Report R44056, *Marijuana and Federal Tax Law: In Brief*, by Erika K. Lunder.

<sup>209</sup> See *Canna Care, Inc. v. Commissioner*, T.C. Memo 2015-206, October 22, 2015, <http://ustaxcourt.gov/UsInOp/OpinionViewer.aspx?ID=10586>.

<sup>210</sup> With 35% being the top, marginal tax bracket for corporations and 39.6% being the top, marginal tax bracket for individuals under the federal income tax code.

<sup>211</sup> Colorado imposes a sales tax of 10% and an excise tax of 15% on retail marijuana sales, in addition to a general 2.9% state sales tax and any local sales taxes. See State of Colorado Department of Revenue, "Retail Marijuana Return Filing Overview," January 29-31, 2014, <http://www.colorado.gov/cms/forms/dor-tax/RetailMarijuanaReturnFilingOverviewJan2014.pdf>. The state of Washington, which began allowing recreational marijuana sales in 2014, will impose an excise tax of 25% on the sales price of marijuana within an established, state-distribution system.

<sup>212</sup> For more general analysis of federal proposals to tax marijuana, see CRS Report R43785, *Federal Proposals to Tax Marijuana: An Economic Analysis*, by Jane G. Gravelle and Sean Lowry.

<sup>213</sup> See the Small Business Tax Equity Act of 2015 (H.R. 1855; S. 987) from the 114<sup>th</sup> Congress.

<sup>214</sup> See the Regulate Marijuana Like Alcohol Act (H.R. 1013) from the 114<sup>th</sup> Congress.

<sup>215</sup> See the Marijuana Tax Revenue Act of 2015 (H.R. 1014) from the 114<sup>th</sup> Congress.



## Oversight of Federal Law Enforcement

### Review of Agency Missions

In exercising its oversight authorities, Congress may choose to examine the extent to which (if at all) federal law enforcement missions—in particular the DEA’s mission—are impacted by state legalization of marijuana. For instance, policymakers may elect to review the mission of each federal law enforcement agency involved in enforcing the CSA and examine how its drug-related investigations may be influenced by the varying state-level policies regarding marijuana. As noted, federal law enforcement has generally prioritized the investigation of drug traffickers and dealers over that of low-level drug users. Policymakers may question whether these policies and priorities are implemented consistently across states with different drug policies regarding marijuana.

### Cooperation with State and Local Law Enforcement

One issue policymakers may debate is whether or how to incentivize task forces, fusion centers, and other coordinating bodies charged with combating drug-related crimes. Before determining whether to increase, decrease, or maintain funding for coordinated efforts such as task forces, policymakers may consider whether state and local counterparts are able to effectively achieve task force goals if the respective state marijuana policy is not in agreement with federal marijuana policy. Policymakers may choose to evaluate whether certain drug task forces are sustainable in states that have established policies that are either inconsistent—such as in states that have *decriminalized* small amounts of marijuana possession—or are in direct conflict—including states that have *legalized* either medical or recreational marijuana—with federal drug policy. For instance, might there be any internal conflicts that prevent task force partners from collaborating effectively to carry out their investigations?

Of note, the Arizona Court of Appeals ruled that patients who possess marijuana in compliance with the Arizona Medical Marijuana Act are entitled to the return of their marijuana that law enforcement may have seized during a traffic stop.<sup>216</sup> In states such as Colorado, media reports indicate that some local law enforcement officers avoid seizing marijuana in certain cases because they do not want to have to return the marijuana to its owner—an act that is tantamount to distribution of a Schedule I controlled substance, a violation of federal law.<sup>217</sup>

### Oversight and Continuation of Federal Enforcement Priorities

As noted, in responding to states with recreational legalization initiatives, DOJ issued federal enforcement priorities for states with legal marijuana. According to DOJ, it monitors the effects of state legalization by

- collaborating with other DOJ components and other federal agencies in assessment of marijuana enforcement-related data;
- prosecuting cases that threaten federal enforcement priorities; and
- consulting with state officials about areas of federal concern.<sup>218</sup>

<sup>216</sup> *State v. Okun*, 231 Ariz. 462 (Ariz. Ct. App. 2013). The U.S. Supreme Court denied certiorari in 2014. *Arizona v. Okun*, 572 U.S. \_\_\_, 134 S. Ct. 1759 (2014).

<sup>217</sup> Jessica Maher, “Law enforcement conflicts still exist with legal pot,” *Reporter-Herald*, January 2, 2014.

<sup>218</sup> U.S. Government Accountability Office, *DOJ Should Document Its Approach to Monitoring the Effects of*

As of December 2015, however, DOJ has not documented its efforts to monitor the effects of state legalization and ensure that these priorities are being emphasized. It is unclear how the metrics to evaluate these priorities will be used to determine whether federal intervention is needed in states that have legalized.<sup>219</sup> For example, one of the eight enforcement priorities listed by Deputy Attorney General Cole was to prevent the diversion of marijuana to other states. While it seems the DEA is aware of increased marijuana trafficking from Colorado to Kansas, it is unclear what level of increased trafficking might trigger action by the federal government against state marijuana laws. Congress may choose to exercise oversight over DOJ's enforcement priorities and metrics for tracking illicit activity in the states. Congress may also request research on or an investigation of this issue outside of actions by the Administration.

The Administration may alter or reverse its enforcement priorities at any time. As mentioned, in a February 2017 White House press statement, the Trump Administration indicated there may be increased enforcement against recreational marijuana, and stated that there is a "big difference" between medical and recreational marijuana.<sup>220</sup>

## Medical Marijuana

### State Medical Marijuana Laws and Federal Law Enforcement

State medical marijuana laws have raised questions for federal policymakers about enforcing federal law related to marijuana in situations where individuals or organizations are acting in compliance with state law. In previous Congresses, Members of both the House and the Senate have introduced legislation that would amend the CSA such that provisions relating to marijuana would not apply to a person who is acting in compliance with relevant state law.<sup>221</sup>

As discussed, in recent years, Congress has included policy riders in appropriations acts to prohibit DOJ from using funds to prevent states from implementing their medical marijuana laws.<sup>222</sup> Congress may decide to alter, maintain, or reverse this provision. Notably, in a February 2017 White House press statement, the Trump Administration signaled some acceptance of the medicinal use of marijuana: "[t]he President understands the pain and suffering that many people go through who are facing especially terminal diseases and the comfort that some of these drugs, including medical marijuana, can bring to them."<sup>223</sup>

*Legalization*, GAO-16-1, December 30, 2015.

<sup>219</sup> Ibid, pp. 30-31.

<sup>220</sup> The White House, Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer*, 2/23/2017, #15, February 22, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15>.

<sup>221</sup> See, for example, the Compassionate Access, Research Expansion, and Respect States (CARERS) Act of 2015 (H.R. 1538/S. 683 in the 114<sup>th</sup> Congress).

<sup>222</sup> See the Consolidated Appropriations Act, 2016 (P.L. 114-113), §542; and the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), §538 from the 114<sup>th</sup> Congress. Of note, the medical marijuana provision remains in effect during the FY2017 continuing resolution (The Further Continuing Appropriations Act, 2017 (P.L. 114-254).) that continues appropriations for the bureaus and agencies funded through the annual Commerce, Justice, Science, and Related Agencies appropriations until April 28, 2017.

<sup>223</sup> The White House, Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer*, 2/23/2017, #15, February 22, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15>.

### State Medical Marijuana Laws and Federal Health Care Providers

A topic of particular interest to federal policymakers has been how federal health care providers—especially those in the Department of Veterans Affairs (VA)—deal with state medical marijuana laws. VA policy does not deny health care services to veterans who participate in state marijuana programs; however, it does prohibit VA providers from completing the forms that effectively take the place of prescriptions in state medical marijuana programs.<sup>224</sup> Members in both chambers have introduced legislation that would allow VA providers to complete such forms.<sup>225</sup> Similar provisions passed the Senate as part of an FY2016 appropriations bill, and passed the Senate Committee on Appropriations as part of an FY2017 appropriations bill; however, neither were included in an enacted appropriations law.<sup>226</sup>

### Consideration of Marijuana as a Schedule I Drug: Maintain or Minimize the Gap

As the gap between federal and state policies on marijuana widens each year, policymakers might decide to reevaluate federal marijuana policy. It has only been a few years since states began to legalize recreational marijuana, but over 20 years since they began to legalize medical marijuana. A large majority of states now have marijuana policies that contradict the CSA.

In addressing state-level legalization efforts, Congress could take one of several routes. It could elect to take no action, thereby upholding the federal government's current marijuana policy and enforcement priorities. It may also decide that the CSA must be enforced in states and direct federal law enforcement to strictly enforce the CSA, even when individuals may be in compliance with state laws. Alternatively, Congress could choose to reevaluate marijuana's placement as a Schedule I controlled substance. Given the history of its scheduling, Congress may consider establishing a committee of experts to evaluate the efficacy of marijuana laws in the United States and address other issues such as the medicinal value and harm of marijuana use.<sup>227</sup>

Upon reevaluation, should Congress determine that marijuana no longer meets the criteria to be a Schedule I substance, it could take legislative action to remove it from the list of substances on that schedule. In doing so, Congress may (1) place marijuana on one of the other schedules (II, III, IV, or V) of controlled substances or (2) remove marijuana as a controlled substance altogether. If Congress chooses to remove marijuana as a controlled substance, it could alternatively seek to regulate and tax commercial marijuana activities. If marijuana *remains* a controlled substance under the CSA under any schedule, this would not eliminate the existing conflict with states that have legalized recreational marijuana. If the conflict remains, Congress may choose to continue to allow states to carry on with implementation of recreational marijuana

<sup>224</sup> Department of Veterans Affairs, Veterans Health Administration (VHA), *Access to Clinical Programs for Veterans Participating In State-Approved Marijuana Programs*, VHA Directive 2011-004, Washington, DC, January 31, 2011, [http://www.va.gov/vhapublications/viewpublication.asp?pub\\_id=2362](http://www.va.gov/vhapublications/viewpublication.asp?pub_id=2362). This directive expired on January 31, 2016; however, it is cited in VHA Directive 1134 (published on November 28, 2016) and thus appears to remain in effect.

<sup>225</sup> See the Veterans Equal Access Act (H.R. 667 in the 114<sup>th</sup> Congress); and the Compassionate Access, Research Expansion, and Respect States (CAREERS) Act of 2015 (H.R. 1538/S. 683 in the 114<sup>th</sup> Congress).

<sup>226</sup> See §246 of H.R. 2029 (in the 114<sup>th</sup> Congress) as engrossed in the Senate on November 10, 2015, and §249 of S. 2806 (in the 114<sup>th</sup> Congress) as reported to the Senate on April 18, 2016.

<sup>227</sup> These would be similar to the efforts of the National Commission on Marijuana and Drug Abuse, also known as the Shafer Commission, which was established under the CSA to study marijuana in the United States. See **Appendix B** for further discussion of the Shafer Commission.

laws, or it may choose to press for increased enforcement action against or within the states to attempt to stop state-sanctioned, recreational marijuana.

## Appendix A. Medical Research on Marijuana

### Approved Drugs and Ongoing Research

The Food and Drug Administration (FDA) has approved two drugs containing synthetic THC: nabilone and dronabinol. Nabilone is FDA-approved as an antiemetic (to reduce nausea or prevent vomiting) for patients receiving chemotherapy for cancer.<sup>228</sup> Dronabinol is FDA-approved as both an antiemetic for patients on chemotherapy and an appetite stimulant for patients with AIDS-related weight loss.<sup>229</sup> In addition, drugs containing plant-derived THC and/or cannabidiol (CBD, a nonpsychoactive chemical component of marijuana) are in the drug development and approval process.<sup>230</sup>

The UK-based GW Pharmaceuticals has plant-derived cannabinoid drug products in trials with the goal of FDA approval.<sup>231</sup> Its drug Sativex®, which is composed primarily of plant-derived THC and CBD, has already gained approval in 30 other countries for the treatment of spasticity<sup>232</sup> due to multiple sclerosis.<sup>233</sup> In 2014, the company announced that the FDA had granted “Fast Track” designation to Sativex as a potential pain reliever for patients with advanced cancer;<sup>234</sup> however, in 2015, three trials of Sativex failed to show superiority over a placebo.<sup>235</sup> The company continues to seek approval of Sativex and other plant-derived cannabinoid products for treatment of various conditions (e.g., childhood epilepsy).<sup>236</sup>

### Scientific Evaluations of Marijuana

Recent evaluations conducted separately by the FDA and the National Academies of Sciences, Engineering, and Medicine (the National Academies) illustrate the challenge of meeting the required standard of evidence. While taking different approaches to their evaluations, both the FDA and the National Academies have found that the current evidence base falls short.

<sup>228</sup> FDA first approved nabilone in 1985 under the trade name Cesamet®, which is registered to Meda Pharmaceuticals Inc. See [http://www.accessdata.fda.gov/scripts/cder/ob/results\\_product.cfm?Appl\\_Type=N&Appl\\_No=018677](http://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=018677).

<sup>229</sup> FDA first approved dronabinol in 1985 under the trade name Marinol®, which is registered to AbbVie Inc. See [http://www.accessdata.fda.gov/scripts/cder/ob/results\\_product.cfm?Appl\\_Type=N&Appl\\_No=018651](http://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=018651).

<sup>230</sup> Department of Health and Human Services, Food and Drug Administration, *FDA and Marijuana: Questions and Answers*, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm#determinations>. For an explanation of the FDA’s drug development and approval process, see <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/default.htm>.

<sup>231</sup> GW Pharmaceuticals, “GW Pharmaceuticals plc Reports Fourth Quarter and Year-End 2016 Financial Results and Operational Progress,” press release, December 5, 2016, <http://ir.gwpharm.com/releasedetail.cfm?ReleaseID=1002545>.

<sup>232</sup> Spasticity refers to problems with muscle control. It is a disorder often found in people with multiple sclerosis, cerebral palsy, and other conditions.

<sup>233</sup> *Ibid.*

<sup>234</sup> GW Pharmaceuticals, “GW Pharmaceuticals Announces that Sativex Receives Fast Track Designation from FDA in Cancer Pain,” press release, April 28, 2014, <http://ir.gwpharm.com/releasedetail.cfm?ReleaseID=842890>. For an explanation of FDA’s “Fast Track” designation, see <http://www.fda.gov/forpatients/approvals/fast/ucm20041766.htm>.

<sup>235</sup> GW Pharmaceuticals, “GW Pharmaceuticals and Otsuka Announce Results From Two Remaining Sativex(R) Phase 3 Cancer Pain Trials,” press release, October 27, 2015.

<sup>236</sup> GW Pharmaceuticals, “GW Pharmaceuticals plc Reports Fourth Quarter and Year-End 2016 Financial Results and Operational Progress,” press release, December 5, 2016. Of note, the FDA does not release this kind of information, which is proprietary; this information is publicly available because the company released it.

**FDA Evaluation.** The FDA evaluated only marijuana, not drugs containing a plant-derived chemical constituent of marijuana or drugs containing synthetic THC. Its analysis of marijuana's potential therapeutic effects is limited to 11 published studies that met criteria for inclusion in the review (e.g., that the study must be a randomized controlled trial).<sup>237</sup> The studies examined marijuana's use to treat neuropathic pain (five studies), stimulate appetite in patients with HIV (two studies), treat glaucoma (two studies), treat spasticity in multiple sclerosis (one study), and treat asthma (one study).<sup>238</sup> The evaluation also assessed potential risks of marijuana use (see text box, "Risks Associated with Marijuana Use"). The evaluation, called an eight-factor analysis, was conducted by the FDA pursuant to a request by the DEA.<sup>239</sup> The DEA requests such scientific and medical evaluations from the Secretary of Health and Human Services (HHS) in response to petitions asking the DEA to reschedule marijuana administratively.<sup>240</sup>

**National Academies Evaluation.** The National Academies evaluated cannabis, its constituents, and drugs containing synthetic THC. For each of 11 health topics, the report assessed "fair- and good-quality" research, relying on systematic reviews published since 2011 (where available) and primary research published after the systematic review (or since 1999, if no systematic review exists).<sup>241</sup> The 11 health topics are (1) therapeutic effects; (2) cancer; (3) cardiometabolic risk; (4) respiratory disease; (5) immunity; (6) injury and death; (7) prenatal, perinatal, and postnatal exposure to cannabis; (8) psychosocial effects; (9) mental health; (10) problem cannabis use; and (11) cannabis use and abuse of other substances.<sup>242</sup> The report presents nearly 100 conclusions, including some related to the challenges in conducting research with cannabis and cannabinoids.

## Federal Research Requirements for Marijuana

Many federal research requirements are standard across all schedules of controlled substances; however, some requirements vary according to the assigned schedule of the particular substance. Federal regulations are more stringent for Schedule I substances—including marijuana. Examples of this include the following:

- For Schedule I substances, such as marijuana, even if practitioners have a DEA registration for a substance in Schedules II-V, they must obtain a *separate* DEA registration for Schedule I substances.
- Individuals who seek to register to manufacture a controlled substance in Schedule I or II are subject to production quota limitations as determined by the DEA,<sup>243</sup> but registrants for substances in Schedules III-V are not subject to such quotas.

<sup>237</sup> Department of Justice, Drug Enforcement Administration, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53687-53766 and 53767-53845, August 12, 2016.

<sup>238</sup> *Ibid.*

<sup>239</sup> The term "eight-factor analysis" refers to the eight factors to be included pursuant to 21 U.S.C. §811(c).

<sup>240</sup> The request for a scientific and medical evaluation is required by 21 U.S.C. §811(b). The results of the most recent eight-factor analysis prior to August 2016 are available at Department of Justice, Drug Enforcement Administration, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 76 *Federal Register* 40551-40589, July 8, 2011.

<sup>241</sup> National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. S-3, doi: 10.17226/24625.

<sup>242</sup> *Ibid.*

<sup>243</sup> See 21 U.S.C. §826.

- Researchers are required to store Schedule I and II substances in electronically monitored safes, steel cabinets, or vaults that meet or exceed certain specifications.<sup>244</sup> They are required to store Schedule III-V substances by secure standards but the requirements are less stringent than those required for Schedule I and II substances.
- When researchers apply for a DEA registration to conduct research involving Schedule I controlled substances, they must comply with federal regulations specifying the form and content of the research protocols.<sup>245</sup> The DEA Administrator must forward a copy of the application and research protocol to HHS, which is responsible for determining “the qualifications and competency of the applicant, as well as the merits of the protocol.”<sup>246</sup> The HHS Secretary delegates that responsibility to the FDA. *No equivalent process is required for Schedule II-V controlled substances.*

### **Marijuana Supply for Researchers**

Under the CSA, the Attorney General is required to register an applicant to manufacture Schedule I or II controlled substances “if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971.”<sup>247</sup> In the case of marijuana, the National Center for Natural Products Research at the University of Mississippi has been the only registered manufacturer, operating under a contract administered by the National Institute on Drug Abuse (NIDA) within HHS’s National Institutes of Health. For nearly 50 years, it has been the only official source through which researchers may obtain marijuana for research purposes—and which some have referred to as a “federal research monopoly.”<sup>248</sup> Some have contended that marijuana provided by NIDA to researchers is “both qualitatively and quantitatively inadequate.”<sup>249</sup> Marijuana’s status as a Schedule I drug has reportedly created difficulty for researchers who seek to study the substance but are potentially unable to meet the strict requirements of the CSA, or perhaps they seek to utilize a different quality of marijuana than what is available through NIDA.

In August 2016, the DEA announced a policy change “designed to foster research by expanding the number of DEA-registered marijuana manufacturers.”<sup>250</sup> Under the new policy, the DEA is willing to license additional growers to “operate independently, provided the grower agrees (through a written memorandum of agreement with DEA) that it will only distribute marijuana

<sup>244</sup> 21 C.F.R. §§1301.72(a)(1)(i)-(iii) (specifications required for safes and steel cabinets storing Schedule I and II drugs or substances); see also 21 C.F.R. §§1301.72(a)(2) and 1301.72(a)(3)(i)-(vi) (specifications required for vaults storing Schedule I and II drugs or substances).

<sup>245</sup> 21 C.F.R. §1301.18(a).

<sup>246</sup> 21 U.S.C. §823(f); 21 C.F.R. §1301.32(a).

<sup>247</sup> 21 USC §823(a).

<sup>248</sup> See *NIDA’s Role in Providing Marijuana for Research*, available at <http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research>; and Marc Kaufman, “Federal Marijuana Monopoly Challenged,” *Washington Post*, December 12, 2005.

<sup>249</sup> Marc Kaufman, “Federal Marijuana Monopoly Challenged,” *Washington Post*, December 12, 2005; and Department of Justice, Drug Enforcement Administration, “Lyle E. Craker; Denial of Application,” 74 *Federal Register* 2101, January 14, 2009.

<sup>250</sup> Department of Justice, Drug Enforcement Administration, *DEA Announces Actions Related to Marijuana and Industrial Hemp*, August 11, 2016.

with prior, written approval from DEA.”<sup>251</sup> In addition, under the new policy, these growers will only be permitted to supply marijuana to DEA-registered researchers whose “protocols have been determined by [HHS] to be scientifically meritorious.” This new approach, DEA states, will allow individuals to obtain a DEA cultivation registration “not only to supply federally funded or other academic researchers, but also for strictly commercial endeavors funded by the private sector and aimed at drug product development.” Given that both the FDA and the DEA identified the lack of research as a significant factor in denying the rescheduling petitions in 2016, and to the extent that this policy may increase the amount of marijuana research conducted, the change *could* contribute to future debate on rescheduling.

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<sup>251</sup> Department of Justice, Drug Enforcement Administration, “Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States,” 81 *Federal Register* 53846-53848, August 12, 2016.



## Appendix B. Background on Federal Marijuana Policy

### Early 20<sup>th</sup> Century

Prior to 1937, the growth and use of marijuana was legal under federal law.<sup>252</sup> During the course of promoting federal legislation to control marijuana, Henry Anslinger, the first commissioner of the Federal Bureau of Narcotics (FBN),<sup>256</sup> and others submitted testimony to Congress regarding the evils of marijuana use, claiming that it incited violent and insane behavior.<sup>257</sup> Of note, Commissioner Anslinger had informed Congress that “the major criminal in the United States is the drug addict; that of all the offenses committed against the laws of this country, the narcotic addict is the most frequent offender.”<sup>258</sup> The federal government *unofficially* banned marijuana under the Marihuana Tax Act of 1937 (MTA; P.L. 75-238).<sup>259</sup> The MTA imposed a strict regulation requiring a high-cost transfer tax stamp on marijuana sales, and these stamps were rarely issued by the federal government.<sup>260</sup> Shortly after passage of the MTA, all states made the possession of marijuana illegal.<sup>261</sup>

#### Anti-marijuana Propaganda

In the early 20<sup>th</sup> century, enforcement of drug laws was primarily the responsibility of local police, and the FBN occasionally assisted.<sup>252</sup> Due to limited and reduced appropriations during the Great Depression, the FBN budget and the number of narcotic agents declined and remained low for years. Publicity and warnings of the dangers of narcotics, in particular marijuana, became methods of drug control for the FBN.<sup>253</sup> In seeking federal control of marijuana and uniform narcotic laws, Commissioner Anslinger made personal appeals to civic groups and legislators and pushed for, and received, editorial support in newspapers; many newspapers maintained a steady stream of anti-marijuana propaganda in the 1930s.<sup>254</sup>

### Mid-20<sup>th</sup> Century

In the decades after enactment of the MTA, Congress continued to pass drug control legislation and further criminalized drug abuse. For example, the Boggs Act (P.L. 82-255), passed in 1951,

<sup>252</sup> David F. Musto, *The American Disease: Origins of Narcotic Control*, 3<sup>rd</sup> ed. (New York: Oxford University Press, 1999), pp. 183-200, p. 228.

<sup>253</sup> *Ibid.*, p. 214.

<sup>254</sup> Richard J. Bonnie and Charles H. Whitebread II, *The Marijuana Conviction: A History of Marijuana Conviction in the United States* (New York: The Lindesmith Center, 1999), pp. 94-95.

<sup>255</sup> States regulated marijuana but did not begin to ban it until after 1937.

<sup>256</sup> In 1930, the Federal Bureau of Narcotics (FBN) was established within the Treasury to handle narcotic enforcement.

<sup>257</sup> See statements by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury and Dr. James C. Munch, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002.

<sup>258</sup> U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002, p. 7.

<sup>259</sup> Congressional testimony indicated that marijuana, while it was a problem in the Southwest United States starting in the mid-1920s, became a “national menace” in the mid-1930s (1935-1937). See statement by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75<sup>th</sup> Cong., 1<sup>st</sup> sess., April 27, 1937.

<sup>260</sup> Charles F. Levinthal, *Drugs, Society, and Criminal Justice*, 3<sup>rd</sup> ed. (New York: Prentice Hall, 2012), p. 58.

<sup>261</sup> In *Leary v. United States* (395 U.S. 6 (1968)), the MTA was overturned by the U.S. Supreme Court as a violation of the Fifth Amendment’s privilege against compelled self-incrimination.

established mandatory prison sentences for some drug offenses, while the 1956 Narcotic Control Act (P.L. 84-728) further increased penalties for drug offenses. In conjunction with growing support for a medical approach to addressing drug abuse, there was a strong emphasis on law enforcement control of narcotics. Congress shifted the constitutional basis for drug control from its taxing authority to its power to regulate interstate commerce,<sup>262</sup> and in 1968 the FBN merged with the Bureau of Drug Abuse Control and was transferred from Treasury to the Department of Justice.<sup>263</sup> Several years later, President Nixon would declare a war on drugs.<sup>264</sup>

Congress and President Nixon enhanced federal control of drugs in the enactment of comprehensive federal drug laws—including the Controlled Substances Act (CSA), enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513). The CSA placed the control of marijuana and other plant, drug, and chemical substances under federal jurisdiction regardless of state regulations and laws. In designating marijuana as a Schedule I controlled substance, this legislation *officially* prohibited the manufacture, distribution, dispensation, and possession of marijuana.<sup>265</sup>

### The Shafer Commission

As part of the CSA, the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, was established to study marijuana in the United States.<sup>266</sup> Specifically, this commission was charged with examining issues such as

- (A) the extent of use of marihuana in the United States to include its various sources of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use;
- (B) an evaluation of the efficacy of existing marihuana laws;
- (C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;
- (D) the relationship of marihuana use to aggressive behavior and crime;
- (E) the relationship between marihuana and the use of other drugs; and
- (F) the international control of marihuana.<sup>267</sup>

The Shafer Commission, in concluding its review, produced two reports: (1) *Marihuana: A Signal of Misunderstanding*, and (2) *Drug Use in America: Problem in Perspective*.<sup>268</sup>

<sup>262</sup> As stated in Article I, §8, cl. 3 of the U.S. Constitution, “Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” For more information about the commerce clause, see CRS Report R43023, *Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases*, by Charles Doyle.

<sup>263</sup> David F. Musto, *The American Disease: Origins of Narcotic Control*, 3<sup>rd</sup> ed. (New York: Oxford University Press, 1999), p. 239. The shift in constitutional authority was part of the Drug Abuse Control Amendments of 1965 (P.L. 89-74).

<sup>264</sup> For a broader discussion of the federal government’s drug enforcement history, see CRS Report R43749, *Drug Enforcement in the United States: History, Policy, and Trends*, by Lisa N. Sacco.

<sup>265</sup> 21 U.S.C. §812 and §841. Of note, growing a marijuana plant is considered *manufacturing* marijuana.

<sup>266</sup> The commission was composed of two Members of the Senate, two Members of the House, and nine members appointed by the President of the United States. President Nixon appointed Raymond Shafer as the commissioner.

<sup>267</sup> P.L. 91-513, §601(d).

<sup>268</sup> National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, First Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1972 (hereinafter, First Report of

In its first report, the Shafer Commission discussed the perception of marijuana as a major social problem and how it came to be viewed as such.<sup>269</sup> It made a number of recommendations, including the development of a “social control policy seeking to discourage marihuana use, while concentrating primarily on the prevention of heavy and very heavy use.”<sup>270</sup> In this first report, the commission also called the application of criminal law in cases of personal use of marijuana “constitutionally suspect” and declared that “total prohibition is functionally inappropriate.”<sup>271</sup> Of note, federal criminalization and prohibition of marijuana was never altered, either administratively or legislatively, to comply with the recommendations of the Shafer Commission.

In its second report, the Shafer Commission reviewed the use of all drugs in the United States, not solely marijuana. It examined the origins of the country’s drug problem, including the social costs of drug use, and once again made specific recommendations regarding social policy. Among other conclusions regarding marijuana, the commission indicated that aggressive behavior generally cannot be attributed to its use.<sup>272</sup> The commission also reaffirmed its previous findings and recommendations regarding marijuana and added the following statement:

The risk potential of marihuana is quite low compared to the potent psychoactive substances, and even its widespread consumption does not involve social cost now associated with most of the stimulants and depressants (Jones, 1973; Tinklenberg, 1971). Nonetheless, the Commission remains persuaded that availability of this drug should not be institutionalized at this time.<sup>273</sup>

At the conclusion of the second report, the Shafer Commission recommended that Congress launch a subsequent commission to reexamine the broad issues surrounding drug use and societal response.<sup>274</sup> While a number of congressionally directed commissions regarding drugs have since been established,<sup>275</sup> no such commission has been directed to review the comprehensive issues of drug use, abuse, and response in the United States.

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the Shafer Commission); and National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, Second Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1973 (hereinafter, Second Report of the Shafer Commission).

<sup>269</sup> The commission stated that three factors contributed to the perception of marijuana as a major national problem, including “[1] the illegal behavior is highly visible to all segments of our society, [2] use of the drug is perceived to threaten the health and morality not only of the individual but of society itself, and [3] most important, the drug has evolved in the late sixties and early seventies as a symbol of wider social conflicts and public issues.” First Report of the Shafer Commission, p. 6.

<sup>270</sup> First Report of the Shafer Commission, p. 134.

<sup>271</sup> Ibid., pp. 142-143.

<sup>272</sup> Second Report of the Shafer Commission, p. 158.

<sup>273</sup> Ibid., p. 224. In this statement, the Shafer Commission cites the following studies: R.T. Jones, *Mental Illness and Drugs: Pre-Existing Psychopathology and Response to Psychoactive Drugs*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, 1973; and J.R. Tinklenberg, *Marihuana and Crime*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, Unpublished, October 1971.

<sup>274</sup> Second Report of the Shafer Commission, pp. 410-411.

<sup>275</sup> See, for example, the President’s Media Commission on Alcohol and Drug Abuse Prevention and the National Commission on Drug-Free Schools.

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Wednesday, February 13, 2019

The Honorable David Scott  
2129 Rayburn House Office Building  
Washington, DC 20515

The Honorable Blaine Leutkemeyer  
4340 O'Neill House Office Building  
Washington, DC 20515

**Re: House Financial Service Committee Subcommittee on Consumer Protection and Financial Institutions "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses"**

Chairman Scott, Ranking Member Leutkemeyer, and distinguished Members of the Subcommittee—thank you for convening this hearing on this important topic and for welcoming our letter into the the record.

My name is Laurent Crenshaw and I am the Senior Director of Government Affairs for Eaze Solutions, Inc (Eaze). Eaze is an technology platform that connects adult consumers with licensed cannabis retailers in states that have legalized the commercial sale of cannabis. Eaze provides technology solutions only to licensed brands and retailers.

Eaze recently published original research on consumer trends in the California market. You will find a copy of that research report attached to this letter. We hope the information will assist your work and demonstrate that a broad cross-section of Americans will benefit from a commonsense approach to cannabis banking.

We strongly support legislative efforts in the committee that will allow legal cannabis businesses to operate responsibly and transparently with the support of traditional financial services providers. Thank you for your thoughtful, bipartisan leadership. We look forward to working with you on this critically important issue.

Sincerely,

Laurent Crenshaw  
Senior Director, Government Affairs.

Appendix:

## **EAZE INSIGHTS | State of Cannabis: Consumers Diversified in 2018**

Jan 15, 2019

### **2018: The dawn of cannabis wellness.**

2018 was a monumental year for the cannabis industry. California, the largest cannabis market in the country, officially transitioned from medical to adult use, and new consumer markets emerged across the U.S.

Throughout the transition, Eaze has kept a finger on the pulse of industry trends as well as consumer purchasing and wellness habits, which we've outlined here in our fourth annual State of Cannabis data report.

### **Executive summary**

Baby Boomers and women continue to demonstrate remarkable market share growth and consumers are increasingly turning to cannabis as a wellness tool, with CBD the breakout star of the year.

This latest report in the Eaze Insights series reveals the cannabis customer base is growing and diversifying, demonstrating a rise in popularity across all adult groups, regardless of gender or age. Consumers are also turning to cannabis to curb unhealthy habits. A majority reduced their alcohol consumption, with Millennials showing the most significant decrease, while many reduced or eliminated their need for over-the-counter and prescription pain medication.

Here are some of the key findings from the report, based on the anonymized consumer behavior data from Eaze's database of 450,000

cannabis consumers as well as attitudes and usage data based on nearly 4,000 survey respondents:

- **The cannabis customer base is diversifying across age groups:** First-time cannabis consumers grew by 140% thanks to adult use legalization. Baby Boomers were one of the fastest growing segments, increasing by 25% over the past year.
- **Year of the female cannabis consumer:** With female consumers nearly doubling, the growth of women entering the market outpaced men and continued the trend of increasing female participation, with women now 38% of cannabis consumers.
- **CBD is driving a new demographic of cannabis users:** CBD consumers nearly doubled in 2018, growing from 2.6% in 2017 to 4.8% in 2018. Baby Boomers are the most common CBD enthusiasts of all age groups (8.4% in 2018), and female Boomers are the most likely CBD users.
- **Cannabis products are used for a variety of wellness applications:** Overall, 71% of surveyed consumers reduced (53%) or stopped (18%) their over-the-counter (OTC) pain treatment, and 60% of surveyed consumers have reduced (52%) or stopped (7%) their alcohol consumption.

## **EAZE INSIGHT: The cannabis consumer is diversifying.**

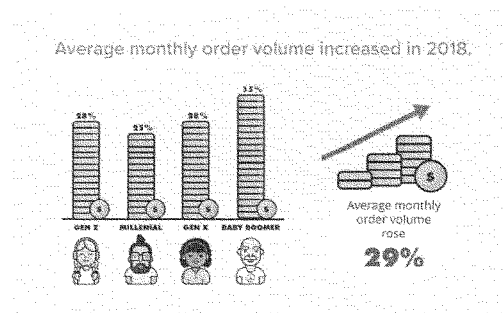


California's cannabis industry took a wild ride in 2018. Shifting regulations, a **persistent illegal market**, and supply constraints due to new testing standards created an ever-changing environment. Despite these challenges, the legal market grew in significant ways, thanks to a huge uptick in new consumers and higher individual spending.

### **New buyers are powering the wellness trend.**



Thanks to a new legal market, first-time adult consumers flocked to Eaze in 2018, more than double from the previous year. Even after adjusting for new cannabis taxes and fees, consumers average order volumes are higher across the board.

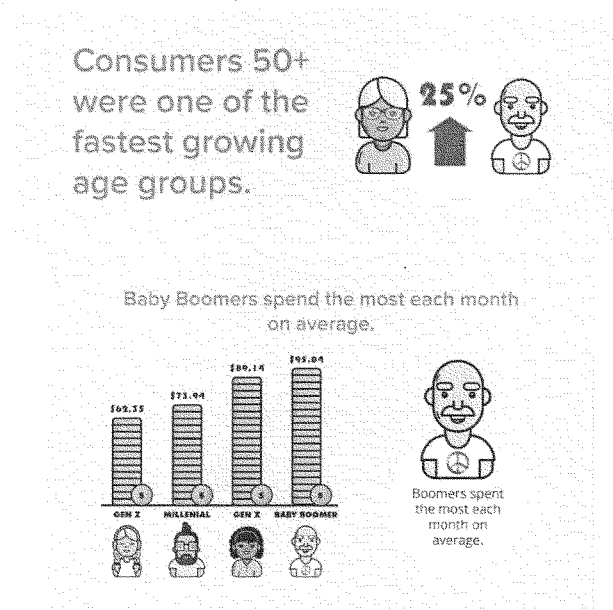


### **The Boom boom.**

Baby Boomers are one of the fastest-growing groups of cannabis consumers. They're also the biggest spenders by a fairly wide margin –



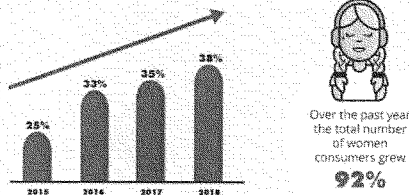
a trend that follows closely along generational lines. On average, Boomers spend 53% more than Gen Z consumers.



### Women are catching up.

The gender balance is steadily shifting: the number of female consumers nearly doubled year-over-year between 2017 and 2018, and market share of women rose 3% for the third consecutive year. If the pace continues, we will see equal gender representation among cannabis consumers by 2022.

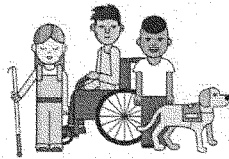
Women are steadily gaining ground in the cannabis market.



### Veterans and people with disabilities benefit from cannabis.



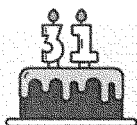
Veterans make up 3% of cannabis consumers.



People with disabilities make up 11% of cannabis consumers.

### Millennials still dominate.

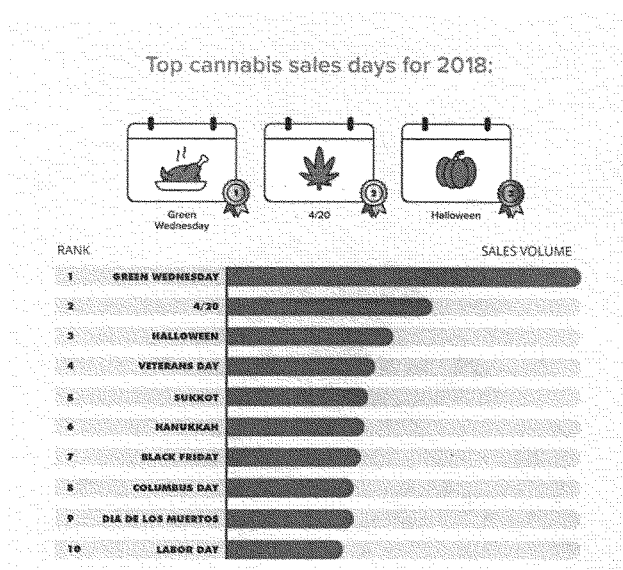
Millennials are still the biggest group on Eaze, reflected in the average age of our customers.



The average age  
of a cannabis  
consumer is 31.

### 'Cannabis culture' is becoming mainstream culture.

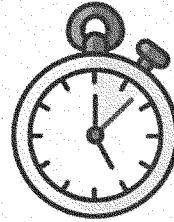
For the first time ever, Green Wednesday (the day before Thanksgiving) beat the classic cannabis holiday April 20th (4/20) in one-day sales. As cannabis normalizes, consumer e-commerce trends, such as Black Friday shopping, are reflected in cannabis purchases. Legalization also brought an openness around consumption, with many consumers likely sharing their experiences and cannabis education with friends and family around the holidays.



**Consumers order cannabis more frequently than ever.**

With a widened customer base, cannabis orders have never come in faster.

Consumers  
placed a cannabis  
order every 8  
seconds in 2018.



**Northern and Southern California have unique buying patterns.**

As cities enhance cannabis access by allowing delivery services, nuanced neighborhood trends are beginning to emerge in the Bay Area and Los Angeles.

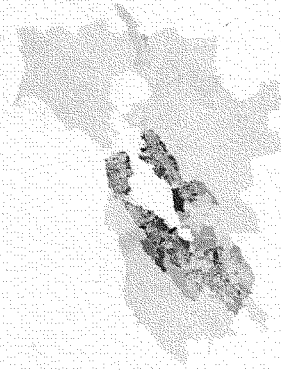
## Number of Eaze orders by region: Bay Area

## TOP 5 NEIGHBORHOODS:

- 🏆 South Beach
- 🏆 Mission Bay
- 🏆 Financial District
- 🏆 Haight Ashbury
- 🏆 SoMa

## ORDER VOLUME:

- LOW
- MED
- HIGH



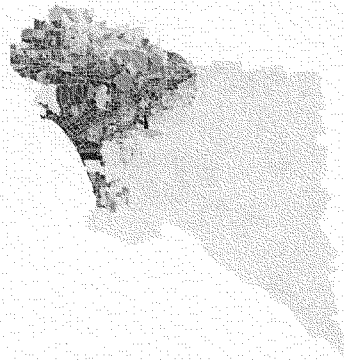
## Number of Eaze orders by region: Los Angeles Area

## TOP 5 NEIGHBORHOODS:

- 🏆 Santa Monica
- 🏆 Playa Vista
- 🏆 Little Armenia
- 🏆 West Los Angeles
- 🏆 Venice Beach

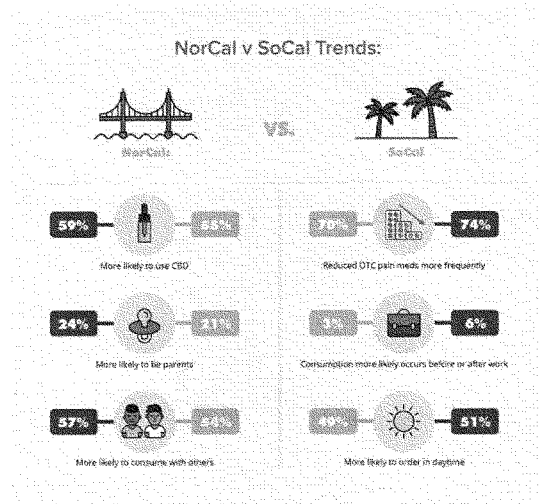
## ORDER VOLUME:

- LOW
- MED
- HIGH



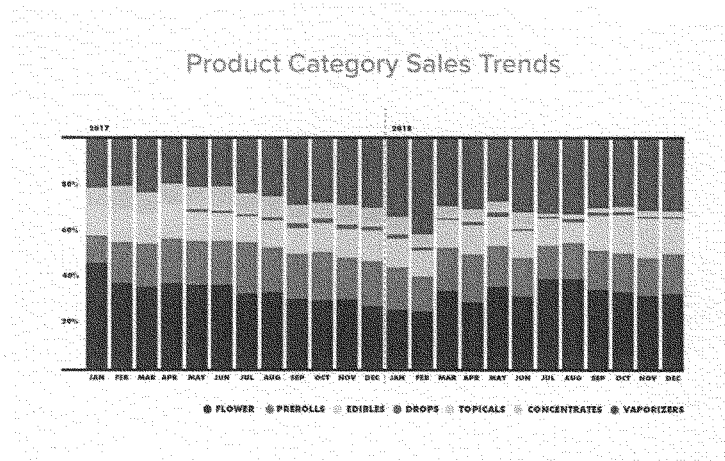
Not only are consumers nuanced in their respective regions, there are also subtle differences in how those in Northern California versus

Southern California consume – though perhaps the biggest insight here is that our commonalities are greater than our differences.



As new consumers navigate the complex world of cannabis brands, easy-to-use products gain popularity. Products that don't require paraphernalia, such as ready to use prerolls, edibles, and vaporizers, are gaining momentum over traditional flower purchases.

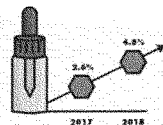
### EAZE INSIGHT: Convenient consumption is on the rise.



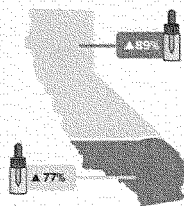
### CBD was the darling of 2018.

Across all cannabis product types, one thing is clear: **CBD** is the breakout star of 2018. The cannabinoid that reportedly brings an array of wellness benefits without the high saw its consumers double year-over-year, with women and Baby Boomers driving growth by using CBD for anxiety, sleep, and pain relief.

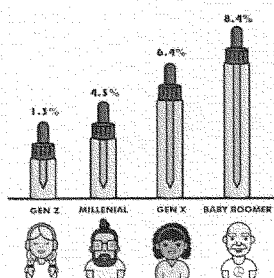
CBD consumers nearly doubled in 2018.



NorCal showed more CBD sales growth than SoCal.



Baby Boomers are driving the CBD surge.



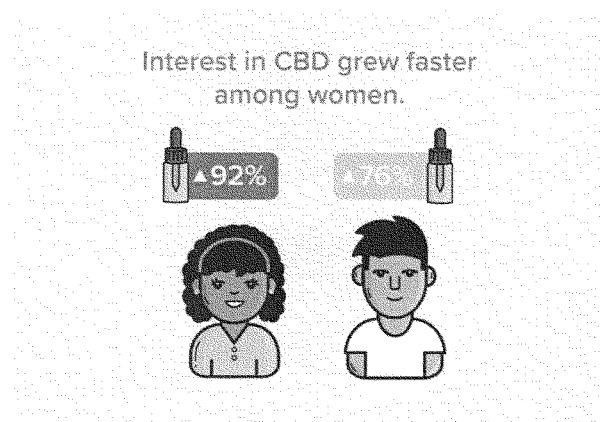
Female Boomers make up **21%** of consumers primarily purchasing CBD.

*Data represents consumers who primarily purchase products with high CBD content.*

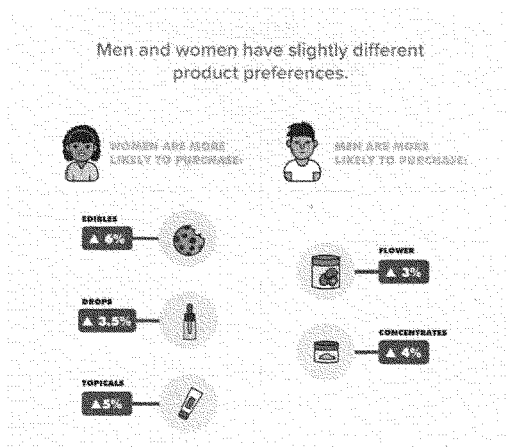
**There are subtle differences in product preference among cannabis consumers.**



As the cannabis consumer diversifies, subtle segment preferences are beginning to emerge. For instance, as women grow as a segment, their preferred products appear to be more “beginner” friendly.

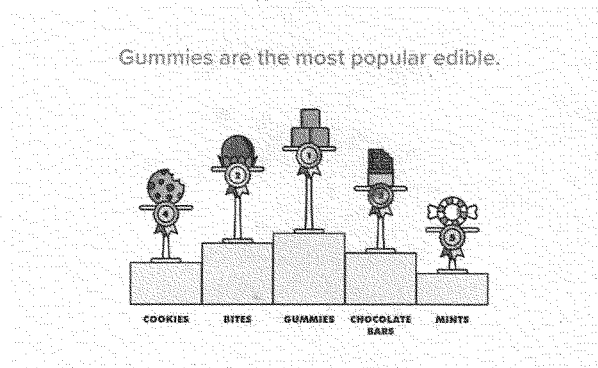


*Data represents consumers who primarily purchase products with high CBD content.*



## The most popular cannabis products cater to beginners.

The most popular vaporizers are those designed for newcomers. Vapes named based on intended effects — Calm, Happy, or Relief for example — outperformed vapes named after any particular cannabis strain. Consumers continue to prefer hybrid flowers over Sativa and Indica strains. Edibles continue to grow in popularity, likely due to the new trend of lower-dosed edibles, and gummies are the preferred delivery method.

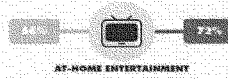


## Eaze Insight: Consumers are taking control of their wellness.

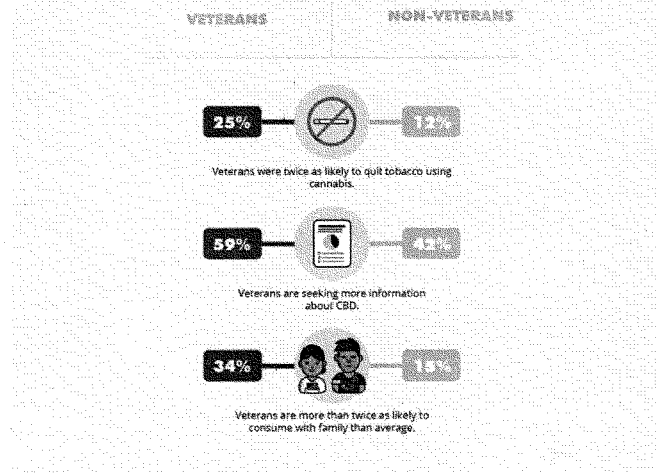
Wellness is a major factor in the increased popularity and consumption of cannabis. While there are subtle nuances regarding how different groups consume, across gender and generation, the overwhelming commonality is wellness.

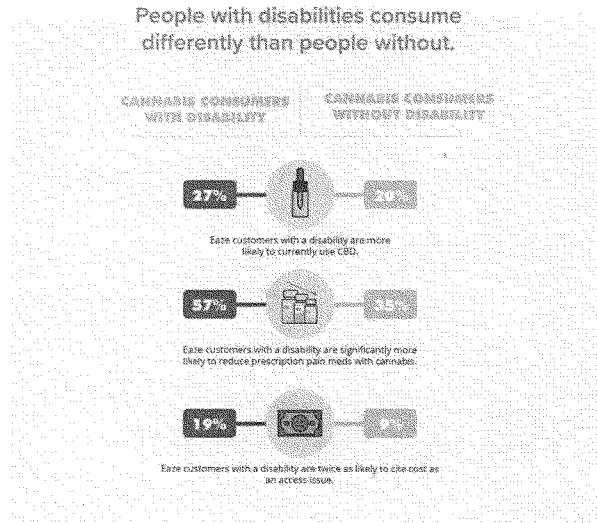


Men and women consume for slightly different reasons.



### Veterans differ from non-veterans in their cannabis consumption.

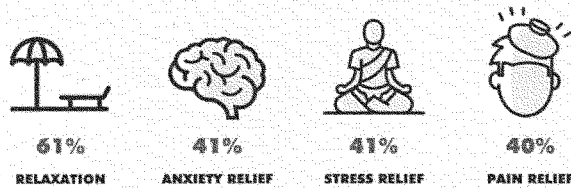




**CBD does not get you high, but it definitely makes you feel *something*.**

CBD-only consumers reported feeling a variety of effects underscoring the expanding role of CBD in the wellness space.

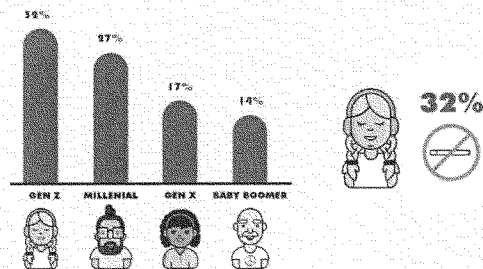
CBD-only consumers reported multiple feelings and effects.



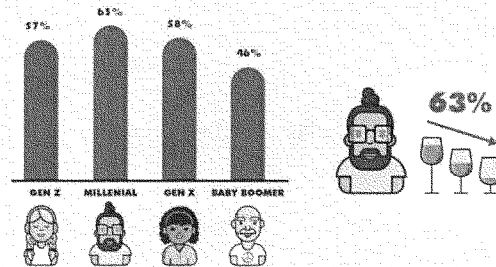
### Consumers are reducing unhealthy habits thanks to cannabis.

Cannabis consumers are leaving harmful substances and medications behind. All generations report drinking less due to cannabis, with Millennials most likely to reduce their consumption.

Gen Z was most likely to reduce or eliminate tobacco use.



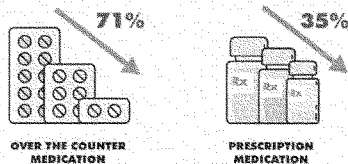
Millennials were most likely to reduce alcohol consumption in 2018.



### Passing on pills.

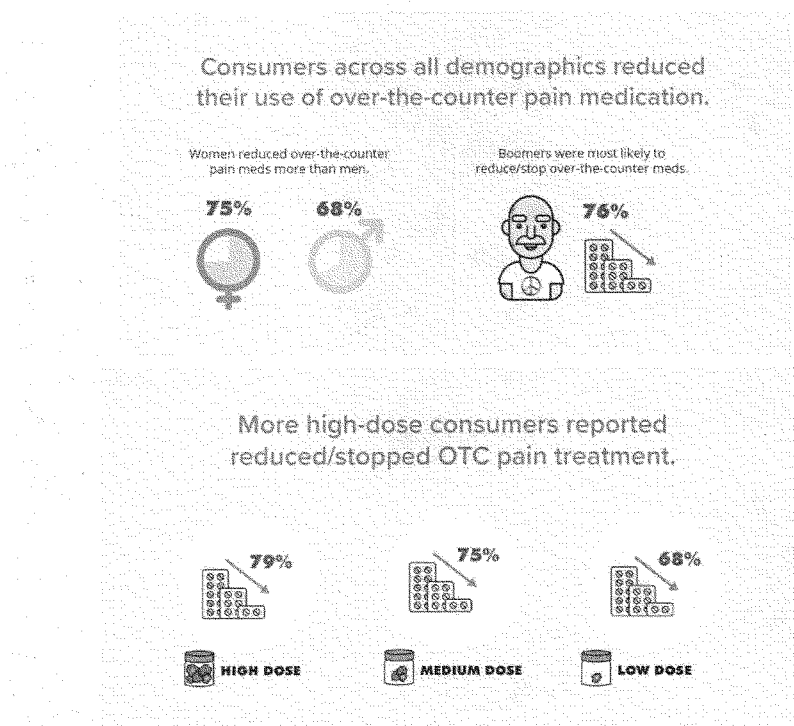
**Pain management** continues to be a popular application for cannabis. From minor aches and pains to more serious, chronic pain, consumers have historically only had access to over-the-counter or prescription medications. That has changed with the introduction of tested, regulated legal cannabis. Across demographics, Eaze customers report needing fewer pills: 71% reduced reliance on over-the-counter drugs and 35% reduced reliance on prescription medications.

Cannabis consumers reduced their reliance on both prescription and over-the-counter pain medication.



### More cannabis, fewer meds.

Baby Boomers and women are finding the most relief with cannabis.



\* "High Dose" = more than 40mg, "Medium Dose" = 11mg to 40mg, "Low Dose" = 10mg or less

### Passing on prescriptions, too.

Similar to over-the-counter drugs, prescription pain medications are falling to the wayside as consumers increasingly turn to cannabis for their more serious or chronic pain.



Consumers across all demographics reduced their use of prescription pain medication.

Women reduced prescription pain meds more than men.



Boomers were most likely to reduce/stop prescription meds.



More high-dose consumers reported reduced/stopped prescription pain treatment.



A copy of this full report can be found:

<https://www.eaze.com/article/insights-2018-state-of-cannabis-report-marijuana-consumer-diversify>



STATEMENT BEFORE  
THE UNITED STATES HOUSE OF REPRESENTATIVES  
FINANCIAL SERVICES COMMITTEE  
CONSUMER PROTECTION AND FINANCIAL INSTITUTIONS SUBCOMMITTEE  
HEARING ENTITLED "CHALLENGES AND SOLUTIONS:  
ACCESS TO BANKING SERVICES FOR CANNABIS-RELATED BUSINESSES"

February 13, 2019

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The Independent Insurance Agents and Brokers of America (Big "I") respectfully submits the following statement regarding the role of insurance agents and brokers in placing insurance products for cannabis-related businesses.<sup>1</sup> Currently most states and the District of Columbia have enacted laws allowing for either medical or adult-use marijuana. However, marijuana remains illegal under the federal Controlled Substances Act meaning those who do business with cannabis-related businesses, such as a marijuana dispensary, are subject to potential federal legal and criminal liability, as well as other professional liability risks.

The Big "I" is concerned that the current dichotomy between state and federal laws regarding legalization of different aspects of the cannabis industry, as well as conflicting court rulings regarding insurer obligations to provide coverage, put insurance agents and brokers who procure coverages for this industry at great risk. Conflicting state and federal laws, as well as emerging standardization of insurance business practices and rapidly evolving regulations, have largely discouraged many insurers from actively participating in this market. This has resulted in businesses seeking out the advice of insurance agents and

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<sup>1</sup> The Big "I" is the nation's oldest and largest trade association of independent insurance agencies, representing a nationwide network of approximately a quarter of a million agents, brokers and employees. Big "I" members sell all lines of insurance—property/casualty, life, health, employee benefit plans and retirement products to business, individuals and non-profit clients.

brokers to place tailored insurance products, such as self-insurance mechanisms, and navigate the complexities related to this emerging line of business. As such, the Big “I” supports clarifying federal laws that create potential legal and criminal liability for insurance agents and brokers who choose to provide state-regulated insurance products to state-sanctioned cannabis businesses.

The focus of today’s hearing is on access to banking services for cannabis-related businesses, but as noted above, another critical service that falls under the jurisdiction of the Financial Services Committee is facing the same challenges in servicing the state-sanctioned cannabis industry: *Insurance*. Like any other business, marijuana growers and distributors need insurance coverage for their assets and potential liabilities. Furthermore, these businesses face legal and regulatory requirements at the state and federal level to obtain insurance if they wish to undertake any number of basic functions such as obtain a loan or mortgage or hire employees. Consequently, the Big “I” respectfully recommends that as the Committee considers solutions to address challenges related to access to banking services for cannabis businesses, continued consideration be given to these same issues as they relate to the business of insurance.

The insurance industry faces many of the same challenges as the banking industry in servicing cannabis-related businesses, including public safety concerns. Insurance is generally thought of as protection against a financial loss, but insurance, like banking, is also pivotal to the overall economy. Put simply, insurance is a necessary precondition for many economic activities that would not or could not take place otherwise. Making sure that businesses in states across the country can obtain insurance is important to the safety and resiliency of communities across the U.S.

Prior to today’s hearing a discussion draft of the “Safe and Fair Enforcement Banking Act of 2019” (SAFE Banking Act) by Reps. Ed Perlmutter (D-Colorado), Denny Heck (D-Washington), Steve Stivers (R-Ohio) and Warren Davidson (R-Ohio) was made public. The Big “I” appreciates this draft legislation and believes it is a positive step in the right direction to ensure that insurance agents and brokers can provide insurance products to cannabis-related businesses where permitted by state law.

The Big “I” looks forward to continuing to work with the Committee and Congress to consider further challenges that the business of insurance, including insurance agents and brokers, face in seeking to service state-sanctioned cannabis-related businesses. The Big “I” thanks the Committee for considering the views of independent insurance agents and brokers.

**U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES  
CHALLENGES AND SOLUTIONS: ACCESS TO BANKING SERVICES FOR CANNABIS-  
RELATED BUSINESSES**

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***Banking & Cannabis: Urgency Grows to Close the Industry's  
Financial Services Gap***

Testimony Submitted by:  
John Kagia, *Chief Knowledge Officer*, New Frontier Data  
2/12/2018

**The cannabis industry's limited access to financial institutions presents a threat to public safety and obfuscates financial accountability, undermining the efforts of state regulators to establish efficient and compliant cannabis industries.**

There are currently approximately 10,000 licensed cannabis businesses in the U.S., with that number expected to rise as more states pass medical and adult use laws. These "plant touching" businesses, which are involved in the cultivation, processing, distribution and retail sales of cannabis have very limited access to the financial services that are integral to the efficient operation of every other sector of the economy.

**Federal cannabis prohibition is at the heart of the cannabis industry's banking challenges.** Under federal law, cannabis is classified under Schedule 1 of the Controlled Substances Act, which means it has a "high potential for abuse" and "no currently accepted medical use in treatment in the United States." Despite this classification, 33 states have legalized the use of cannabis for medical purposes, of which 10 states have also legalized full adult use.

**The disconnect between state and federal law has led financial institutions to decline to serve the cannabis industry for fear of federal prosecution.** As the American Bankers Association notes, "contact with money that can be traced back to state marijuana operations could be considered money laundering and expose a bank to significant legal, operational and regulatory risk." The ABA further notes that "the rift between federal and state law has left banks trapped between their mission to serve the financial needs of their local communities and the threat of federal enforcement action".

**Without access to banks, many businesses in the cannabis industry operate exclusively in cash.** The high volume of retail sales drives large numbers of small-dollar transactions. New Frontier Data's analysis revealed that the average consumer spends

**Banking & Cannabis: Urgency Grows to Close the Industry's Financial Services Gap**

2/12/2019

\$74 per transaction and \$163 per month on cannabis. With some dispensaries serving over 500 customers per day, the volume of cash generated from these transactions creates significant security and operational challenges.

Challenges exist in the wholesale market as well. With a pound of cannabis in Colorado now averaging just under \$1,000, it is not uncommon for growers to be dealing with \$100,000 transactions or more for large wholesale purchases. The number of transactions for wholesalers may be much lower than for retailers, but the effect is the same – plant-touching businesses are left holding extremely large volumes of cash as part of their day to day operations.

**Storing and transporting such large volumes of cash presents not only a daunting logistical challenge for businesses, but an increased risk to public safety.** There have been enough robbery and theft attempts targeting the cash of cannabis businesses to affirm the heightened risk of a cash-based industry. As noted by Don Childers, President & CEO of Colorado Bankers Association in January 2019, "We've had some security guards killed. We have not had the level of violence we've feared [in Colorado]. But we still have the public at risk because we have [so] much cash moving around by people inexperienced with handling that much cash".

**There are some limited existing financial services for the industry as state-chartered banks and credit unions increasingly serve the cannabis industry.** According to the U.S. Treasury's Financial Crimes Enforcement Network (FINCEN) there were 444 financial institutions serving the cannabis industry as of September 2018, up from 318 in October 2018. Most of these are state-chartered banks and credit unions. While these chartered banks and credit unions have offered businesses in the industry basic business accounts and, in some cases, lines of credit, many cannabis businesses do not have access to merchant services, such as credit card processing and loans, which are essential for the efficient operation of most businesses. Even state-chartered banks and credit unions are often hesitant to offer the full complement of financial services to the cannabis industry because most are federally insured.

Alternative payment processors and cash management solutions have emerged to address the services gap, but few have the ability to match the scale and service of established financial institutions. Many of these solutions, which have been custom-built for the cannabis industry, are very new and not well positioned to scale with the industry's rapid expansion.

**Even businesses with bank accounts are at constant risk of having their bank accounts cancelled.** The 444 financial institutions serving the industry collectively terminated 15,363 bank accounts as of September 2018. The loss of a bank account is a highly disruptive event for the affected businesses. It creates significant operational, logistical and security issues associated with identifying and migrating over to a new provider. In the instances where the business is not quickly able to find a new bank, it is forced to

accumulate the cash until such a time as it has secured an alternate provider. ***The fact that there have been more account terminations than there are businesses in the industry underscores the disruptive impact of the current approach to banking in the industry.***

**Bank account terminations impact non-plant-touching businesses too.** It is not only plant-touching businesses that are affected by bank closures. Many non-plant touching ancillary companies have also had their accounts terminated simply due to their affiliation with the cannabis industry. As a research and analytics company focused on the cannabis industry, New Frontier Data does not touch the plant, nor is the company an advocacy organization. However, even New Frontier Data has had three banks terminate the company's business accounts because of the prominence of the term 'cannabis' in the company's business documents.

The frequency with which account terminations continue to occur across the cannabis industry is often driven by financial institutions taking an abundance of caution to serving cannabis businesses. Such a highly conservative approach to serving the industry would not be needed if the federal government codified the rules governing federally-chartered and insured financial institutions, and enabled the industry to fully access the country's financial system.

#### **Strong Growth is Exacerbating the Industry's Banking Challenges**

The impact of lack of access to banking services has become more acute as the cannabis industry has grown. New Frontier Data estimates that in 2019, the U.S. legal cannabis industry will generate \$12.9 billion in retail sales (i.e., purchases made by medical and adult use consumers), with sales forecast to grow to \$26.3 billion by 2025. This estimate is only for currently legal states and does not assume the addition of any new legal markets in that time. With large states including New York, New Jersey, and Pennsylvania actively considering full legalization, and others including Texas, and Virginia considering medical use, the legal markets in the U.S. will likely grow beyond current forecasts in the years to come.

The continued expansion of the legal market will only exacerbate the challenges caused by the lack of access of the full financial services market.

#### **Only congress can comprehensively address the cannabis industry's banking issues.**

At the heart of this issue is not just access to banking services, but the desire among cannabis businesses for the stability and protections afforded to every other legal sector of the economy. Until the cannabis industry's banking issues are resolved the industry's growth will be constrained, businesses will incur higher than necessary operational costs, state and local governments will face challenges with ensuring regulatory compliance, and the public will be placed at higher risk.

**Banking & Cannabis: Urgency Grows to Close the Industry's  
Financial Services Gap****2/12/2019**

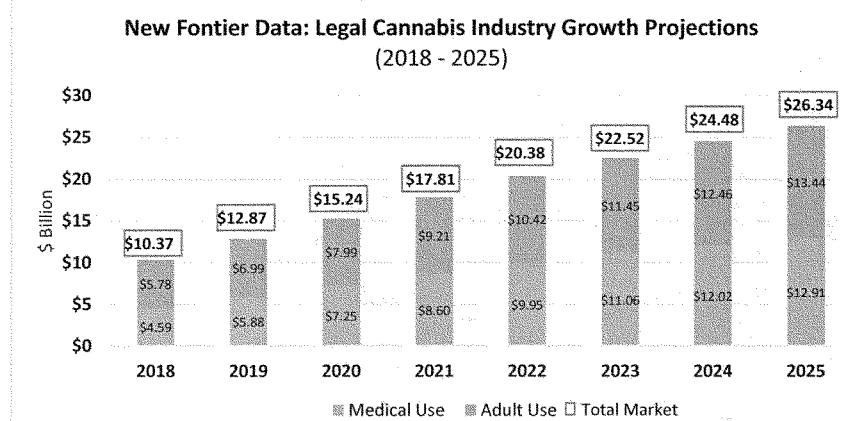
If the intent of legalization is to bring cannabis out of the shadows and establish a well-regulated industry that is integrated into the rest of the U.S. economy, access to the country's unrivaled financial markets will be key to that objective. The laws being discussed by the U.S. House Committee on Financial Services will be key to addressing this systemic issue and will lay the foundation for the full integration of the regulated cannabis industry into the U.S. economy.

**ABOUT NEW FRONTIER**

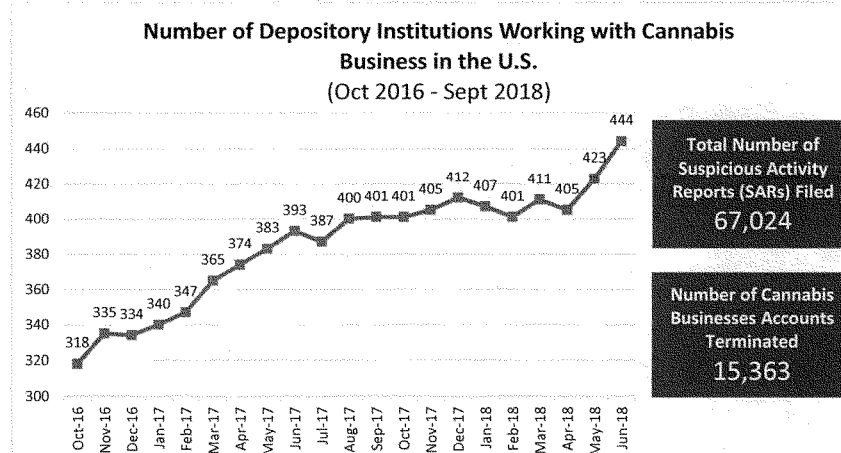
New Frontier Data provides objective, rigorous and comprehensive analysis and reporting about the nascent and underserved cannabis industry worldwide. New Frontier Data's analytics and reports have been cited in over 69 countries around the world to inform industry leaders, investors, policymakers and others. New Frontier Data, the premiere and only Big Data shop in the sector, looks beyond plant cultivation and distribution to raise the industry bar and improve visibility into what will inevitably soon be a mature and more complex global market. Founded in 2014, New Frontier Data is headquartered in Washington, D.C. and has additional offices in Denver, Colorado.

New Frontier Data does not take a position on the merits of cannabis legalization. Rather, its mission and mandate are to inform cannabis-related policy and business decisions through rigorous, issue-neutral and comprehensive analysis of the legal cannabis industry.

John M. Kagia  
*Chief Knowledge Officer*  
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703.975.1435  
[www.newfrontierdata.com](http://www.newfrontierdata.com)

**APPENDIX****Appendix 1: U.S. Legal Cannabis Industry Growth Projections.**

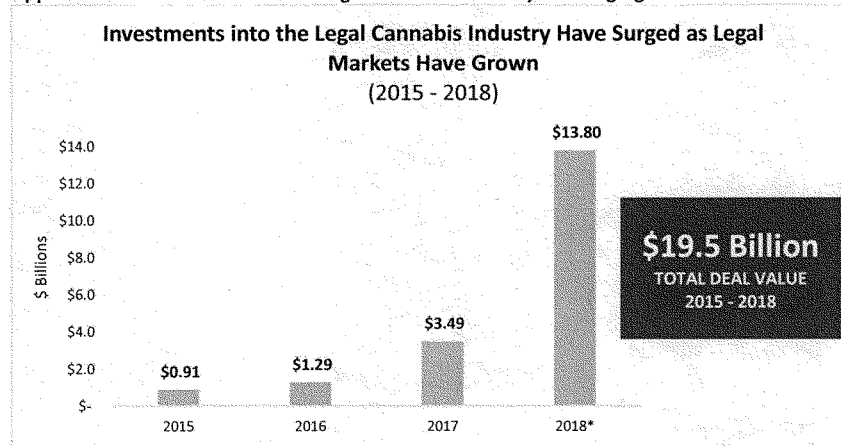
Source: New Frontier Data

**Appendix 2: The number of depository institutions serving the industry is rising but  
account terminations remains a persistent concern**

Source: U.S. Financial Crimes Enforcement Network

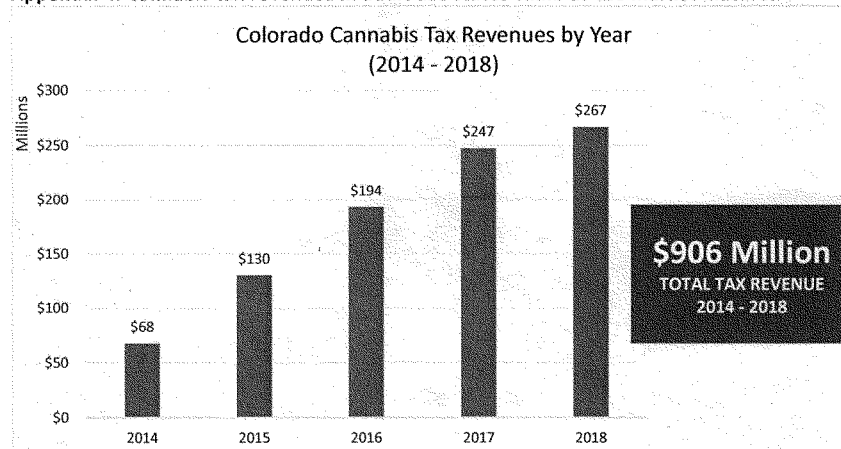


## Appendix 3: Investments into the legal cannabis industry are surging



Source: New Frontier Data; Viridian Capital Advisors

## Appendix 4: Cannabis tax revenues in adult use states climb as the market matures



Source: Colorado Marijuana Enforcement Division

Testimony of

Lauren R. Kohr, CAMS-FCI, CAMS, CFIRS

Senior Vice President and Chief Risk Officer  
Old Dominion National Bank

Before

House Subcommittee on Financial Institutions and Consumer Credit

on

“Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses.”

February 13, 2019

Chairwoman Waters and members of the subcommittee, I am Lauren Kohr, Chief Risk Officer of Old Dominion National Bank, headquartered in Virginia. Old Dominion National Bank is a small community Bank regulated by the Office of the Comptroller of the Currency (OCC) and services communities throughout Washington D.C., Virginia and Pennsylvania. The opinions and recommendations I express are my own and do not necessarily reflect the views of Old Dominion National Bank.

As I present my thoughts and recommendations on the SAFE Banking Act of 2019, it is important to note that as a practitioner in the Anti-Money Laundering (AML) and Bank Secrecy Act (BSA) compliance space for nearly fifteen years, I have a strong desire to ensure that the integrity of the financial system is not exploited by illicit actors such as those aligned with trans-national organized crime, terrorism and other heinous crimes. I also maintain a strong belief in assisting law enforcement in any capacity legally possible.

My testimony is not intended to address the positives and negatives of the legalization of cannabis but rather address the challenges faced by FIs, and the need for clarity around the legal uncertainty both the FIs and the cannabis industry face. I believe there is an opportunity for the legitimate cannabis industry to appropriately gain access to the financial system in the states where it has been legalized, provided reasonable safeguards are in place. My position on executing this process while addressing the potential risk is through collaborative and transparent discussions with all stakeholders including law enforcement, regulatory partners, and practitioners. It is critical to ensure appropriate outreach and clarification exists by our regulatory partners. This will assist in safeguarding against unclear and inconsistent understanding of the operational and practical regulatory expectations.

One of the challenges the financial industry, including community banks and credit unions, are currently facing is offering financial services to cannabis related legitimate businesses (CRLB). Because such CRLB activity violates the Controlled Substance Act (CSA), which in turn creates the potential for a violation of the money laundering statutes, the directors, officers and employees of the institution may be subject to potential prosecution for participating in or “aiding and abetting” a federal crime, such as money laundering. As mentioned above, I believe the legitimate cannabis industry should have the ability to appropriately gain access to the financial system. This would assist in preventing larger scale problems, such as a multi-billion-dollar industry turning to underground markets, and alternative banking methods that provide for limited transparency that are not subject to adequate oversight by governing authorities.

The conflicting state, federal and now international laws surrounding the cannabis industry have created a complex legal, reputational and compliance landscape for FIs. This draft bill, particularly the proposal to remove the proceeds of legal marijuana activity from the money laundering activities, should address the major concerns by FIs and deserves widespread support. I have a few recommendations and comments for the subcommittee’s consideration.

#### **Guidance and Examination Procedures (Section 7)**

While we continue to work through the complicated legal status of the cannabis industry and the resultant implications FIs face, I am in full support of the delivery of uniform guidance and

examination procedures for depository institutions that provide financial services to CRLBs, and strongly commend the subcommittee for this inclusion of this section. I would like to be clear that I am not advocating for additional regulatory guidelines, but rather clarification on existing guidance issued. The previous guidance was issued nearly 5 years ago when the industry was in its infancy, and has not been updated following the rescission of the Cole Memorandum. That said, it would be extremely useful to FIs that choose to bank CRLBs, if regulatory guidance and examination procedures addressed at least the following:

- Filing of “Marijuana Limited” Suspicious Activity Reports (SARs) on businesses or individuals that fall within a tiered cannabis-related business and/or indirectly deal with or derive a portion of their revenue from the cannabis-related industry.
- Filing of “Marijuana Limited” SARs and Know Your Customer Expectations for funds that are intended to be used for or in support of the direct cultivation, possession, and distribution of cannabis (an example would be investors and venture capitalists investing in a medical cannabis license).
- Filing of “Marijuana Limited” Suspicious Activity Reports on individuals who receive compensation from directly working at/or with CRLB or a portion of the individual’s revenue or compensation is derived from working with or at a CRLB.
- Suspicious Activity Reporting requirements on brokered deposits purchased, that would include CRLB funds.
- Ongoing obligation to refile on “Marijuana Limited” SARs.
- CRLB Due Diligence and Enhanced Due Diligence Expectations.
- Risk Assessment factors and mitigation considerations for Medical cannabis, legalized recreational cannabis, industrial hemp and CBD as they all present different levels of risk.
- Expectations on handling foreign businesses that operate in or have connection to the U.S. or operate in a jurisdiction, such as Canada where cannabis is legal.
- Red Flags and potential suspicious activity identifiers and typologies for direct and indirect and domestic and international CRLB risk.
- Currency Transaction Reporting and CTR Exemptions, specifically if a CRLB is considered an ineligible business identified under (31 CFR 103.22(d)(f)(viii)).
- Information sharing ability and reporting requirements under the 314(a) and 314(b).
- Address several of the legal, reputation, compliance, financial, geographical, and market risks.
- Clear and concise definition around what defines the following generally accepted legitimate CRLBs:
  - Direct CRLB
  - Indirect or Tiered CRLB
  - Legal Hemp and CBD Related Businesses

Without the relief that is intended from this proposed legislation, the risk of potential money laundering violations to FIs, still exists and these risks are not limited to direct transactions with medical CRLBs. These risks expand far beyond medical CRLBs, especially when you consider

recreational cannabis, indirect businesses that support or derive revenue from CRLBs, and cross-border transactions involving jurisdictions that have legalized cannabis.

With additional interpretative and updated guidance, FIs who have made, or will make the decision to offer financial services to CRLBs will have a stronger platform to ensure they are offering financial services to a high-risk industry in a safe and sound manner and in compliance with their BSA obligations.

#### **Action Items**

During collaborative discussions surrounding the challenges of banking CRLB with a number of professional colleagues, a clear theme emerges from both small community banks to global FIs, that the most straight-forward action besides your proposal to change the money laundering statutes would be to reschedule and/or decriminalize cannabis by removing it from the Controlled Substance Act. FIs would no longer be in direct violation of the Controlled Substance Act or “aiding and abetting” a federal crime such as money laundering. In addition, our bank regulatory authorities should issue subsequent guidance to assist FIs in properly managing the risks of an industry that will source legal proceeds but can easily source or be infiltrated by illicit monies.

Several years ago, I wrote a white paper for the Association of Certified Anti-Money Laundering Specialists (ACAMS) addressing a number of challenges FIs face when banking the cannabis industry and proposed solutions and considerations. I have attached the paper to my testimony. While I am not advocating one or the other, I would like to highlight opportunities for state and federal representatives to consider when addressing the issues, outside of de-scheduling, that would assist in FIs’ ability to better meet their requirements under FinCEN guidance, the BSA and to the extent considered, the Cole Memorandum:

- Develop a clear, transparent and secure avenue for FIs to verify with state authorities that the business is legitimate, and, as applicable, duly licensed and/or registered appropriately as a FI-related business. Specific to medical cannabis, this should include providing copies of documents or an attestation of compliance with license and registrations. FIs will need the ability to request the information on a periodic basis to ensure the FI maintains the most current information regarding state licenses in connection with the customer.
- Make available through an appropriate and secure channel, the ability for FIs to review as requested the medical cannabis license application and other related documents used by the state in determining the appropriateness of granting licenses. FIs may compare these documents to those provided by the FI dispensaries during account opening. This will assist the FI in meeting obligations under the USA PATRIOT Act and the handling of circumstances where the FI would potentially need to file a SAR in accordance with applicable law and regulation.
- Provide the FIs with available information, as applicable, about the business and related parties such as results of inspections and monitoring compliance with provisions and regulations under state law.

- Provide financial intuitions within the state through a secure portal a listing of the number of businesses and/or licenses granted to businesses and whether they are in good standing and the list should include name of business, address, tax ID number, beneficial owners and controllers and their related identifying information. The bank should be able to use this listing to verify the accuracy of the information they have on file for the FI-related businesses as well as scrub their existing database to assist in identifying accounts that may not be identified as FI-related businesses. This will assist a FI in meeting their requirements under the BSA, including the new requirements under the Customer Due Diligence rule (5<sup>th</sup> pillar).
- Ability for FIs to be made aware, at their inquiry, if an investigation has been initiated on the FI-related business by state or federal authorities.
- Capability to verify the medicinal cannabis identification card for individuals. FIs will need a channel to verify the authentication of the card if they choose to allow the card as an acceptable form of identification at account opening.
- Consider requiring cannabis-related businesses to have a written and effective AML/BSA program that contains at least the designation of a compliance officer, internal policies, procedures and controls, ongoing relevant training of employees, independent testing and review and to the extent possible and applicable, the Customer Due Diligence rule. However, this may be extremely challenging as it is impractical to have those entities be assessing who purchases legal marijuana.

### Conclusion

In conclusion, the proposed legislative provisions dealing with the federal money laundering laws is the only way to ensure that changes are sustainable for both FIs as well as, CRLBs. The current lack of regulatory and legal clarity requires comprehensive action. Furthermore, actions and decisions cannot be made in silos. Addressing these challenges and setting expectations should be developed through enhanced public and private partnerships that involve not just our legislative bodies and practitioners, but law enforcement and regulatory authorities. This will allow for effective, direct and clear guidelines for both the FIs and industry. FI's can be successful with offering financial services to high risk lines of businesses by adequately establishing an effective corporate governance framework. Clear and consistent execution of guidance by FinCEN and/or regulatory authorities would assist in removing the regulatory uncertainty financial institutions face, and allow for an effective risk management process for an additional high-risk industry.

I would like to thank the subcommittee for the opportunity to testify. I would be happy to address any questions or concerns.

**Subcommittee of the House  
Financial Services Committee  
Public Comments**



**Submitted by:**

**Nick Kovacevich, Chairman and Chief Executive Officer, KushCo Holdings, Inc.**

Dear Esteemed Members of Congress,

February 11, 2019 – KushCo Holdings, Inc. (OTCQB: KSHB) the parent company of innovative cannabis industry leaders such as Kush Supply Co., Kush Energy, The Hybrid Creative, and Koletto Innovations, appreciates the opportunity to provide comments to the subcommittee of the House Financial Services Committee concerning cannabis banking reform.

Founded in 2010, KushCo has now sold more than 1 billion units and regularly sells to more than 5,000 legally operated medical and adult-use dispensaries, growers, and producers across North America, South America, and Europe. KushCo's subsidiaries maintain facilities in the five largest U.S. cannabis markets as well as having a local sales presence in every major U.S. cannabis market.

KushCo strives to be the industry leader for responsible and compliant products and services in the legal cannabis and CBD industry. While KushCo provides products and solutions to customers in the cannabis and CBD industries, it has no direct involvement with the cannabis plant or any products that contain THC or CBD.

Although cannabis is legal in two-thirds of the country and despite the fact that 95 percent of the U.S. population lives in a state where cannabis, in some form, is legal, cannabis is still considered a Schedule 1 drug at the federal level. This makes it nearly impossible for banking and financial institutions to conduct business with companies involved in the cannabis industry, especially given the current administration's rescindment of the Cole Memorandum, without risking criminal prosecution under federal law for, among other things, money laundering, conspiracy and "aiding and abetting." Even if such banks can get comfortable with operating in the industry, banks are required, at great time and expense, to file suspicious-activity reports (SARs) for virtually every transaction involving a cannabis company. To illustrate this challenge, one Colorado credit union was required to file 7,000 reports for 220 cannabis businesses, as opposed to 226 reports for its other 33,000 customers combined.

Such onerous regulations make working with companies in the cannabis industry extremely unprofitable for banks, regardless of the financial health of their potential customers. Moreover, the current banking laws severely restrict access to traditional forms of credit given that major credit card companies themselves also prohibit using their cards for cannabis purchases. That's led to an estimated 70% of cannabis businesses being unbanked, resulting in an untenable situation: financially solvent companies are left operating exclusively in cash. Not only are dispensaries (and all cannabis businesses, for that matter) at a higher risk of robbery and other violent crimes given the large sums of money that they are forced to carry to transact their businesses, ...

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**Subcommittee of the House  
Financial Services Committee  
Public Comments**



...performing basic business functions such as payroll, paying vendors and auditing can be extremely challenging. Cash transactions also make it more difficult for federal and state regulatory bodies to track payments in the industry, ironically, making it harder to enforce the laws against "bad" actors.

Many politicians and regulators acknowledge this problem. The challenge is to create a safe, legal mechanism to allow businesses to make deposits and write checks to pay taxes, fees, vendors and landlords and employees. Without this ability, legally compliant cannabis companies cannot secure access to traditional capital markets and much needed debt financing, typically leading to more "black" and "gray" market activity. And those companies that have a dire need to access the capital markets have been heading to friendlier, international markets such as Canada. Given that projected cannabis market sales are expected to exceed \$24 billion by 2025, according to New Frontier Data, the United States undoubtedly will lose its competitive market advantage in this burgeoning industry.

What the cannabis industry is asking is simple: we would like (a) to protect the public welfare and safety by reducing the extremely high number of cash transactions in the industry, (b) to allow cannabis companies to more easily access traditional capital markets and debt financing, and (c) to implement banking regulations which work hand in hand with law enforcement's efforts to track payments in the industry, all in an effort to help facilitate the growth of this explosive industry.

We would welcome any opportunity to assist the subcommittee as the members advance their review of cannabis banking reform and other related cannabis issues in the near future.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nick Kovacevich'.

Nick Kovacevich  
Chairman & Chief Executive Officer, KushCo Holdings, Inc.

 **KUSHCOHOLDINGS**

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National Association of Federally-Insured Credit Unions

February 12, 2019

The Honorable Greg Meeks  
Chairman  
Subcommittee on Consumer Protection and  
Financial Institutions  
Committee on Financial Services  
United States House of Representatives  
Washington, DC 20515

The Honorable Blaine Luetkemeyer  
Ranking Member  
Subcommittee on Consumer Protection and  
Financial Institutions  
Committee on Financial Services  
United States House of Representatives  
Washington, DC 20515

**Re: Tomorrow's Hearing: "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses"**

Dear Chairman Meeks and Ranking Member Luetkemeyer:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's Subcommittee hearing on access to banking services for cannabis-related businesses, also known as marijuana-related businesses (MRBs). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 115 million consumers with personal and small business financial service products. NAFCU and our members appreciate the Subcommittee's focus on this important and challenging topic.

As the Subcommittee is aware, the vast majority of states have authorized varying degrees of marijuana use, ranging from limited medical use to decriminalization and recreational use at the state level. NAFCU has heard from a number of our member credit unions in these states that they are being approached by their members, or potential members, that have small businesses that are in, or that serve, the legal cannabis industry in their state in order to obtain banking services for those businesses.

As the cultivation, sale, distribution and possession of marijuana remains illegal at the federal level under Schedule I of the *Controlled Substances Act*, almost all credit unions remain hesitant to provide financial services to these members and their small businesses. While the 2013 memo from U.S. Deputy Attorney General James M. Cole ("Cole Memo") and the 2014 guidance from the Financial Crimes Enforcement Network (FinCEN) have attempted to provide clarity to financial institutions, uncertainty remains for financial institutions in this area. Guidance can be rescinded at any time, and in fact, former Attorney General Jeff Sessions took action in 2018 to essentially rescind the "Cole Memo." For financial institutions, such as credit unions, there are additional regulatory challenges that compound the uncertainty of providing financial services to state-authorized MRBs. These go beyond just concerns about criminal or civil penalties, but also extend to requirements related to proper Suspicious Activity Report (SAR) and Anti-Money Laundering (AML) filings as required under the *Bank Secrecy Act*, access to federal deposit

insurance and a Federal Reserve master account, and even potential issues with the Internal Revenue Service (IRS). Missteps in these areas could prove devastating to an institution. It should be noted that these risks also exist when providing financial services to ancillary businesses that provide products and services to MRBs and fall within the credit union's field of membership, even if the state-authorized MRB does not.

NAFCU does not have, and is not taking, a position on the broader question of the legalization or decriminalization of marijuana at any degree at the federal or state level. However, we do support Congress examining what legislative steps can be taken to provide greater clarity and legal certainty at the federal level for credit unions that choose to provide financial services to state-authorized MRBs and ancillary businesses that may serve those businesses in states where such activity is legal. While not a total solution, a strong safe harbor for financial institutions that wish to serve such businesses would be one step towards improving clarity and addressing what is often perceived as misalignment between federal and state laws. While the discussion draft of the *SAFE Banking Act of 2019*, which is before the Subcommittee at this hearing, is an important step toward this goal, NAFCU believes that there are additional issues that the legislation may not address and should be examined.

Thank you for your attention to this important issue. We look forward to continuing to work with the Subcommittee on this and other issues of importance to credit unions. Should you have any questions or require any additional information, please contact me or Alex Gleason, NAFCU's Associate Director of Legislative Affairs, at 703-842-2237 or [agleason@nafcu.org](mailto:agleason@nafcu.org).

Sincerely,



Brad Thaler  
Vice President of Legislative Affairs

cc: Members of the House Financial Services Committee



TESTIMONY OF AARON SMITH

*OF THE*

NATIONAL CANNABIS INDUSTRY ASSOCIATION

*BEFORE THE*

UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCIAL INSTITUTIONS

"CHALLENGES AND SOLUTIONS: ACCESS TO BANKING SERVICES FOR CANNABIS-RELATED  
BUSINESSES"

FEBRUARY 13, 2019

TESTIMONY OF AARON SMITH  
*OF THE*  
NATIONAL CANNABIS INDUSTRY ASSOCIATION

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES  
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FEBRUARY 13, 2019

**Introduction:**

Chairman Meeks, Ranking Member Luetkemeyer, and members of the Subcommittee, I am Aaron Smith, Executive Director and Co-Founder of the National Cannabis Industry Association (NCIA), the largest national trade association dedicated to protecting state-legal cannabis businesses, defending state laws, and advancing federal policy reforms. On behalf of our members, we thank you for the opportunity to discuss our support for providing fair access to banking and financial services for state-licensed cannabis cultivators, processors, and retailers throughout the country.

Founded in 2010, NCIA represents nearly 2,000 member-businesses and tens of thousands of cannabis professionals committed to replacing criminal marijuana markets with a responsible and regulated cannabis industry.

Currently, our industry supports hundreds of thousands of jobs, tens of millions in tax revenue, and billions in economic activity. In 2017, the five states that had taxed and regulated adult-use sales (Alaska, Colorado, Nevada, Oregon, and Washington) collected more than \$790 million in state tax revenue that year. However, per current federal law, cannabis remains a Schedule I drug under the Controlled Substances Act. This blocks state-licensed cannabis business and firms providing ancillary products or services to the industry from accessing banking services, forcing them to operate in an all-cash environment. This situation not only creates an unnecessary public safety risk, it poses an undue burden on state and local tax and licensing authorities, which are forced to take large cash payments. These taxes and licensing fees fund the enforcement of state marijuana laws as well as school construction, drug education activities, and infrastructure programs.

After nearly a decade of significant regulatory changes at the state level, now is the time to conduct a universal review of this federal framework and make changes that would foster greater productivity and transparency. Ending the conflict between state and federal cannabis laws will promote a sound and robust financial system that best supports the economic growth and job creation driven by the growing number of state-licensed cannabis businesses across the country.

**The Current Cannabis Banking Situation:**

To date, forty-six states, the District of Columbia, as well as Guam and Puerto Rico have passed legislation authorizing some form of cannabis for regulated medical or adult-use purposes and thirty-three states have

enacted laws regulating the commercial production and sale of medical or adult-use marijuana. Ten of those states, which include 80 million people, or nearly 25% of the United States' population, have passed laws allowing for the responsible use of cannabis for adults over 21.

Despite significant legal changes and advancement of the status of medical and adult-use cannabis across the country, most banks, credit unions, and financial institutions do not provide traditional banking services to cannabis-related businesses. These denied services include access to standard checking or savings accounts, the ability to receive loans and lines of credit, and the capability to accept common debit and credit cards. As a result, business owners often have no choice but to pay their employees, their federal and state taxes, and process every consumer purchase in cash, in addition to paying for armored trucks to transport the money.

In order to operate safely and successfully, businesses must have access to traditional financial services. For the cannabis industry, which conducts hundreds of millions of dollars in transactions across the majority of U.S. states, the lack of access to financial services creates public safety hazards, including an increased chance of becoming a target for robberies, loss of economic opportunity, and inability to retain workforce talent. Restricting financial services to licensed cannabis businesses also prevents the elimination of illicit businesses currently operating in the grey and black markets. The absence of clarity and direction by the federal government for financial institutions about how to provide banking services for state-legal, licensed cannabis businesses has undoubtedly created undue hardship for cannabis-related entities.

In 2014, to elevate some of the banking challenges associated with the cannabis industry, the U.S. Department of the Treasury's Financial Crime Enforcement Network (FinCEN) issued guidance regarding the conditions under which financial institutions may work with cannabis-related businesses. As a result, some credit unions and regional banks have been providing limited financial services to some cannabis industry businesses. However, the number of banks working with cannabis-related businesses remains marginal in the current context of an emerging global industry. In addition, before the House Financial Services Committee early last year, Treasury Secretary Steve Mnuchin confirmed that the department is reviewing the existing FinCEN guidance and does not want to rescind current guidance without having a replacement policy to address public safety concerns.

NCIA commends the Secretary for keeping the FinCEN guidance in place, especially as more states have passed cannabis-related legislation. However, the FinCEN guidance does not solve the fundamental need for financial institutions to facilitate ordinary banking access and services at standard costs for licensed businesses operating in compliance with state laws. Currently, a cannabis business attempting to open a bank account might be charged \$10,000 to \$1,000,000 in fees per year for excessive compliance and regulatory costs required for a financial institution to successfully follow obligations under federal anti-money-laundering laws. Moreover, many cannabis companies pay initial and annual state and local licensing fees necessary to operate, as well as tax rates of 60% or more because of an arcane provision in the federal tax code. Because of these excessive fees and taxes, the average cannabis-related business often does not have the resources necessary to pursue traditional financial products common to other state-licensed industries.

#### **Looking Ahead:**

The U.S. legal medical and adult-use cannabis market is currently estimated to be valued between \$10 and \$11 billion and is expected to grow to \$56 billion by 2025 with the possibility of employing one million individuals. However, the U.S. illicit cannabis market is currently estimated to be near \$30 billion. This

adverse ratio between the legal and illegal cannabis marketplace is a direct result of outdated federal policy toward a responsible industry operating at the state and local level.

Last month, before the Senate Judiciary Committee, Attorney General nominee, William Barr, said he would not go after cannabis-related business in compliance with state law and urged Congress that the legislative process, rather than administrative guidance, is ultimately the right way to resolve whether and how to legalize marijuana. However, until the United States establishes a permanent solution, most-state permitted cannabis-related businesses will continue to operate in a cash-only environment and this will allow the illicit market to exist at unreasonable levels.

As we have seen in states with full adult-use legalization, removing restrictions on cannabis leads to greater financial accountability and transparency, which naturally combats the illicit marketplace. Addressing the challenges associated with a regulatory maze of conflicting federal and state laws will allow state-compliant entities to operate in a fully regulated environment and encourage the expansion of regulated markets, increase consumer safety standards, reduce access to minors and combat illegal trafficking throughout the country.

**Conclusion:**

In conclusion, the cannabis industry has thoroughly evolved into a national commercial enterprise and NCIA expects to see more states enact and expand cannabis laws in the coming year and beyond. State laws that have replaced the criminal markets with systems that provide for the tightly regulated production and sale of cannabis to patients and adults over 21 are working to improve public safety overall – but, the unnecessary hazards caused by outdated federal banking policies must be resolved in order for our communities to fully realize the public safety benefits of regulation.

I want to thank the Chair, Ranking Member, and the Subcommittee for your time to discuss access to banking services for cannabis-related businesses. This topic is important to all the members of NCIA and the entire legal cannabis industry. On behalf of NCIA, I encourage Congress to update and develop federal policies that will provide clarity and enable reasonable access to banking and financial services for state-licensed cannabis businesses. I again thank the committee for the opportunity to submit testimony today.



TESTIMONY SUBMITTED ON BEHALF OF THE  
NATIONAL CANNABIS INDUSTRY ASSOCIATION

*BEFORE THE*

UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCIAL INSTITUTIONS

"CHALLENGES AND SOLUTIONS: ACCESS TO BANKING SERVICES FOR CANNABIS-RELATED  
BUSINESSES"

FEBRUARY 13, 2019

Robert Martin  
CWAL, Inc.  
[robert@cwanalytical.com](mailto:robert@cwanalytical.com)  
851 81st Ave Suite D  
Oakland, CA 94621

Please find a way for banks to accept our industry! Cash sales remain a constant and this process creates a great deal of security risk for our employees. Further, we have no credit building functions, loan capabilities, or investment opportunities being banned from traditional banking. We want to be legitimate and bank the same way! The current situation demands that we seek banking support using all sorts of nefarious routines and slight of hand with banks and isn't that the reason banking laws were established in the first place? A full service bank is something we all dream. Please hear our cry for help before someone gets killed!

==

Mara Meyers  
The BeLeaf Company  
[mitch@beleafco.com](mailto:mitch@beleafco.com)  
13378 Lakefront Drive  
MO, 63045

I have been participating in Illinois and Missouri for several years in the medical cannabis space. It has been extremely difficult expecting our customers to bring cash in for their medication. It also has been very expensive to have our cash transported to a bank by a security company several days a week. All of this adds unnecessary and additional costs to medicine that is already not covered by insurance. Medical cannabis is a great option to harsh Pharmaceutical drugs. Please help us make it safe by providing banking.

==

Phil Gibson  
AEssenseGrows  
[pgibson@aessensegrows.com](mailto:pgibson@aessensegrows.com)  
1281 Reamwood Ave.  
CA, 94089

We make the equivalent of picks and shovels for the indoor farming business. We do not touch the cannabis plant but many of our customers in the USA are in the cannabis business. As a result of this relationship, our banker at the time Silicon Valley Bank, cancelled our account.

This created many complications for our business and a scramble to find a new bank that was willing to do business with us. This is silly. We run a real business making capital equipment and we need to be able to work with banks on routine payment processing, pay our taxes, and pay our employees.

Please correct this situation.



Colum Tinley  
 Discovery Garden  
[cpt409@ymail.com](mailto:cpt409@ymail.com)  
 409 Lane de Chantal  
 WA, 98368

I have owned and operated a legal cannabis cultivation and processing business for about 5 years. We do not have a bank account since the only banks in Washington offering services to cannabis businesses are credit unions that are a 1-2 hour drive away. Also those credit unions charge outrageous fees that prohibit small businesses like mine from being able to afford a bank account. \$750 just to apply for an account, \$250/month service charge, plus a percentage of every dollar deposited is simply robbery that no other business would put up with. As a legal business we need access to bank accounts with the same fees that apply to any other legal business otherwise we will continue operate as a cash business. It seems to me that many people believe everyone in the cannabis industry is stinking filthy rich but sadly this is not the case. In Washington State businesses are closing at a staggering pace because they simply cannot generate profits. As far as I can tell the only one getting rich from WA cannabis is WA State. With our greedy 37% excise tax plus 10% sales tax that's almost 50% tax which unfortunately leaves no room for small businesses to generate profits. We badly need access to affordable banking.

==

David Faulk  
 The Green Vault  
[greenvault1@gmail.com](mailto:greenvault1@gmail.com)  
 365 NW State Ave  
 Chehalis, WA 98532

Three of our bank accounts have closed down. We end up dealing in cash, which is very scary when walking out of a delivery with large amounts of cash. We are easy targets. In addition, I can't get a business loan and have to resort to investors who want to take unreasonable large amounts of equity stakes in our businesses. We should have better banking laws and protections.

==

Phil Lord  
 Black Sands Ranch  
[plord519@hushmail.com](mailto:plord519@hushmail.com)  
 5985 Rd. H NW  
 Ephrata, WA 98823

In Washington state there are only about 5 or 6 options when it comes to "green" banking. We banked with Timberland Bank. At first they charged \$150 per month for a checking account. All deposits had to be through Pay-Quick. They charged \$600 per year and a handling fee of .5% of every deposit. This changed about 3 months ago when Timberland started to accept deposits. They then increased the monthly fee for a checking account to \$400 per month. We are a small mom and pop tier 1 grow with no employees. This

expense is a huge burden on our business. I would urge the House to change the laws regarding funds from legal marijuana business.

==

MARIO CERETTO  
New Era CPAs LLP  
[mario@neweracpas.com](mailto:mario@neweracpas.com)  
3033 Fifth Ave #230  
San Diego, CA 92103

Due to lack of banking available to my tax clients, I opened an escrow account at Wells Fargo to enable clients to deposit funds so that we can make tax payments on their behalf. Millions of dollars in taxes were paid to the IRS and state agencies to fulfill tax obligations of my clients ranging from income tax to payroll taxes. My account was flagged for suspicious activity and the Department of Homeland Security started an investigation. I was charged with structuring and spent 90 days in federal prison. The lack of banking outlets prevents taxes from being paid...as I tried to assist with tax compliance, a technical violation of the bank secrecy act was committed and became a life changing matter for me. Congress needs to address this NOW.

==

David Ward  
NCI LLC  
[davew@olypen.com](mailto:davew@olypen.com)  
P.O. Box 130  
Quilcene, WA 98376

Access to Banking Services for Cannabis-Related Businesses is a must in America, There are billions of dollars in cash that is not being allowed to be put in banks, and there forth the IRS is not receiving taxes. In states where the sale of cannabis is legal not being able to use a bank poses an unsafe situation for the owners of said businesses. I strongly urge you to pass forward the recommendation to legalize banking for cannabis businesses....

==

Jeffrey Oberfelder  
Oberfelder Holdings  
[ochelan@aol.com](mailto:ochelan@aol.com)  
120 Rolling Rock Road  
WA, 98816

My wife and I own a 15.78 acre farm in Chelan, WA. We have been farming for 20 years on our family farm. We have been growing apples, pears, cherries, etc. 6 years ago we got a cannabis license to grow and process cannabis from WA state 502 initiative. We have 5 sons and a daughter that all rely on our income from our new cannabis business. We grow marijuana for the WA state LEGAL retail market. We love our new business venture, and are now going into our 6th year supplying the state compliant retail stores. We need action IMMEDIATELY to resolve the ridiculous banking constraints. My family has been suffering for 6

years because of the banking issues. There is no difference between cannabis and hemp, hops, grapes or any other agriculture plant. This needs to change . Please , please support the cannabis farmers that follow the rules and supply the WA state legal market.

==

Jenny Carbon  
The Grass Is Always Greener  
[jenny@thegrassisalways.com](mailto:jenny@thegrassisalways.com)  
7505 West Lake Sammamish  
WA, 98052

Lack of banking aka "normal business" has limited me from even being able to open my business. I have assumed personal debt in order to keep the opportunity alive and cannot take out a personal loan due to debt and/or owning a cannabis business. It's the single limiting factor for success in our industry. We are normal retail and need to be treated as such.

==

Bethany McMartin  
[bethanymcmartin@gmail.com](mailto:bethanymcmartin@gmail.com)  
Olympus Horticulture LLC  
123 Elwha Rd  
Port Angeles, WA 98362

I am currently paying a fee of \$480 a month to have limited banking services with the only bank that is willing to bank for where my business is located. It's excessively higher than I pay for my other non-cannabis businesses. I would like better options for banking.

==

Shawn Wagenseller  
Washington Bud Company  
[shawn@wabudco.com](mailto:shawn@wabudco.com)  
28308 15th Ave NE, Ste B  
Arlington, WA 98223

Our company is a self-funded mom and pop with family & friends working together to create products that result in over \$1.1 million of taxes paid to Washington State. We are at capacity and need to expand to meet demand and our business model.

We are at a stand still until we get business capital at common business rates. Hard money lending or investment that demands ownership are our only avenues and that does not pencil out. Our highly competitive markets allow for only so many slices of the pie.

Currently, we pay \$350 per month to a private bank for the privilege of depositing our checks and utilizing the bill payer system. All our other business paid <\$20/mo for the same common services. This money could be utilized in better ways.

We are responsible, hard working, entrepreneurial Americans striving for middle class status. We would love to be able to meet our demand, increase our bottom line and be able to provide health care for our employees. But we must grow to do so and need capital. Please reform the US banking laws on cannabis companies that are legal and licensed within their states.

==

Kirsten Curry  
Leading Retirement Solutions  
[kirsten.curry@leadingretirement.com](mailto:kirsten.curry@leadingretirement.com)  
200 W. Mercer St., Suite 504  
WA, 98119

I administer 401(k) Plans (we are the compliance and government reporting folks). Cannabis companies can't sponsor 401(k) Plans because the banking institutions that custody employee contributions won't touch cannabis companies. This results in thousands of employees of cannabis companies being denied the opportunity to save for their own retirement. They should have the same opportunity to save to an employer 401(k) or other plan as any other employee does.

==

Ammon Ford  
Gleam Law, PLLC  
[ammon@gleamlaw.com](mailto:ammon@gleamlaw.com)  
613 19th Avenue E, STE 202  
WA, 98112

I am a business attorney, and many of my clients are state law-compliant Cannabis businesses. Simply because we work with these businesses, my law firm recently had our bank accounts closed, including our firm trust accounts holding Washington State Bar Association regulated client funds. Unlike some of our clients, we were able to find another bank quickly without disrupting our services. However, our experience as an ancillary business is a glaring example of how pervasive and widespread the lack of access to banking is for these entrepreneurs—many of them have it much worse than us and that is not fair. Congress must do its job and enact the pro-Cannabis will of the people. Giving me and my clients reliable access to modern banking is an obvious and tremendous first step.

==

Sheldon Norberg  
Trichometry  
[sheldonnorberg@gmail.com](mailto:sheldonnorberg@gmail.com)  
420 Fair Haven Road  
CA, 94501

I have worked in California's Medical Cannabis industry for over a decade, beginning with managing Harborside Health Center in 2006. By 2008 I was responsible for cash management which had me counting 50-100,000 dollars a day, but at least as we had a fortified location.

Leaving to enter the manufacturing space, which has had little if any legal protection, I am largely forced to operate in cash, and surrounded by businesses doing the same. Imagine the burden to maintaining a million dollar annual business in cash - all payments to vendors, payroll, etc counted and recounted, and delivered personally, putting myself, my staff, and my associates at constant risk. This is no way to run a business, or protect the interests of government entities as they try to partner in the legitimization of the industry. I hope you will do what is in your power to remove the impediments to our creating a robust and socially beneficial industry.

\*\*\*

Philip Davis  
Parahealth Inc  
[philip.j.davis@utah.edu](mailto:philip.j.davis@utah.edu)  
PO Box 581142  
UT, 84158

In November, we launched a non-toxic, food grade solution for mold and fungus. In our marketing we mentioned that this would be effective in cannabis cultivation, but also a huge adjunctive to mitigate these problems in general agriculture. After two weeks, US Bank closed all our accounts without any warning, and confiscated our assets. We are still trying to recover from this precipitous and fraudulent action by US Bank. Again, note that we are not in any way related to cannabis production or marketing, but simply mentioned in our advertising that the product would also help in cannabis production.

\*\*\*

Tina Morelli  
Morelli Enterprises  
[tinampda@gmail.com](mailto:tinampda@gmail.com)  
81 Oneil Road  
WA, 98055

I am the owner of Morelli Enterprise's producer processor for legal cannabis in the state of Washington. The problem with the banking system is broken. Not only was I denied by Salal Credit Union (after they had kept my 26K check for over 30 days-- they claim not to take tier 1's ), my bank account was closed down for 30 to 60 days. They withheld the funds making all of my bills late payments, overdraft fees and headache trying to correct it all. My Bank of America account was shut down without my knowledge. I received a letter in the mail after it already been done-- again with holding the funds longer than 30 days. I am trying to follow the law by the book. I listed it as agricultural because that's what it is! Chase bank as well shut me down (stating that they do not back businesses that are not federally legal). I am currently using pay quick . A bank that comes without a debit card or checks and can only be used for bills related to the business and payroll. As I am the owner, I cannot even pay myself ! This is a huge problem and has been from the start. All it is doing is hurting the companies that are following the law!

\*\*\*

Steven Cinelli  
Growth Group  
[steve@growthgrp.com](mailto:steve@growthgrp.com)

P.O. Box 2025  
CA, 94948

Legislation without thoughtful regulation lays the foundation for continued stasis. Note that many states have advanced the legalization of marijuana, but development and execution of respective state regulatory frameworks, such as in California, has been vacuous and ineffectual. While recreational legalization was approved in California during 2016, the following year was devoted to establishing a regulated marketplace, including implementing a tax regime. As seen, the anticipated transition out of the grey/black market into the "light" was completely overestimated, as were expected tax revenues. Certainly, good intentions, but the deployment was less than adequate, overly burdensome, and economically unfeasible. Reflecting further, California has enjoyed legal medicinal cannabis since 1996, itself a multi-billion-dollar market, and yet, nothing has been done to support this segment's needs for an economic infrastructure.

The issue of banking has surely been part of the ongoing narrative, and earlier "reliance" on core memoranda, has still failed to open the floodgates of financial service provision. While many view that this massive industry should be intoxicating for the banks, the cash-intensive nature, inconsistent monitoring requirements as an agricultural product, and the compliance rubric has stunted what is generally required for a growing economy, namely a financial system. There are other legal cash-intensive sectors, such as convenience and liquor stores, private ATM purveyors, even farmer's markets, which too have been limitedly received well by the banks, given the AML protocols. So, this is not just about moving darkness into the light, but really creating a model that addresses the needs and desires of many constituencies - cannabis industry participants, law enforcement, and regulators – and do so in an efficient, transparent and informed way, thereby affording the exigent support this economy requires. Passing legislation to allow the banks to do what they currently do, without fear of regulatory reprisal, won't necessarily become the panacea, given existing banking conventions. Like cannabis, banking is highly regulated, and the conflation of two heavily administered structures can be challenging, even further constricting.

But as the cannabis industry is developing, so too are financial services, with the flourishing of digital technologies, open banking and shifts in how customers are interacting with institutions, banks and others. There is a unique opportunity ahead to not only formulate a "fix" for the palpable pain due to the absence of cannabis banking, but to create a next-generation fin-services model to propel both these industries concurrently, negating many legacy and analog practices. Both industries are data-intensive, whether for compliance, safety or analytical reasons. Why not envisage a novel schema to support, even accelerate, the growth and value creation of the cannabis space, domestically and soon globally, with an informed "smart" financial platform? Beneficiaries are broad, and insights would be invaluable. This can be and should be a time to reassess old models and give rise to what could be.

As background, Growth Group has been organized to create a smart financial ecosystem for critical underbanked segments, particularly cannabis, so that such industries may evolve it to achieve their fullest potential. We would welcome an opportunity to discuss our vision and model. Thank you.

==

Patricia Dean  
Wadsworth Control Systems Inc  
[patricia.dean@wadsworthcontrols.com](mailto:patricia.dean@wadsworthcontrols.com)  
5541 Marshall Street  
CO, 80002

This year we had to frantically search for a new bank because ours dropped us. We are a third generation family-owned business. We build environmental controls and curtains for greenhouses. My 86 year old father is in the flora culture hall of fame for changing the industry. Some of our customers grow cannabis for either recreational or medical use. We never touch the plants we simply provide the controls or curtains. If we are being dropped from our bank I think that's a sign of how far off base this system has become. Because of the increase in business, largely due to cannabis, we have doubled the size of our staff, many of the jobs are for our engineering team. I thought you'd like to hear this story. If you'd like to discuss this please call me at 303.424.4461.

\*\*\*

Ryan McQueeney  
Midway Dispensary  
[rmcqueeney3434@gmail.com](mailto:rmcqueeney3434@gmail.com)  
5648 S. Archer Ave.  
IL, 60631

Midway Dispensary has been in operation since April 2016, serving medical cannabis patients in Chicago and the suburbs. We have operated as a cash only business without access to the financial system during the entire time we have been in operation. Aside from the unfairness of being a legal business while being shut out from the financial system, operating a cash-only business present obstacles not just to the business, but also our employees, vendors and patients. In order to pay taxes we must travel to the state offices to pay in cash. In order to pay vendors we have to obtain money orders. We pay employees in cash and our patients can only use cash. This presents issues that force us to expend funds on security no other businesses are required to expend.

Additionally, we have no access to financing like any other small business. We cannot access financing for things like increasing employee pay and benefits, improving our physical space, updating IT, research and development, investing in additional business opportunities, or contributing to the community.

Midway Dispensary is a retail store that provides a valuable service and product to patients who are trying to avoid opioids and other pharmaceuticals, who seek relief from everyday aches and pains, who want help sleeping without using addictive sleep aids, and who want to be able to purchase cannabis that is tested, labeled, and safe. Other than the product we sell having a stigma from 90 years of prohibition, we are no different than the retail establishments on the same block, except we cannot get access to the greatest financial system in the world. There is no reason to treat us this way.

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Mark Passerini  
[mark@omofmedicine.org](mailto:mark@omofmedicine.org)  
Om of Medicine  
111 S. Main Street  
MI, 48104

We have served over 18,000 medical cannabis patients since 2010 and are now licensed by the State of Michigan. Over the past 8 1/2 years we have gone through 9 different bank accounts – this policy needs to

change on the federal level! Being an all cash business puts us at an unnecessary risk and there's a public safety concern for the employees that have to make deposits. Simple things like employee benefits and payroll become extremely difficult to navigate. All we are asking is to be treated like any other industry, especially considering this substance is one of the least toxic substances known to man!! Please support banking access for the legal cannabis industry!!

==

Manndie Tingler  
Khemia  
[manndie@khemiamfg.com](mailto:manndie@khemiamfg.com)  
4370 24th Street Suite H  
CA, 95822

Our company is all female founded and run. When we are unable to utilize banks to store our money it puts us at significant risk for break in, theft, or being targeted by attackers. We regularly struggle with large quantities of cash management. It doesn't work well for us to carry suitcases of cash to our local tax office to pay taxes, or collect page sum cash payments from our customers. Our businesses are already forced into the less desirable parts of town because of the type of business we have. This leaves us as sitting ducks to be attacked or worse for what we have in our possession. Please allow us access to banking. Thank you.

==

Andre Robinson  
The Robinson Group  
[arob55@gmail.com](mailto:arob55@gmail.com)  
1725 Druid Hill Avenue  
21217, MD

My city has been devastated by marginalization and criminalization of its black and poor population. The emergence of this new industry offers an extraordinary opportunity to right the wrongs of the past. Now is the time to support its development by providing policies in banking, proper tax collection and sensible regulations. Do the right thing!

==

Kim Claxton  
KC Financial Services  
[kim@kcfinancialsvcs.com](mailto:kim@kcfinancialsvcs.com)  
3385 Airways Blvd # 115  
TN, 38116-3830

I provide full accounting services to the industry. One of my clients' biggest challenge is obtaining funding, as well as safe-keeping of their funds. They are concerned for their safety as well as that of their employees due to the large amounts of cash they have in hand due to the lack of banking services for cannabis businesses. I would really love to see this issue resolved across the nation.



Benjamin Fonseca  
Allied Access Foundation Inc.  
[bfonseca78@yahoo.com](mailto:bfonseca78@yahoo.com)  
6157 N. Sheridan Rd. Suite 20K  
IL, 60660

As cannabis legalization progresses. Many profits have been made off of the sick and elderly. We at Allied Access Foundation, owned and operated by patients and people with disabilities, was developed to ensure and securing entry into this very newly lucrative industry.

=====

Ryan Kendall  
Savage Venture Group  
[ryan@savageventure.com](mailto:ryan@savageventure.com)  
806 Bayview Drive  
Hermosa Beach, CA 90254

I am a consultant regarding compliance, operations, and CSR for permit writing within the cannabis industry due to the lack of banking options available to the industry there are several risks and costs that cannabis businesses have the burden of paying for that no other industry in the US has. A lack of banking available to legal businesses allows for black market activity to continue, endangers employees by having large amounts of cash on site, puts the business at risk of having its revenue stolen, and several other issues. Allowing legal businesses to bank in the US will be a major step towards reducing crime, increasing legitimacy, and making accounting and bookkeeping easier which in turn means more taxes collected by states and eventually the federal government. This also protects the consumer who usually has to enter shops with large sums of cash on them and puts them at risk of being robbed or worse. It is time for the federal government to support this movement and move into a new era which will benefit the nation, our economy, and the people.

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Joshua Eisenberg  
Universal Herbal Center, Inc d/b/a Pineapple Express  
[joshua@skyislandconsulting.com](mailto:joshua@skyislandconsulting.com)  
5200 E 60th St  
CA, 90270

Having been in the cannabis industry for over 7 years, I have seen first-hand the challenge that cannabis operators have had consistently over time. They WANT to pay their taxes but working in cash causes hours of extra time spent in accounting and the companies need to spend money on additional layers of security. This would be cumbersome to any business, let alone cannabis startups.

Now that California has reached a mature licensing and regulation structure, we are still fighting to get proper banking. I have encountered several businesses that are either maliciously or idiotically pitching their financial services to cannabis businesses that are clearly not legal. The industry needs clear places to

bank. The banks need clear authority, regulations and frameworks so that more can expand their services to cannabis businesses.

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Metrik Feurtado  
Big Petes Treats  
[metrik@bigpetestreats.com](mailto:metrik@bigpetestreats.com)  
1560 Mansfield St #A  
95062, CA

Hello. Our drivers deliver product and can collect as much as \$80,000 in a day. We do not have an armored delivery van so our drivers face significant risk from criminals who may find them an easy target. Banking would allow our drivers to deliver product and not touch cash. Safe banking is common sense.

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Donna Gardner  
Back porch  
[donna98801@yahoo.com](mailto:donna98801@yahoo.com)  
Wenatchee Ave  
WA, 98801

My son is employed here. They have been broken into once. I worry about the amount of cash they have in the store all the time and that he has to be paid in cash. Make it legal for them to use banks !

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Carol Roye  
Jamaican Imports  
[jighealing@gmail.com](mailto:jighealing@gmail.com)  
2305 Campbell Circle  
CA, 94534

To avoid breaking banking laws for hemp and MJ income should be allowed to help Patients, veterans and anyone else who would like help through Herbal medication.

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Erin Rulli  
Alice & Fran LLC  
[emrulli@aliceandfran.com](mailto:emrulli@aliceandfran.com)  
222 N Rose St #308  
CA, 91505

With the majority of US states having some sort of marijuana legalization it is imperative that the industry have access to legal, federally insured financial institutions. The significant personal and property safety issues related with all-cash transactions must be eliminated. Allowing cannabis businesses to participate in

the banking system will create stability and investment opportunities while reducing the risk of fraud and tax evasion. I intend to serve the cannabis industry as a finance professional; knowing my clients have banking options is one of my first priorities. There is tremendous opportunity for growth in the industry, from adult-use cannabis consumables and cbd for pets to cannabis derived, life-saving cancer drugs and non-opioid pain management options. That being able to open a bank account would delay/derail any of this, in 2019!, seems irresponsible and unproductive.

=====

Victoria W  
Materia Medica Laboratories, Inc.  
[info@materiamedicagroup.com](mailto:info@materiamedicagroup.com)  
3017 Halladay St  
CA, 92705

I moved from food safety testing into cannabis testing. I did not expect that we would have such a hard time simply opening a checking account in order to do basic things like paying vendors and receiving payments from customers. In food testing there is no way we could have told our customers that we strongly prefer cash over check or card, but that's what many cannabis labs have to do. Testing labs are highly academic businesses and have no trafficking risk whatsoever, yet we are still treated as if we are illegal operations. It cannot be overemphasized that healthy and clean cannabis requires testing labs to exist, but testing labs are very expensive to operate, and that's especially true in the start-up phase. Testing lab owners need the ability to finance loans and lease expensive lab equipment, but when no banks want to work with the cannabis industry, the start-up costs become enormous obstacles. In the state of California, there are already too few testing labs open to support how many products need to be tested. This will continue to be a problem and a challenge for many reasons, but financial transparency should not be one of them. As far as cannabis businesses are concerned, testing labs should be the safest risk for the financial institutions to work with. If the testing labs are having this much trouble, everyone else is going to have an incredibly difficult time.

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Michael Bird  
Valentine Ventures, LLC  
[michael@valentine401k.com](mailto:michael@valentine401k.com)  
550 SW Industrial Way, Suite 201  
OR, 97702

Our current lack of banking for cannabis companies is dangerous, inconvenient, and illogical for everyone. While it hurts the cannabis industry directly, it also has significant negative ripple effects in all of our communities. It costs companies money. It puts people in danger. It incubates fear. It keeps Americans from retirement savings. Please strongly consider making a historical change for the better by providing access to safe banking to the cannabis industry. Thank you.

=====

Ali Taghavi  
Elevate Shasta

[aztec farming@gmail.com](mailto:aztec farming@gmail.com)  
 401 Berry St  
 Mount Shasta  
 CA, 96067

Please help us with this huge safety concerns, we have done everything we can to insure a safe product and safe environment for our customers, however handling cash for our expenses, Taxes and collecting taxes from other producers through our distribution obligation has become a huge liability and safety concerns for us. Please help with a solution and allow us to operate just like any other business services. Thank you again.

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Leah Heise  
 4front Ventures  
[leah.heise@4frontventures.com](mailto:leah.heise@4frontventures.com)  
 234 RIDGEWAY RD  
 MD, 21228

Not only has the lack of banking resulted in multiple issues for our employees (having the sheriff called on them in Massachusetts when attempting to cash an out of state check from a cannabis company, having to pay some employees in cash, not able to have immediate access to payroll), but I have also had my personal bank account shut down just for being employed by a cannabis company. Additionally, as a business operating in the plant touching part of the industry, we are subject to very costly checking account fees (\$2,000 plus/month/account). We are unable to take credit cards and can only take debit cards through an outside system with additional higher costs. This is a business issue and a health and safety issue for our employees and customers. It just isn't tenable.

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Todd DeWitt  
 Leven  
[todd@levencbd.com](mailto:todd@levencbd.com)  
 68A Washington St  
 CT, 06854

We strongly believe in the benefits of a natural product. From counteracting an opioid epidemic to relief from epilepsy to reforming our criminal system, it is a must for common sense reform. Our federal banking legislation will lead to a regulated system for states to implement and properly grow taxable revenue. It will allow the US to raise capital at a pace much greater than Canada and will help industries from farming to security to technology. We implore you to work towards a set of rules each state can implement and fine tune if they choose.

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Robert Martin  
 CWAL, Inc  
[robert@cwanalytical.com](mailto:robert@cwanalytical.com)

851 81st Ave Suite D  
CA, 94621

Please find a way for banks to accept our industry! Cash sales remain a constant and this process creates a great deal of security risk for our employees. Further, we have no credit building functions, loan capabilities, or investment opportunities being banned from traditional banking. We want to be legitimate and bank the same way! The current situation demands that we seek banking support using all sorts of nefarious routines and slight of hand with banks and isn't that the reason banking laws were established in the first place? A full service bank is something we all dream. Please hear our cry for help before someone gets killed!

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Marvin Otsuji  
Aloha Aina  
[marvin.otsuji@gmail.com](mailto:marvin.otsuji@gmail.com)  
1954 Piner Rd.  
Santa Rosa. CA 95403

I can't believe that the process is so painful. Everyone in line wants more of paperwork, permit, rent, product, insurance. Well I'm ok with all of this but to pay all these fee and want to conduct banking and be forced into a cash only The allowance of credit cards would take a security element out of the entire industry. It's a changing culture why don't the banks change with it.

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CHRISTOPHER HURTADO  
nature contained, LLC  
[info.naturecontained@gmail.com](mailto:info.naturecontained@gmail.com)  
6306 Jefferson St  
7903, NJ

Let's make it safer for the people conducting legal business in this industry. No need to put them in harm's way and make it difficult for them.

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KATHLEEN KNUTSON  
Cannabis Industry Journal/Kathy Knutson Food Safety Consulting LLC  
[drkathyknutson@gmail.com](mailto:drkathyknutson@gmail.com)  
1421 Argonne Drive  
WI, 54304

Coming from the food industry, I am shocked that the cannabis industry is not supported in banking. I have heard stories of people delivering \$800,000 in cash to pay state taxes. Companies have to decide if they arm their employees. I saw first hand the service industries of vaults and armored vehicles being sold to cannabis companies. It is time to bring the business of cannabis to the banks and credit unions under federal jurisdiction.

George Lynch  
 Green Stem LLC  
[glynch@greenstemmi.com](mailto:glynch@greenstemmi.com)  
 23938 Fairview Ct.  
 Farmington, MI 48335

I am the owner of a Medical Cannabis Grow and Processing Company in Michigan. Our company has been pre-qualified by the State and we are just awaiting our full operating license once our facility is complete. Thus far, trying to navigate the murky waters of our national banking system has been ominous to say the least. I have been turned down/away from so many banking and credit union institutions in Michigan that I have lost count. All I am trying to do is establish a legal/legitimate business in my home State. However, with zero access to proper banking/financial institutions, it means that I am running a rogue operation. It also means that not only business but my family could be put in harm's way with large quantities of cash on our premises. Please make sure Washington remedies this terrible situation. Isn't about time that our government wakes up and realizes that cannabis has been unjustly demonized and unfairly regulated by old time corrupt politicians with a specific agenda of persecution. Cannabis is medicine, it is legitimate (in Michigan) please use your power to erase this stigma and wrongheaded thinking in DC by supporting the upcoming hearing (and hopefully a Bill) for Banking Access to the Legal Cannabis Community.

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Melinda Kadinger  
 Smokey's  
[admin@smokeys420.com](mailto:admin@smokeys420.com)  
 2515 7th Ave  
 CO, 80631

The banking issue is a major health and safety concern for employees of this industry as well as the local community.

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Stephen Madigan  
 Kidder Mathews  
[smadigan@kiddermathews.com](mailto:smadigan@kiddermathews.com)  
 1 Park Plaza Suite 500  
 CA, 92614

I am a commercial real estate broker with 20 years of experience in Southern California. Over the last 2 years I have represented both landlords, tenants, buyers and sellers in commercial real estate. The total value of transactions to all parties are estimated to be worth \$50M which a small piece of the larger Orange County/LA Market. The banking problem for all parties is far-reaching and is positioned to be either the largest hurdle or the strongest facilitator of growth for the cannabis industry. Here are a few of the problems these parties face when trying to lease or purchase real estate in the cannabis industry.

Tenants cannot provide banking history or credit history when trying to lease, therefore they are treated as a high credit risks and must provide hundreds of thousands of dollars in security deposit and prepaid rent. This money which could be used to the grow the business is tied-up by landlords because of the lack of banking.

Buyers of commercial real estate cannot secure "market" loans or even SBA loans which their pier industries enjoy. Instead of securing a 4.1% loan with a 10% down payment amortized over 20 years, they have to borrow at 9%-15% rates, interest only, due in 3 years. This is one step above predatory lending terms.

Tenants often have to pay rent with cash and therefore cannot find a landlord to accept cash. Landlord will sign a lease and later find out their tenant must pay rent with cash and after several months, the landlord's bank not accept the cash. Both parties are fearful, both parties do not have real banking solutions and the lack of banking has been the single biggest hurdle to growth, second only to the removal of cannabis as a Schedule 1 drug.

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David Hopkins  
Bad Kitty Clones  
[omykiss1953@gmail.com](mailto:omykiss1953@gmail.com)  
P.O.Box 3107  
CA, 93613

NOT securing safe banking for Cannabis Businesses does not promote public safety and provides circumstances for theft and assault. As a consultant and T.C. lab, I am at risk whenever at the facility or on location with clients.

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Maureen Nolan  
Akule Street LLC  
[akulestreet@gmail.com](mailto:akulestreet@gmail.com)  
2000 Roza St.  
WA, 98953

Operating in the legal cannabis business in Washington state is very difficult due to the many regulations the State requires us to operate within. Those of us in the legal cannabis business work hard to follow the rules and meet all of the requirements demanded of us. To that end, we invest our efforts to build legitimate businesses that contribute liveable wages to the communities we operate in and without legal banking, the cannabis business is susceptible to a black market that we would all like to see gone. Please allow banking access to legal cannabis businesses.

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Tara Nielsen  
Clandestine Gardens  
[tara@clandestinegardens.com](mailto:tara@clandestinegardens.com)

5410 Saxon Rd  
Acme, WA 98220

For our small farm to remain profitable and employ people the help of banking without having to jump through every loophole would be beneficial. The IRS wants to be paid, but from a bank account that either costs us tens of thousands of dollars a year to have or penalties because they don't want cash, and so on. Let's get right on this issue so we also aren't being taken by other banking systems who do let us bank there. We pay enough in taxes, just give us a bank to use to do so.

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Sam Tracy  
4Front Ventures  
[sam.tracy@4frontventures.com](mailto:sam.tracy@4frontventures.com)  
5060 N 40th St Suite 120  
Phoenix, AZ 85018

Thank you for the opportunity to comment on the SAFE Banking Act, which would allow state-regulated cannabis businesses to access financial services like countless other businesses in the country. As an experienced consultancy and multi-state operator of cannabis businesses, we at 4Front believe this bill would be a major benefit to state governments, cannabis businesses, and most importantly, the medical marijuana patients we serve.

As of this writing, 32 states have passed laws allowing for the production, sale, and consumption of marijuana for medical purposes. Nine of those states also allow for the sale of cannabis to all adults over 21 years of age. While the federal government has allowed these states to regulate cannabis within their borders, federal prohibition has led to a great deal of confusion and inconsistency, which has slowed down or even halted some of these programs.

For example, while West Virginia adopted a medical cannabis law in 2017, the state has still not licensed any businesses to produce or sell cannabis because of the lack of banking services available for such businesses. West Virginia Treasurer John D. Perdue is working with the state legislature to create a workable system so that the state's program can become operational, but these significant delays have caused incalculable harm to patients who are unable to obtain the medicine they need. This has also prevented a great deal of investment, job creation, and other forms of economic growth that would benefit the entire state.

Even when states can get their systems up and running, patients are still harmed by the federal prohibition on banking services. While most dispensaries can obtain local banking services that allow them to accept debit card transactions, all major credit card processors operate nationally and have therefore refused to work with the cannabis industry. This prevents medical marijuana patients from using credit cards to purchase their medicine, despite being able to use credit cards to purchase any prescription medication at any pharmacy.

This lack of banking access has harmed businesses ability to raise much needed capital to build out their cannabis cultivation, production, and retail businesses. In any other industry, the owner of a business granted a license with limited competition, as is the case in most legal cannabis states, would be able to access bank loans and other institutional lending to fund their start-up costs. With that not available in the



cannabis industry, license owners are forced to take investment from individuals that is usually highly dilutive and potentially leads to loss of operating control, or if they can find lending, it comes at usurious interest rates. This disproportionately impacts smaller mom-and-pop operators, who typically do not have access to high-net-worth individuals capable of cutting checks for hundreds of thousands or millions of dollars, which is what it often costs to get a cannabis business off the ground.

Finally, this lack of federal clarity hurts cannabis businesses and their employees. In most states with active medical marijuana programs, there are very few banks that are willing to work with the industry, making it difficult to start a new business. Because there is such little competition, banks often charge exorbitant fees for basic services, sometimes charging thousands of dollars per month just for a simple checking account. Similar businesses, such as pharmacies (for medical marijuana programs) or liquor stores (for adult-use programs), do not face such steep costs for the same services. This makes it very difficult to successfully operate a state-regulated cannabis business.

Even employees of cannabis companies are often impacted by the lack of guidance from the federal government on banking. Just last year, shortly after then-Attorney General Jeff Sessions rescinded the Cole Memo, one of our employees was rejected for a mortgage specifically because he worked for a cannabis-related company. While the bank eventually allowed him to be listed on the title of his home, they would not consider his income towards qualifying for the mortgage out of an abundance of caution. If he was supporting his family alone rather than with a spouse who also worked full-time, he would not have been able to become a first-time home-buyer, which the federal government otherwise encourages.

The SAFE Banking Act would fix these problems by providing absolute clarity from the federal government on banking cannabis businesses. States will be able to proceed with implementing their programs, medical marijuana patients will have more flexibility in paying for their medicine, cannabis companies will have fewer hurdles for operating in a safe and compliant manner, and their employees will not face any undue burdens for buying a home or obtaining other financial services. We urge you to pass the SAFE Banking Act as soon as possible. Thank you.

About 4Front:

4Front Ventures is a retail and brand development company in the U.S. cannabis industry. It has developed a national platform that consists of a multi-state footprint, including its network of Mission-branded retail operations and associated production facilities, and a far-reaching network of relationships developed during its long history in the industry, beginning with its founding in 2011 as one of the first professional consulting firms in the sector.

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Lloyd Stiassny  
Eden Management Group, LLC  
[lloyd@edenalaska.com](mailto:lloyd@edenalaska.com)  
6511 Arctic Spur Road  
AK, 99518

Honorable Chairman and Members of the U.S. House Committee on Financial Services. My name is Lloyd H Stiassny and I am the owner and operator of a legal Cannabis business in the State of Alaska for the past 18 months. I own and operate two (2) State licensed retail stores and a licensed cultivation facility to

support them. We currently employ over twenty (20) full time employees in living wage jobs. Our customers are broad based and mainstream Alaskans who thank us every day for the ability to purchase cannabis in a legal and well regulated environment. The cannabis industry is in the early stages of growth at a State level as well as Nationally. The economic value is measurable today and projected growth in the coming years is significant. Global sales are expected to exceed 16.9 billion in 2019, a 38% increase. The industry is creating and supporting job growth in numerous industries including, agricultural, manufacturing, and retail. The private sector investment is and will continue to be a long term investment in our economy and infrastructure. Tax revenue will continue to grow as additional legal markets open throughout the Country.

Current Federal regulation(s) limit and constrain the industries growth. Banking, access to capital markets, elimination of 280e provisions of the tax code, will allow the industry to continue to achieve economic growth with vital reinvestment in jobs, communities, public safety and education. Access to banking is fundamental for any business and cannabis is no exception. By allowing business owners access to banking and tax reform the industry will have an opportunity to operate more efficiently, support long term employment and continued community investment.

The Cannabis industry is committed to being a contributing member of a vibrant national economy. We thank you for your consideration toward implementing important industry changes that will help all of us achieve this goal.

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Sabrina Fendrick  
Berkeley Patients Group  
[sabrina@mybpg.com](mailto:sabrina@mybpg.com)  
1440 4th St, ste D  
CA, 94710

Berkeley Patients Group is a Berkeley-based, California state-licensed, locally authorized dispensary as well as the oldest, continuously operating cannabis dispensary in the country. We pride ourselves on having set the standard for responsible, compliant cannabis operations around the country.

Since our founding in 1999, we have prioritized maintaining a safe operation following standard business practices, especially when it comes to cash handling. Federal laws have created an inconsistent, unstable, and at times dangerous situation. Regardless of our state compliance, we have been removed from well over 30 banking institutions.

We seek and request to be treated like any other business with the rights and privileges that come with being recognized as a legitimate industry. It is the federal prohibition and financial roadblocks against cannabis that have kept us from achieving this goal. We encourage the committee to consider relief that will rid us and all legitimate cannabis businesses of these handcuffs so that we can ensure the industry has access to safe, sustainable banking solutions.

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Dottie Lulick  
MJIC

[dlulick@gmail.com](mailto:dlulick@gmail.com)  
5800 S. Eastern Avenue #300  
CA, 90292-5953

Opening up the legal banking industry will strengthen public safety. Most violent burglaries, embezzlements, and even kidnappings are happening due to large amounts of cash exchanged. Also, these legal businesses are paying taxes yet have no access to loans or credit card payments. Please pass this bill to help our industry come out of the darkness and establish legitimate, legal cannabis companies.

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Jessica Billingsley  
[jessica@mjfreeway.com](mailto:jessica@mjfreeway.com)  
MJ Freeway  
1601 Arapahoe St Suite 900  
CO, 80202

The SAFE Banking Act of 2019 would provide businesses ancillary to the cannabis industry, like MJ Freeway, a safe financial space to operate in. We are a company that ensures cannabis regulatory compliance and this would be the first time we would be afforded banking protections. As the memo clearly points out, legal cannabis operations exist in most states. This is the norm, and our industry should be operating within the proper financial infrastructure just as any other regulated industry. I applaud the committee, Chairwoman Waters and Colorado's own Rep. Perlmutter for their leadership for sound and anti-discriminatory business practices.

The current banking issues faced by the Cannabis Industry in the U.S. are forcing major restrictions on one of the fastest growing industries in the country. MJ Freeway's clients cultivate, manufacture and dispense cannabis products and are forced to operate mostly with cash which has huge security concerns along with major inefficiencies in completing all transactions relating to their businesses. In what other legal industry are you forced to pay your taxes, rent, payroll, utilities in cash?

From an international perspective, the US is the only country in the world that is regulating legal cannabis and does not provide a framework for traditional business banking. For our country to become a world leader in this industry, it is imperative that we provide our local businesses the opportunities to compete on an international stage.

The Safe Banking Act of 2019 would not only allow existing legal cannabis businesses to operate as any other business from any other industry in the U.S., but it will provide the opportunity for American businesses to expand and become world class leaders in this industry.

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Dan Hentschke  
[dan@cltcbd.com](mailto:dan@cltcbd.com)  
Charlotte CBD  
2419 Central Ave  
NC, 28205

The current situation with banking and cannabis, or should I say the lack of banks doing business with cannabis related businesses is a huge problem. Like any other industry, at the end of the day we are simply selling a product. My company and I have already been through three different banks, we have had 4 different credit card processors. 2 of the 4 processors shut us down with absolutely no warning, even though we were told when we signed up for services that this would not be an issue. We were transparent with everyone of these companies, and later found out some of the representatives from these banks had not been so honest. They covered up what we do, they didn't want the underwriters to be aware of the type of business we were running. It behooves me to think that albeit we run a legitimate business, right on a main road in Charlotte, pay LOADS of taxes into our city, but banks didn't want to or weren't allowed to handle our money. Alcohol companies have no problem with taking payments or being accepted by banks, because it's "legal". What we are doing is also legal, yet I have had to run around with 10s of thousands of dollars on my person to get money moved from one bank to the next. Like I'm some sort of criminal who is required to put myself into a dangerous position. People in this business from cultivation to retail sale should not have to incur these types of risk. It's ignorant, and quite frankly just not ok. Hopefully this testimony is in with a large stack of the same pleas for help and regulation in fixing this situation. I ask that if anyone's eyes cross this short read to make changes. Ask yourself: "Why Not?" And let's make moves for a better future in banking and the cannabis industry.

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Lynn Wubbels  
[lynn@askmycpa.com](mailto:lynn@askmycpa.com)  
 Wubbels & Duffy, Certified Public Accountants, RLLP  
 999 West Taylor Street, Ste C  
 CA, 95126

We are a CPA firm service provider to various cannabis business in Northern California. I can advise you from years of practical experience that the legal Cannabis sector is severely challenged by the lack of banking capability. It is difficult to operate a business in today's economy without a bank account as many transactions such payroll; income, sales, and cannabis excise taxes; certain vendors, utilities, licensing, and a host of other transactions require a bank ACH paper check or electronic funds transmission. Bringing a briefcase full of paper currency to pay a tax, fee, or vendor is not a practice to be furthered by discriminatory banking rules. Even with those briefcase currency payment practices, cannabis businesses typically must play musical banks when a bank compliance officer makes the decision to close an account.

I can cite a personal example of banking's aversion to currency deposits. As an accommodation to the cannabis sector and it's banking challenges, our CPA firm accepts fee payments in currency. As a result of our currency deposits, we had our bank account closed because in one 12 month period we deposited less than 5% of fees received in the form of currency and had to find another bank. It is ironic that we routinely arrange for clients to make appointments with IRS to pay taxes with currency. So on the one hand, federal agencies will accept and deposit currency with impunity, while non-cannabis touching businesses do so at the risk of losing their banking capacity.

A great deal of challenge and chaos ensues around this lack of banking. Frankly, I fail to understand the reasoning for continuing to force this disability on the nascent legal cannabis sector now operating in some 33 states. That 2/3 majority statistic alone argues for recognition of what is arguably an organically growing national public policy. It is therefore incumbent to reset many of the archaic challenges to this sector that the federal government continues to pursue.

As a practical matter, having to retain large currency balances as a medium of exchange results in diminished accountability and internal control which invites risk for armed robbery, theft, conversion, and skimming. It is in the national interest to legalize and regularize this industry and bring it out of the shadows. To provide banking for state sanctioned legal cannabis touching enterprises is smart government and a step in the right direction toward a total legal cannabis federal franchise. Alcohol Prohibition, while well-intended, did not work as we learned from the criminal repercussions and societal damage from the Volstead Act.

While the world may be better off without alcohol is very possible that it will be a better world with fully legal cannabis. That is to say that the many benefits of cannabis may outweigh its detrimental effects. This cannot be said for other drugs, alcohol, and tobacco.

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Laurie Danzuka  
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A tribally owned business in Oregon needs fair banking access to provide revenue and jobs to the tribal membership. The Confederated Tribes of Warm Springs announced that they would be developing a cannabis project and subsequently current bank accounts (US Bank) were closed for the tribal government and its affiliated enterprises. At the mere mention of entering the market and not yet operational. Now the tribal enterprise has decided to produce hemp since the Farm Bill passed and the enterprise is still being denied banking services from "cannabis friendly" credit unions and our local bank. This is due to the fact that the federal regulations are unclear on banking with cannabis companies. Since the tribe's are a sovereign nation and not subject to state law we have developed an agreement with the state and incorporated a tribal regulatory commission (Warm Springs Cannabis Commission) with legal codes and requirements as strict or more strict than the state. The state does not license our project through OLCC or ODA and now we are being denied banking because we are not licensed through the state. The Warm Springs Cannabis Commission would issue all licenses and permits for the cannabis operations. If tribe's were included in negotiations and language surround the cannabis industry we could address this policy gap. So now we are at a further disadvantage because our production facility will be located on tribally owned property. In our due diligence we negotiated an intergovernmental agreement with the state and negotiated a state tax rebate. The State of Oregon U.S. Attorney Billy Williams (the federal authority) has also been in communication with our legal counsel and does not have any concerns with our regulatory oversight. Even with all the work for the past three years to get our cannabis project started our access to banking has not improved. The other banks that I have contacted that specialize in cannabis banking demand two years in business and credit checks on any person in management and high maintenance fees for each separate service (checking, deposits, wire transfers, money orders). It is imperative that the enterprise go operational to capitalize on the hemp market and provide jobs for the tribal membership. If we have to be a cash only enterprise that will cause other issues such as security and theft. Offer fair and safe banking to the cannabis industry because it is causing undue burden to get our project started. As a tribal entity we already have to negotiate with the state and now have further hurdles in dealing with banking due to us being located on a tribal reservation. This limits fair access to us as a minority owned business based on our status as a sovereign nation with the Oregon borders. Oregon legislators are attempting to close the policy gap, but this banking issue needs to be addressed/corrected immediately.

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 Humboldt Canna Co  
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I'm begging you to change the laws surrounding cannabis banking. We have a small farm in northern Humboldt County, California. We bought the farm and grow legal, medical grade cannabis so that we can make medicine for people who need it most. We have lost so many family members to cancer over the years and having discovered that cannabis can fight cancer, as well as it's horrible side effects, we bought this farm to grow and make that medicine. We've successfully treated family members and friends with a full spectrum whole plant extract called "RSO", made from our cannabis plants. This oil has literally saved lives, and put 3 family members/friend's cancer into REMISSION, with no other treatment, only the RSO we made. We want to provide this medicine to more than just our family and friends, we want to get this RSO out to the entire country- hopefully the entire world. We can't do that successfully until many issues/laws are cleared up or changed. One of the biggest problems we face is our banking. We have had our bank account shut down 5 times now, because we are in the cannabis industry. We are 100% legal and compliant with the county of Humboldt, and the State of California- which was no easy feat due to the excessively stringent laws, fees and processes required to do so. We have made it this far though, and need to continue to make it, so that we can help so many of the people out there fighting cancer and other diseases. We can't do it successfully or easily unless the banking laws are changed. Cannabis is just a plant, but it's a very powerful, magical one. It is quite literally harmless, just the opposite in fact. It has helped so many people, and we need to continue to help get this plant out there. The banking laws surrounding cannabis need to be fixed, it's just a plant. Alcohol isn't regulated to the extent of cannabis, and alcohol kills people on a daily basis. Cannabis has never killed a single person ever. We beg you to make it easier to pay for cannabis and cannabis products, please help us to get our medicine out there to people who desperately need it. Thank you for taking the time to read this!

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 Greenbridge Corporate Counsel  
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My name is Khurshid Khoja, and I serve as the Vice Chair of the NCIA Board, and have previously served on California State Treasurer John Chiang's Cannabis Banking Working Group. While I operate a law firm, my bank account has been shut down previously for refusing to disclose my client's information without their consent. A full account of this incident was first published by [Law.com](http://Law.com), and reprinted elsewhere as well. See "Cannabis-Industry Lawyer Raises Questions After His Bank Terminates Account" at <https://finance.yahoo.com/news/cannabis-industry-lawyer-raises-questions-110520186.html> which I've also pasted below. Thank you for considering my written testimony.

Cannabis-Industry Lawyer Raises Questions After His Bank Terminates Account

ALM Media December 28, 2017

Khurshid Khoja says he tries to play by the rules. The Greenbridge Corporate Counsel founder advises state-legal marijuana-related businesses. He knows the sector they all work in is legally murky. While California will roll out a licensed recreational market just days from now, the federal government still considers marijuana an illegal drug. Khoja said he operates by certain business principles. His clients do not pay in cash. Deposits into the law firm's state bar-required trust account are identified by their source and visible to the bank. Every client must comply with Obama-era federal guidance designed to minimize any federal scrutiny. Khoja said he was surprised when his bank, Umpqua Bank, this fall started demanding information about clients. Were they in direct contact with marijuana plants? What were their names? How much business did Greenbridge do with them?

After Khoja asked for more time to get his clients' consent to release that information—he said the bank gave him two business days to do so—Umpqua said it was closing his firm's accounts in 30 days. "Our first duty as attorneys is to our clients and the ethical rules that apply to us," he told The Recorder in an interview. "We are licensed by the state and it's our duty to protect confidentiality and to keep our clients safe." He added: "We can't have banks interfering with that." As California's green rush is set to begin next year, Khoja's experience offers some perspective for lawyers who are in the industry—and those who want to take part. Marijuana dispensaries and growers have historically struggled to find banks willing to open and maintain accounts for them. That struggle can extend to companies providing services to those businesses, including attorneys. Calls and emails by The Recorder to Umpqua Bank's media office were not returned. Despite projections of a \$7 billion state marijuana industry, major banks and credit unions are still wary of attracting the scrutiny of federal regulators if they accept deposits tied to cannabis-related businesses—even those that never touch a plant. That puts lawyers in a quandary. Abide by professional requirements with escrow accounts and banks may start asking questions about clients and their money. Maintain ethical duties to protect client information and banks may dump your account. Large firms that have big-dollar, long-term relationships with banks may not have a problem if their "regulated industries" practices constitute a tiny fraction of their work. Smaller shops that openly cater to marijuana clients are taking a much bigger risk, according to lawyers who have clients in the cannabis industry. "Marijuana attorneys finding themselves excommunicated from their banks are incapable of paying staff, taxes and utilities," said Steven Schain, chair of Hoban Law Group's financial service and banking practice. And if their banks drop them, they could be stuck with only a cashier's check representing their clients' escrow account deposits—with no other bank willing to accept them—in violation of their fiduciary duty, he said. The U.S. Department of the Treasury's Financial Crimes Enforcement Network in 2014 advised financial institutions they can serve marijuana-related businesses and still comply with federal Bank Secrecy Act obligations if they follow certain compliance guidelines. As of June 30, 390 banks and credit unions across the country reported providing services to marijuana-related businesses, according to federal records. The number has risen steadily since 2014 but still represents just a small fraction of the total number of financial institutions in the U.S. Many of those banks act only as a depository for marijuana clients, charging thousands of dollars in fees each month while offering only a few additional services, such as lending, that are provided to other businesses.

California explores banking options.

California regulators have explored options to bank the industry, from creating a public institution to setting up a network of depositories that are willing to accept marijuana funds. The ideas have yet to catch fire with major banking institutions.. "We hear all these proposed solutions being offered up" by state

officials, said Beth Mills, spokeswoman for the California Bankers Association. "Really, the solution is at the federal level."

The State Bar of California offers little specific guidance to attorneys in the cannabis field. Regional bar associations in Los Angeles County and San Francisco in 2015 issued opinions that attorneys may ethically represent state-legal medical marijuana enterprises within certain parameters. A paragraph in the proposed rules of professional conduct, now awaiting state Supreme Court approval, offers similar ethical guidelines for attorneys. But the bar has offered no advice for lawyers trying to hang on to professionally mandated bank accounts. Chief Justice Tani Cantil-Sakauye recently told reporters that a Judicial Council committee will likely handle any complaints about marijuana-related litigation, licensure and business issues. The council could then consider policy changes or possibly supporting legislation "to help clear up this area." "It's going to be a quagmire where we are and to what extent the federal [government] seeks to enforce its laws in California," Cantil-Sakauye said.

"Your business isn't welcome."

How often banks boot lawyers like Khoja who provide legal services to marijuana clients is difficult to say. The names of banks willing to do the federally mandated work to vet cannabis customers—or simply not ask probing questions—circulate quietly among those in the industry. "It's definitely frequent that they kick marijuana businesses out," said Brian Vicente, a partner in Vicente Sederberg in Colorado and a veteran of marijuana legalization efforts in that state. "And it's definitely not uncommon for them to kick out lawyers who work with marijuana businesses." Vicente said he's been dumped by three banks since he started practicing exclusively in the cannabis sector. "It's honestly humiliating," he said. "You're told your business isn't welcome there." Khoja first suspected trouble when employees at his Umpqua Bank branch in San Francisco started asking this fall about his volunteer service on the state treasurer's Cannabis Banking Working Group. For a year, the group, which included cannabis industry representatives, government officials and bankers, studied the problem of marijuana businesses' lack of access to banking. The group issued a report in November seeking more research into several issues. Not long after the questions started, Khoja said he got a questionnaire from Umpqua Bank's Sacramento office. Executives wanted to know detailed information about his marijuana clients, including their names, addresses and activities. In a letter to Umpqua, a copy of which was provided to The Recorder, Khoja said he could not reveal some of the information sought by the bank without client consent—something he said he may never be able to obtain from them and certainly something he could not obtain in two days. Khoja instead asked bank officials to identify any specific deposits that troubled them so he could try to get information from those clients. He noted the rules he requires his clients to comply with, his work with the National Cannabis Industry Association and his efforts to change federal laws that scare banks away from the state-legal marijuana industry. "I hope you agree that Greenbridge is the type of client that Umpqua should welcome and support, rather than subjecting to unreasonable scrutiny and disclosure demands," he wrote. Days later Khoja received another letter from his bank. "Umpqua Bank has determined that maintaining your deposit account relationship is no longer mutually beneficial and has decided to exercise our right to terminate your banking relationship," according to the letter, also provided to The Recorder. The letter offered no explanation. Umpqua gave Khoja 30 days to find a new bank before it closed his two accounts. Khoja said he managed to find another financial institution, which he declined to identify, to take his business before the one-month deadline arrived. He said he does not see a solution—no lasting one anyway—to his and other professionals' banking challenges until Congress acts to ease banks' fears. "The salient point here is attorneys need to be able to do their jobs and still protect attorney-client privilege," he said.



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I currently advise manufacturers in the California cannabis industry. I have 12 years of experience in banking and know for a fact that the current banking system allows businesses that have a far greater negative impact on society to safely bank, for example, the pornography industry or the weapons industry. I also believe that if Congress is concerned about how the cannabis industry will impact society isn't it more beneficial to have more data points to monitor that impact, as in oversight of the flow of funds in the industry. The amount of cash that is currently outside of the banking system will become a breeding ground for crime and violence. Please allow business owners in this industry the chance to create and manage businesses with the resources given to other industries.

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Banking is a fundamental and necessary facet of any industry and any business. 32 States have now legalized some form of Cannabis, yet it remains illegal for Federally Regulated banks to have ANY involvement, and State regulated banks are extremely reluctant. As with any other new and developing business, that needs to hold cash from business generated revenue, pay employees, pay taxes, pay service providers, it is ESSENTIAL to have the support of a bank for safety, security and success. To exclude Cannabis based businesses, who are attempting to form and grow economically, is unjust and entirely unfair, and puts them in a very disadvantaged position. As the owner of a medical cannabis based business, seeking licensure, it is essential to our progress to be able to accept money from investors, pay our service providers, pay our taxes, our governmental operating fees and our employees, without discrimination that is derived by current regulation. Banking must open up to Cannabis based businesses - who are putting thousands of citizens to work - and developing a highly sustainable economy, that has a tremendous growth potential on the horizon.

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State Licensed farmer of a crop that the banking industry automatically denies access to an account that could, would, and SHOULD be utilized to make payroll withholding deposits, (quarterly deposits for federal

and state business purposes) corporate taxes both federal and state, employee garnishments, etc. Without this passing, we are crippled without proof of payment, or hindered by having to obtain \$200.00 maximum each money orders (which have been stolen by individuals receiving them). We are a legal business entity being crippled by banks denying us access because of the burden of federal regulation. I have found one bank that would accommodate my business but the monthly cost of \$750.00 a month to have it would cripple my business. I employ up to 14 people at my height of season.

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We are a African American woman owned cannabis manufacturing company offering a topical for pain relief to seniors, musicians, bodywork professionals and athletes. One of our owner's background in accounting knows that access to banking opens up opportunities for us to be full compliant businesses that can build financial histories. When we can track our credit worthiness we can access capital that will not only move our business we can make positive impacts to our communities. Please take the information available to the real financial impact this industry will make when we are able to fully engage in good business practices through banking.

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 The Green Solution  
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I joined the legal Cannabis industry in 2017 after 20 years as a commercial production greenhouse grower. I'm married with 2 kids, a senior in high school and a college sophomore. For the first couple of months, we enjoyed payroll direct deposit and everything seemed fine. All of this changed when our bank 'discovered' that we were a Cannabis company. For a year I was paid in cash; walking through downtown Denver with \$thousands until I could get to my bank. This is not safe. In addition, I can't get a home loan, so I'll be renting until things change. The banking situation is inhibiting the validity of the industry and restricting access to basic economic functionality.

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I work for several different cannabis companies consisting of cultivators, manufacturers, distributors, etc. I assist them with various aspects with their businesses - i.e. licensing, books and keeping bills paid. Without

the ability to keep the business's money in banks, that leaves me personally transporting exorbitant amounts of cash at times. In my opinion, this leaves me personally at risk for attack. While I don't advertise or publicly discuss the fact that I carry large amounts of cash on me, anyone who knows that I work in the industry is aware of the fact that there is a probability that I likely have cash on me at all times.

I have two children, a 2 year old son and a soon-to-be-1 year old daughter. I fear for their safety. It is widely known that there is no banking for the cannabis business and that it is still a cash-based business. Anyone who works in the industry is at risk for an attack/robbery, etc. Therefore, I fear not only for my safety but even more so for the safety of my children.

In summary, it is putting everyone in the industry at risk by not allowing a secure and insured way to store their business money.

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Alan Heroux  
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 Hydrofarmer, LLC  
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Marijuana businesses are currently unable to have "normal" banking services because of federal regulations. We handle cash on a regular basis which is unsafe for both sides of the transaction. Paying bills in a digital world when using cash is to say the least difficult and time consuming. From a regulatory point of view it would be far easier to track bad actors in the industry if there were a digital trail of money to follow. There are many reasons why we should have normalized banking services with the only negative being how the industry is viewed at a federal level. Simply allowing federal chartered financial institutions to treat those in the marijuana industry as regular customers would be beneficial for everyone that has the potential to benefit from the products sale.

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Paying taxes, paying employees, paying vendors, receiving payments, securing investments, and all other standard business practices, which has become much easier for all industries other than cannabis, are still extremely difficult and sometimes dangerous.

Many cannabis employees are either lying or avoiding paying taxes because of their cash payments. They also are forced to make extra trips to their banks to deposit large sums of cash - which similar to people in all other normal industries, they don't have time for.

THC has been proven time and time again to be safer than alcohol and many other legal substances.

It's time we fix one of the largest mistakes/issues in the history of government regulation. We certainly don't need a wall on the border, although further security technology would be nice, although re-scheduling THC and regulating as a psychoactive substance (less dangerous than alcohol) would eliminate much of the cartels' financing and ability to illegally import cannabis.

It just makes sense. And please don't make the mistake of over-taxing such as California did.

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Patricia Woods  
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I am not an owner of a Cannabis Related Business. I am an employee. I have worked for this company for over 3 years and a different company in the same industry for a year before that. The current situation puts an element of danger where there shouldn't be one. As a mother and grandmother, I don't like having to be afraid of someone knowing (or simply assuming) that I am in possession of cash. This industry has grown so much in the last 4 years. It is really time that we embrace it and remove the danger surrounding a very normal business environment. I encourage you to search our company on the internet. You'll see that we are a very professional business employing regular, hardworking people. We would appreciate being able to conduct business in a safe manner.

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Marissa Rodriguez  
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 TSL Distribution  
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Greetings from Oregon!  
 The lack of access to banking negatively affects nearly 2000 small business owners in Oregon. Handling cash is dangerous and time consuming. We spend 6 labor hours a day counting cash and have many costly security measures in order to feel safe.  
 Please provide safe banking for legal cannabis businesses.

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Jeanie O'Laughlin  
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 CA, 93505

I am a CPA and PhD. I consult with a dispensary. Not having access to the banking industry puts all of us at risk; I have to pay vendors with cash; employees are paying bills and then getting reimbursed with cash; my consulting fee is paid in cash. This is now becoming even more of an issue as my personal bank is now questioning all the cash deposits I make. Cannabis is legal in California and for businesses that have all the

property local and state licensing permits, we should have access to the banking industry. We even struggle getting our payroll taxes, sales tax, and local taxes paid. I recently had to carry almost \$50,000 in cash to downtown Los Angeles to pay the local tax. We are a legal business and should have access to the banking industry and the safeguards it provides. Thank you.

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Simon Menkes CPA  
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 Menkes Accounting & Mediation  
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I have several clients in the cannabis industry. These are good people who are doing their best to run a regulation-compliant and tax-compliant business. Without access to the banking system, they have to handle large amounts of cash. As their CPA, I WORRY ABOUT THEIR PHYSICAL SAFETY EVERY DAY! They are at constant risk of armed robbery and must take home cash every night to leave their business less vulnerable to theft. When they go to pay their taxes, they take large amounts of cash with them. Criminals would find them easy targets, and their lives would be a cheap cost to these people to steal their funds! Please do the right thing and allow accessible banking for the legal cannabis industry. This is not a matter of economics. IT'S A MATTER OF DECENCY AND PROTECTION OF HUMAN LIFE AND SAFETY! Thank you, Simon Menkes CPA

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 Norml national care givers  
 161 North 7th Street, Apt. A, A  
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Hello my fellow Americans I'm glad that we could connect and forge the future of Cannabis in America this action is critical to the safety of employees and also patients in America and across the globe. So Congress let's make history this is legendary status may God bless the future of humanity.  
 Sincerely yours truly believe that Mr. Christopher Daniel Jennings.

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Banking for the cannabis community needs to be made safer and easier to access. We are a legitimate business with legitimate business banking needs that should be recognized.

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Heather Hughes  
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 Hillside Growers  
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My husband and I grow grapefruit. I work in healthcare and can see the benefit of cannabis to patients. Those who grow cannabis need a safe environment with access to banking and credit - to avoid the cash-based-business that encourages theft. Please help those growers to get access to legitimate banking businesses in which to continue their industry.

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Matt Mooney  
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 Matt Mooney Real Estate Group.  
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I don't own a cannabis business, but I am a patient in Chester County, PA. We need to be able pay for these medications and the companies need to be able to run their business using our banking system. It is time!! Marijuana is helping me get off opioid Medication and Benzodiazepine medication safely and effectively. Since April 2018, I have cut the daily dosage of these medications by two thirds and moving towards getting off them completely. ONLY reason, I am able to do this is my use of cannabis medication that began last April. Changed my life!!

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Robert Finkle  
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I have represented compliant commercial cannabis businesses exclusively for the past 3+ years. There are three principal reasons cannabis businesses should be given access to safe banking services: (1) the large amounts of cash generated are being actively targeted by criminals creating a public safety risk, (2) as with all businesses, cannabis businesses require banking services to conduct everyday transactions, (3) there is no better way for government to ensure regulatory compliance, including the payment of taxes.

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This is not a marijuana issue. It is not about the pros and cons of legalization, potential medical applications, and the myriad challenges faced by an industry struggling to transition from the black market to mainstream acceptance.

The most critical and essential issue arising from the lack of banking for the cannabis and hemp industries is actually one of a community safety crisis and not one of the albeit considerable inconveniences and expenses plaguing the industry. The crisis is real, it is severe and it is bearing down upon us now.

The circumstances of communities now awash in millions or billions of dollars of poorly accounted for new cash is wreaking havoc now with frightening short and long-term potential consequences. Forcing legal, well-regulated and supervised innovative new enterprises to operate in cash:

1. Attracts violent robbery attempts frequently involving innocent bystanders, enormously increases security costs both internal and external, and
2. Encourages licensed operators (many of whom are making a sincere effort to shed ingrained black market business practices) to cut corners and under report results and taxes, sell product into the black market, and engage in otherwise questionable business practices.
3. Represents a systemic risk to the safety and soundness of our financial system.
4. Perhaps worst of all, organized crime is attracted to opportunities related to billions of dollars of poorly accounted for cash and metastasizes over time into a generational unwanted presence in the community.

This looming crisis demands immediate and decisive action. And the simple solution is to provide a safe harbor for our financial institutions to provide business checking accounts for all transparent, responsible, compliant state-licensed cannabis operators and the enterprises that provide them goods and services.

It's quite true that the lack of access to traditional banking and institutional financial services suffocates the cannabis and hemp industries in other important ways, particularly in access to capital to fuel the industry's explosive growth, but addressing that whole ecosystem is accessorial to quenching the firestorm threatening to engulf our communities.

An attempt at this point in the political calendar to adequately address the many nuanced issues of full access to banking and financial services for these industries will substantially dim any hope of timely success. And without having to get into the weeds (pun intended), the ultimate and simple solution to all the rest of it lies with an end to federal prohibition of cannabis.

However, I'm sure many here today recognize the importance of not making the perfect become the enemy of the good.

Our advisory firm educates and guides financial institutions around the country on the true risks and opportunities of servicing these industries. We work directly or indirectly with about 75 banks that provide compliant, transparent depository accounts to state licensees, professionals and vendors providing licensees goods and services, hemp and CBD companies, investment funds, and so on.

I can report from direct experience that the interest level on the part of banks is growing rapidly. One need only look to the over 100 NJ bankers who attended our recent presentation on marijuana banking to their local chapter of the Association of Certified Anti-Money Laundering Specialists (ACAMS – the leading international banking industry AML compliance trade association) representing more than twice the usual

attendance at such chapter meetings. Many institutions are giving serious consideration to venturing into some or all industry sectors this year, perhaps resolving the crisis by years end.

But they need your help. They cannot and will not adequately address this crisis and take advantage of this opportunity without your help.

And the help they need from you is very simple, the precedent for which was already established last year:

On August 21, 2018, the US District Court for the District of Massachusetts in RICO litigation brought against cannabis-friendly Century Bank found "that providing ordinary banking services to marijuana-related businesses, in compliance with Treasury Department guidance aimed at enabling banks to provide such services insufficiently demonstrates the joining and intention to further a RICO conspiracy".

In other words, a federal judge has already decided that simply providing ordinary banking services to marijuana-related businesses is not a federal crime. Nobody's asking anyone to walk a plank here - now there's authoritative judicial review to rely upon. All that's required of Congress is a simple statute confirming this decision that plainly states:

"In and of itself providing ordinary banking services to marijuana-related businesses, in compliance with Treasury Department guidance aimed at enabling banks to provide such services is not a violation of federal law".

Section 3 (a)(1)(2) & Section 3(b) of both HR2215 & S1152 fulfill this requirement and is therefore the essential safe harbor protection our financial institutions require to fulfill their responsibility as essential stewards of commerce.

Step number one is to bank, track and account for all the cash but a close second in importance is to dramatically reduce the amount of cash transactions themselves by providing the same safe harbor for MasterCard, Visa, American Express and Discover to reverse their current prohibition against cannabis transactions on their networks. Via the above referenced Sections, this legislation serves that additional vital purpose by providing these card networks the assurance they require to safely serve the cannabis industry.

Once again this is not a cannabis issue. Certainly everyone across the political spectrum can easily support nipping in the bud violent and organized crime, tax evasion, questionable and illegal business practices and injury to the safety and soundness of our financial system. This one is easy, universally justified and widely acceptable.

The issues of cannabis legalization are complex and worthy of measured debate and thoughtful deliberation. This not about that and the time for that debate is not yet upon us.

This is about the safety of our communities; this is something everyone can get behind. Think about it: None of us would like to be called to account for not having acted sooner if heaven-forbid an innocent child is struck by a stray bullet in a cash robbery gone wrong. The clock is ticking and time is of the essence.

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Sean McAllister  
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 McAllister Garfield, PC  
 501 S Cherry St, 480  
 CO, 80246

The lack of banking is a major public safety concern for the cannabis industry. Due to the lack of banking, companies have to store large amounts of cash on hand, which makes them targets for theft (although studies show they are not robbed more often than convenience stores and banks, but it is still a problem). Also, the inability to get loans from banks makes it very difficult for small businesses to grow and comply with the complex regulatory regimes in cannabis. Please make it clear that banks should be able to work with the cannabis industry, just like any other industry. I have personally lost a bank account as a lawyer because I service the cannabis industry, so this reform impacts more than just direct cannabis businesses.

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Heather McElravy  
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 Kanopli  
 5940 Chief Buffalo Horn Trail  
 MT, 59044

As a female I am uncomfortable and vulnerable when handling large amounts of cash without the ability to carry a firearm. Banking would allow us to accept electronic funds.

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Roopal Patel  
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 Lilu Financials, LLC  
 4110 SE Hawthorne Blvd. #134  
 OR, 97214

My clients face incredible hardship and extreme business costs in trying to manage without sensible, accessible banking solutions. It is already challenging to be a start up in any industry, but to have limited to no banking facilities is debilitating when a company is trying to grow and maintain compliance (e.g., payroll). Please work to provide a easy and safe way for my clients to manage their businesses by providing safe banking services to legal cannabis businesses at a national level. Thank you.

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Adrian Moore  
[adrian.moore@reason.org](mailto:adrian.moore@reason.org)  
 Reason Foundation  
 5737 Mesmer Ave Los Angeles, CA

Congress should always pay attention when federal and state policies conflict in ways that create public safety problems. That is certainly the case with banking for cannabis businesses.

For a number of historical reasons banks are subject to federal regulations intended to protect the public. As states legalize cannabis, medical or adult recreational use, an industry has arisen that involves considerable flows of money and need for banking services. This puts banks between conflicting state and federal rules vis a vis cannabis. Banks have mostly chosen not to defy federal rules and so have not served the cannabis industry. Which has created significant problems with safe operation of cannabis businesses, paying taxes, and crime. Problems which have been extensively documented.

Only a change in federal rules governing cannabis or a change in federal rules governing banking can end this conflict of rules and the public safety hazards it creates.

States are regulating cannabis businesses to prevent interstate movement of the products and keep the market within their state. Banks are heavily regulated to prevent the flow of illegal funds. Surely Congress and federal agencies can craft a pathway to allow cannabis industries to bank within their states and ensure that those funds do not create any potential external harms. Addressing those problems represents much less risk to public safety than does the current situation in which banking services are denied a multi billion dollar industry that is growing fast.

The longer we wait to solve this problem the greater the risk and the more disruptive it is.

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Gina Elko  
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 House of Hemp OBX  
 P.O. Box 1131  
 NC, 27948

We opened a retail location offering CBD products. Our community welcomed us and we are doing well. CBD is helping a lot of people with their ailments. We did have a credit card service in the beginning, but we're canceled, due to selling CBD. We now have to take cash only. It inconveniences our customers and creates a risk for my staff. Smaller banks will provide CC service, but the rates are too high for business sustainability

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Matthew Friedlander  
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 Skagit Organics  
 16915 State Route 20 Unit B  
 WA, 98273

We have less than five credit unions in Washington state that will open accounts for our business and they charge \$1000 to open the account and \$350 a month to maintain the account. I am unable to use banks to access a loan that would allow our business to purchase the real estate we are currently leasing and I am also unable to use the income from my business to qualify for a FHA loan or refinance loan for a personal residence. Please change the laws to allow business in the cannabis industry to have parity with all other legal businesses.

Michael Anderson  
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 NW GROWN LLC  
 8531 Postma Rd  
 WA, 98936

There are so many challenges of traceability, farming, weather, pests, transport, record keeping etc that go into this business.

Having Federally legal banking for licensed businesses would be a great boost for all cannabis businesses.

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Monica Martinez  
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 The Calyx Company  
 484 Alderdale Rd Ste. B  
 WA, 99350

The banking system, where do I start? We have endure quite a bit because of this. The first thing to happen was to have the banks for our farm and my in-laws home (also owners) mortgage loans announce that we were in default on both loans bc we are now owners in an i502 business. We had to figure out how to pay the loans or go into default and possibly lose their home and the farm!! Luckily, we were able to get the loans paid with in two years. It took EVERYTHING we had to get them paid off and have been left trying to catch up ever since. Especially when this industries market is continuing to go down every year, it has not been easy. Next would be our inability to get a loan for a new home. Our family has grown and we started looking at selling and moving, but we cannot bc we cannot get a bank to lend to us. We are a family of 5 in a 1000 sq ft home. I pride myself on having excellent credit, but you wouldn't know it because it feels like we have the worst credit or are even criminals when it comes to trying to bank like "normal" people. Another one of our owners banks dropped her when they found out she was an i502 owner and this same bank refused to cash our employees paychecks. Luckily we do now have a bank for our business. It is an hour from the farm, has a fee of \$150/month to use it and is very limited. No ATM use or online app functions and they will not lend ANY money. But it is much better than no bank at all like when we first started. This is just what I can think of off the top of my head, I am quit sure there have been more negative situations that I cannot think of right now...Thank you!

==

AC Braddock  
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 Eden Labs  
 Seattle, WA 98108

Eden Labs is a 24 year old botanical extraction and distillation company that has worked in a multitude of industries such as; bio-fuels, flavorings, perfumes, natural products and liquor to name but a few. However,

because we also supply extraction equipment to the cannabis industry we have been labeled a "cannabis company" by financial institutions. This has caused Eden to lose a bank account and has caused 3 of our employees to go through a far more rigorous qualification process when applying for their home loans this past year. These are loyal hard working people and it pained me to hear of the added stress that had to endure by simply being employed by Eden Labs.

To be clear, Eden Labs does not produce concentrates, yet our growth has been significantly inhibited by the inability to acquire the basic financial support any other small business requires from time to time including Lines of Credit and Short Term loans simply because of our arms length association with cannabis. Our business is in a state that has supported medical cannabis since 1996 and has had Adult Use legalization since 2012. At this point, the majority of states nationally have legalization primarily to find alternatives to opiates and other serious medical illnesses.

On a national scale, it is a travesty that billions of US investment dollars are supporting a worldwide legalization movement for medical use while American businesses wallow unsupported, not by the populace, but by those who have taken an oath to represent them. The short term solution is congressional action on banking to provide the US industry a modicum of support to compete globally and to remove the regulatory burdens placed on the banking industry. This is the most bipartisan win-win Congress can act on this year. The polls are clear.

The US should have been the global scientific and business leaders, but we are losing out to other countries on an issue being resolved at a snail's pace state by state. The scales have tipped. Please support our countries innovation and entrepreneurship now.

==

Sean Caffrey  
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 PharmaCann  
 Located in multiple states (IL, NY, MA)

I was part of a small startup in CO from 2010-2015. When we first got our bank account shut down it was just about the same time that we actually started making money, so the cash started to pile up. On one occasion we were stalked and singled out by some predatory con artists. They somehow determined our excel energy account number, and knew that we were behind on our bills. They asked us to head to an address to take care of payment to avoid service interruption. I didn't check the address, I just went there with \$20,000 in my 1999 Ford Windstar. I got to the address, and didn't see the excel office. Just as I am realizing the naive mistake I had just made, I saw four guys rolling up on the windstar, two on each side. I sped away as fast as that minivan could take me.

All of the cash was stored on site, we paid employees in cash and took the withholdings down to denver ourselves, in cash. One budtender, stole another's paycheck, but we couldn't prove it so we cleaned house.

One time the mechanic across the street from the dispensary asked me one morning, "What were you doing on the roof last night?" I wasn't on the roof.

In 2013 our cultivation was broken into by kids armed with handguns, they got in through the ventilation. They looked around for cash and didn't find any, so they just wrecked a bunch plants and left. If I had been in the building at the time, that story would have ended differently.

Hope this helps,  
Sean Caffrey

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Etienne Fontan  
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1440 4th St, ste D  
CA, 94710

Berkeley Patients Group is a Berkeley-based, California state-licensed, locally authorized dispensary as well as the oldest, continuously operating cannabis dispensary in the country. We pride ourselves on having set the standard for responsible, compliant cannabis operations around the country.

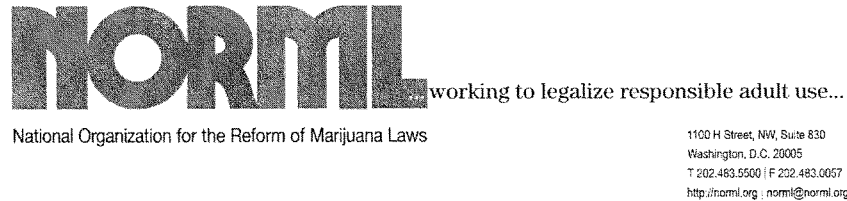
Since our founding in 1999, we have prioritized maintaining a safe operation following standard business practices, especially when it comes to cash handling. Federal laws have created an inconsistent, unstable, and at times dangerous situation. Regardless of our state compliance, we have been removed from well over 30 banking institutions.

We seek and request to be treated like any other business with the rights and privileges that come with being recognized as a legitimate industry. It is the federal prohibition and financial roadblocks against cannabis that have kept us from achieving this goal. We encourage the committee to consider relief that will rid us and all legitimate cannabis businesses of these handcuffs so that we can ensure the industry has access to safe, sustainable banking solutions.

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Keith Cich  
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Sunderstorm LLC  
1146 N Central Ave  
Glendale, CA 91352

I am a Stanford grad and former fixed income derivatives trader on Wall Street, now heading up finance for a licensed manufacturer in California. Our biggest security risk is cash: our delivery drivers are followed by thugs and vans broken into, and this problem is escalating. Lack of banking in a highly regulated state legal industry is a major cause of unwanted crime. Let's allow federal banking and turn this into a professional industry without crime, and reduce the risk that cannabis employees are robbed with significant exposure to physical harm. Also, this will improve the federal and states ability to monitor cannabis companies and collect taxes due them. Its a win-win. Do it now.



Contact:  
Paul Armentano  
Deputy Director  
NORML  
[Paul@NORML.org](mailto:Paul@NORML.org)

Submitted to:  
The Consumer Protection and Financial Institutions Subcommittee  
Washington, DC  
February 13, 2019

Testimony of Paul Armentano, Deputy Director:  
National Organization for the Reform of Marijuana Laws  
In Regard to:  
Challenges and Solutions: Access to Banking Services  
for Cannabis-Related Businesses

My name is Paul Armentano and for the past two-and-one-half decades I have worked professionally in the field of marijuana policy. I have authored various books specific to the issue of cannabis policy, and my writing has been featured in over two dozen academic anthologies. I have testified on matters of cannabis policy before numerous state legislatures and federal agencies, as well as at various academic and legal symposiums.

I hold a faculty position with The Lambert Center for the Study of Medicinal Marijuana and Hemp at Thomas Jefferson University in Philadelphia, and I currently serve as the Deputy Director for the National Organization for the Reform of Marijuana Laws (NORML). Since its founding in 1970, NORML has served as an advocate for those who believe that the use of cannabis by responsible adults should not be subject to criminalization. NORML further believes that a regulated, above-ground marijuana market -- rather than the perpetuation of a criminal underground market -- best mitigates potential risks associated with cannabis use and sales.



I wish to thank the members of this Subcommittee for holding this hearing to discuss strategies to facilitate greater financial transparency in the legal cannabis industry and retail market.

To date, nine states<sup>1</sup> – Alaska, California, Colorado, Maine<sup>2</sup>, Massachusetts, Michigan<sup>3</sup>, Nevada, Oregon, and Washington – permit retail sales of recreational marijuana to adults. According to data<sup>4</sup> compiled by the Institute on Taxation and Economic Policy, tax revenues in 2018 derived from state-sanctioned recreational sales surpassed \$1 billion – a 57 percent increase over 2017 levels. Annual excise tax revenues on adult-use cannabis sales in these states (\$1.04 billion) rivaled those for all forms of alcohol (\$1.16 billion).

These tax revenues indicate the significant and exponentially growing size of the legal, retail recreational cannabis market in the United States. In coming years, this legal market is only going to increase in size, as additional states enact similar cannabis regulatory and taxation schemes governing the adult use marijuana market.

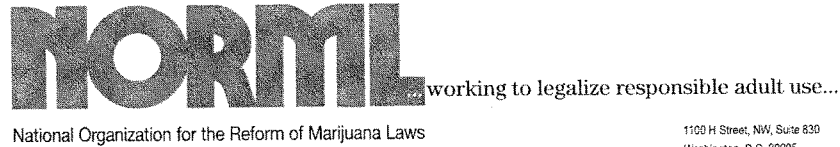
Yet there remains one significant hurdle facing players and consumers who participate in this market. Almost none of these licensed businesses operating in this increasingly lucrative space can legally obtain a bank account, process credit cards, or take standard business deductions on their federal taxes. This is because federal law continues to inappropriately define all marijuana-related endeavors as criminal enterprises, including those commercial activities that are licensed and legally regulated under state laws.

<sup>1</sup> Although both Vermont and the District of Columbia permit adults to legally possess marijuana, neither jurisdiction regulates retail cannabis sales.

<sup>2</sup> Retail adult use sales have yet to begin in Maine.

<sup>3</sup> Retail adult use sales have yet to begin in Michigan.

<sup>4</sup> Institute on Taxation and Economic Policy, 2019. *Taxing Cannabis*: [https://itep.org/taxing-cannabis/?fbclid=IwAR0DUf48AoHQ9J7y81EDxjiA\\_XdzsUXJSvJmJnwdP-8UR9BE3zuN-SOsM](https://itep.org/taxing-cannabis/?fbclid=IwAR0DUf48AoHQ9J7y81EDxjiA_XdzsUXJSvJmJnwdP-8UR9BE3zuN-SOsM)



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In short, federal lawmakers are mandating that this rapidly growing multi-billion dollar industry operate on a cash-only basis – an environment that makes businesses more susceptible to theft and more difficult to audit. It also places the safety and welfare of these businesses' customers at risk, as they must carry significant amounts of cash on their persons in order to make legal purchases at retail facilities. Similarly, it needlessly jeopardizes the safety of retail staffers, who are susceptible to robbery.

Good faith efforts taken by the Obama administration to address this situation have thus far failed to adequately do so. Specifically, in 2014, the US Department of Treasury issued guidelines<sup>5</sup> for financial institutions seeking to provide services to state-licensed cannabis businesses. Yet, according to the latest data compiled by the US Treasury Department's Financial Crimes Enforcement Network (FinCEN), fewer than 500 financial institutions nationwide are actively providing services to the thousands of existing cannabis-related businesses.<sup>6</sup>

For an industry seeking legitimacy and requiring transparency, the inability to obtain banking and credit access remains a primary, but unnecessary, roadblock. In order to truly bring the marijuana industry out of the shadows, actions need to be taken by Congress to amend these outdated and discriminatory practices. Legislation seeking to address this issue in the 115th Congress garnered 95 House co-sponsors. Yet it failed to receive either a committee hearing or a vote. This federal inertia must end.

In short, no industry can operate safely, transparently, or effectively without access to banks or other financial institutions and it is self-evident that this industry, and those consumers that are served by it, will remain severely hampered without better access to credit and financing. Ultimately, Congress must amend federal policy so that these growing numbers of state-compliant

<sup>5</sup> <https://www.scribd.com/document/207174093/Marijuana-Business-Guidance>

<sup>6</sup> FinCEN. 2018. *Marijuana Banking Update*:

[https://www.fincen.gov/sites/default/files/shared/Marijuana\\_Banking\\_Update\\_September\\_2018.pdf](https://www.fincen.gov/sites/default/files/shared/Marijuana_Banking_Update_September_2018.pdf)





National Organization for the Reform of Marijuana Laws

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businesses, and those millions of Americans who patronize them, are no longer subject to policies that needlessly place them in harm's way.



# STATEMENT

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## STATEMENT FOR THE RECORD

U.S. House of Representatives  
Committee on Financial Services  
Subcommittee on Consumer Protection and Financial Institutions  
Hearing on "Challenges and Solutions: Access to Banking Services  
for Cannabis-Related Businesses"

Wednesday, February 13, 2019

The Reinsurance Association of America (RAA) submits the following comments relating to today's hearing. The RAA is a national trade association representing reinsurance companies doing business in the United States. RAA membership is diverse, including reinsurance underwriters and intermediaries licensed in the U.S. and those that conduct business on a cross border basis. The RAA also has life reinsurance company affiliates.

The RAA appreciates the Committee's interest in legislation that would create protections for depository institutions that provide financial services to cannabis-related legitimate businesses. The use of medicinal marijuana has been approved in 33 states and the District of Columbia, and eleven of those states have also approved recreational use. Given this growing trend, the RAA believes that the Committee's review of the extent to which services to legitimate cannabis-related businesses should be permitted is timely and appropriate.

The Committee's consideration should not be focused solely on banking services, however. The RAA requests that the Committee include in the legislation similar protections (see attached) for persons engaged in the business of insurance, including reinsurance. As with any business, cannabis-related legitimate businesses require insurance products and

services to protect their business. Given the changes in state law in this area, demand for insurance products and services for cannabis-related activities and losses has increased. Legitimate cannabis-related business includes medical/recreational dispensaries, manufacturers, growers, delivery, transportation, landlords, laboratories/testing, as well as an ancillary business that supports such activities. Like federal depository institutions, insurers today are limited in their ability to engage in the business of insurance in connection with a cannabis-related legitimate business given federal laws designating cannabis as a Schedule I drug under the Controlled Substances Act and making its possession, distribution, and sale a punishable offense under federal law.

Interest in this market is not driven solely by perceived business opportunities. Federal depository institutions, federal programs, and federal law require borrowers to secure property casualty insurance, like flood insurance offered by the National Flood Insurance Program, for a business and its property. Many states also require employers to have workers compensation and other kinds of insurance. In at least one state where medicinal marijuana use has been approved, a court has ruled that insurers are obligated to provide medical marijuana under workers' compensation policies. In addition, states are beginning to consider (and, in California, implement) regulatory requirements that increase the demand for insurance products in this area.

For these reasons, the RAA appreciates the Committee's consideration of this request and looks forward to working with the Committee on legislation that also would create protections for entities engaged in the business of insurance in connection with a cannabis-related legitimate business.

**Safe and Responsible Banking Alliance**

**Becky Dansky, Executive Director**

**Testimony for the Hearing Record**

House Financial Services Subcommittee on Consumer Protections and Financial Institutions

*"Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses"*

February 13, 2019

Chairman Meeks, Ranking Member Luetkemeyer, and members of the Committee:

Thank you for the opportunity to provide testimony on access to banking services in the cannabis industry. I represent the Safe and Responsible Banking Alliance (SARBA), a coalition of financial institutions, associations, governments, and business groups advocating for a solution to federal cannabis banking prohibitions. We advocate for legislation to eliminate civil and criminal risk for financial institutions and businesses involved in the lawful sale of cannabis and related products in states and tribal lands where sales are legal.

Today, we are proud to speak in support of the Secure and Fair Enforcement (SAFE) Banking Act, a bipartisan, bicameral bill that would rightfully protect financial institutions, ancillary business, and consumers engaged in legal cannabis-related transactions. The SAFE Banking Act would address many of the key problems associated with the cannabis industry's lack of access to financial institutions, and would help bridge the disconnect between state and federal law.

**Public Safety**

When cannabis-related businesses cannot utilize traditional banking services, major public safety issues arise. Because those involved in the cannabis industry are denied access to

financial institutions, they are forced to operate and purchase using cash alone, making the businesses and individuals involved in the industry attractive targets for criminals. An industry that banks almost exclusively in cash poses obvious public safety dangers, including an increase in violent crimes.

Communities will be safer if cannabis-related funds can be electronically-transferred and deposited in regulated financial institutions. Yet our current laws make this nearly impossible. The SAFE Banking Act would change this by allowing financial institutions to engage the cannabis industry and give those involved secure alternatives to cash operations. This will mean less unregulated cash in the streets and fewer associated crimes.

#### **Institutional Risk**

The SAFE Banking Act will improve conditions not only for the public, but for financial institutions as well. Even in jurisdictions where cannabis is legal, financial institutions face the potential for risk because funds involved in cannabis transactions are considered illegally-gained by federal regulators and law enforcement officers. This makes it far less likely that banks will engage in the industry, provide loans to cannabis and ancillary businesses, and to provide accounts for individuals who are paid from cannabis-derived funds – everyone from the horticulturist that tends the plants to the plumber who runs the water lines.

Financial institutions are further disincentivized by the lack of clarity surrounding cannabis laws. Federal law paints any dollar that flows through the cannabis industry as tainted, but such broad brush strokes provide little certainty to financial institutions. Financial institutions may feel compelled to cancel the account of someone who works in the cannabis industry. All depository institutions have to consider how to handle an individual's cash deposits that may have at some time been involved in a legitimate cannabis related transaction. Such dilemmas reveal the

broad reach of the cannabis industry<sup>1</sup>. Under current federal law, banks interacting with these customers are at risk. Financial institutions cannot help but be exposed to potential consequences, because the cannabis industry is intertwined with so many other legitimate businesses that support the burgeoning marijuana industry.

The SAFE Banking Act is critical to addressing a significant area of the risk owed to the inescapable comingling of cannabis related funds with ancillary business and individual accounts. By clarifying federal cannabis regulations, including money laundering issues and Suspicious Activity Reports (SARs), the SAFE Banking Act would make it much safer for financial institutions to process cannabis-related transactions.

#### **Small Business & Minority Access**

The SAFE Banking Act would do more than simply destigmatize the industry—it would increase access to capital among demographics that have been disproportionately disadvantaged by the federal prohibition of cannabis. The bill would allow financial institutions to provide small business loans for cannabis-related business — loans which could be considered illegal under current law. In effect, this ban has barred those with the least access to capital, often minorities, from becoming involved in and profiting from the industry.

Furthermore, many states prohibit anyone with even a minor marijuana arrest on record from participating in the regulated legal marijuana business. Minorities are disproportionately represented in marijuana arrests; despite equal drug use rates, African Americans are almost

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<sup>1</sup> In Washington state, the legal marijuana industry is responsible for 15,600 jobs, with related jobs estimated at an additional 6,100 according to Arcview Market Research.

four times more likely to be arrested for marijuana than their white counterparts<sup>2</sup>. This economic disadvantage, compounded with disproportionate arrests, puts minorities at a significant disadvantage in this emerging industry. The SAFE Banking Act would address this by allowing banks to give out small business loans legally, thereby somewhat leveling the playing field and increasing opportunities for minority representation in the industry.

The SAFE Banking Act would also help create space for more women in leadership roles in the cannabis industry. The percentage of women holding executive positions in cannabis businesses is higher than the average across larger U.S. businesses: 36% in the cannabis industry versus 23% overall<sup>3</sup>. Because this is a new, rapidly-expanding industry<sup>4</sup>, there is promise that a broader range of individuals can be successful in this field. The SAFE Banking Act will expand this access by crediting women and minorities with small business loans, presenting financial institutions with a unique opportunity to lift up communities that are historically disadvantaged.

#### **Patient Access**

A final problem addressed by the SAFE Banking Act is that of patient access. There is no insurance plan that covers medical marijuana, forcing patients and caregivers to pay out of pocket. Compounding this significant financial strain is the fact that these are almost exclusively cash transactions, because credit or debit cards—including HSA/FSA cards and accounts—cannot be used in cannabis-related transactions. Families are thus forced to choose between

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<sup>2</sup> ACLU: Marijuana Arrests By The Numbers

<sup>3</sup> Marijuana Business Daily: Women and Minorities in the Marijuana Industry

<sup>4</sup> From July 2017 to July 2018, marijuana retail sales totaled \$972,527,246 according to the Washington State Liquor and Cannabis Board.

coming up with large sums of cash each month and forgoing other basic needs, or going without necessary medication. The SAFE Banking Act would help eliminate this impossible choice by opening up financial services to the cannabis industry and reducing the price of medical marijuana, which is disproportionately high due in part to a lack of banking access.

#### **Conclusion**

The SAFE Banking Act is not proposing mass legalization, nor does it make any normative statements about cannabis use. It would not even require financial institutions to work with cannabis related businesses. Rather, it follows the laws already set by states – 33 of which already allow legal marijuana sales for medical or personal use. The SAFE Banking Act will increase the ability of financial institutions and services to legally operate in this space, with positive impacts on public safety, institutional risk, small business and minority access, and patient access. In jurisdictions where cannabis transactions are in compliance with state laws, it only makes sense for federal financial regulations to follow suit.

Thank you for the opportunity to provide this testimony. For additional information on our work, please visit [www.banksafe.org](http://www.banksafe.org).

Becky Dansky  
Executive Director  
Safe and Responsible Banking Alliance  
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Jim King  
Senior Vice President, Corporate Affairs  
Chief Communications Officer

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p 937.644.0011

February 12, 2019

The Honorable Gregory W. Meeks  
Chair - Subcommittee on Consumer Protections & Financial Institutions  
U.S. House Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, DC 20515

RE: Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses Hearing

Dear Chairman Meeks,

I am writing regarding the upcoming hearing of the Subcommittee on Consumer Protection and Financial Institutions titled "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses."

The ScottsMiracle-Gro Company is the quintessential American business. Established in 1868 in Marysville, Ohio, the ScottsMiracle-Gro name is synonymous with America's love for lawns and gardens. We are also a leader in the evolution and emergence of indoor and greenhouse gardening through our subsidiary, The Hawthorne Gardening Company.

With approximately 6,000 associates at more than 65 U.S. locations in 26 states, ScottsMiracle-Gro has small and large manufacturing plants that create products for American consumers. The vast majority of our business is based on a wide range of products for lawn and garden care. However, we are also the country's largest manufacturer of hydroponic growing systems, nutrients, lights, filters and components for indoor growing. These products can be used to nurture a wide variety of plants, including cannabis. Our hydroponic division is expected to generate revenue this year of approximately \$600 million, or about 20 percent of company-wide revenue.

While ScottsMiracle-Gro does not directly participate in the U.S. cannabis industry, this rapidly growing and critical business unit is nonetheless impacted by the existing conflict between federal and state laws. Our concern is particularly acute when it comes to our relationships with our banking partners. We know that state-law-authorized cannabis cultivators are among those who use our products to grow their crop. However, we are unable to sell equipment to them directly because of the current banking rules. In order to satisfy our banks' compliance requirements and maintain our banking relationships, we are required to use a costly two-step distribution process to serve these end customers.

We share these experiences to help the committee understand the vast implications and challenges to the current system. While the committee may hear from many cannabis companies, we also want to highlight the inefficiencies ScottsMiracle-Gro faces as a provider to this industry.

We applaud the Committee for taking the time to learn more about the challenges of this current arrangement and encourage you to examine the many different aspects of this banking issue during your evaluation of the topic, including the needs of ancillary companies like ScottsMiracle-Gro. We also thank Congressmen Perlmutter, Heck, Stivers and Davidson for their leadership on this important issue through their work on the SAFE Banking Act and look forward to additional discussion on this measure as a means to address concerns raised in this letter.

As an American company with over 150 years of business experience, we have many unique insights about this emerging industry and would be happy to share those perspectives as the Committee continues to learn more and develops solutions to address this issue.

Thank you for your attention to this matter.



Jim King

Cc: The Honorable Ed Perlmutter, US House of Representatives  
The Honorable Denny Heck, US House of Representatives  
The Honorable Steve Stivers, US House of Representatives  
The Honorable Warren Davidson, US House of Representatives

January 16, 2018

Hon. Paul Ryan  
Speaker of the House  
H-232, The Capitol  
Washington, DC 20515

Hon. Mitch McConnell  
Majority Leader  
317 Russell Bldg  
Washington, DC 20510

Hon. Kevin McCarthy  
Majority Leader  
H-107, The Capitol  
Washington, DC 20515

Hon. John Cornyn  
Majority Whip  
517 Hart Bldg.  
Washington, DC 20510

Hon. Mike Crapo  
Chair  
Senate Committee on Banking,  
Housing & Urban Affairs  
534 Dirksen Senate Building  
Washington, DC 20510

Hon. Nancy Pelosi  
Minority Leader  
H-204, The Capitol  
Washington, DC 20515

Hon. Charles E. Schumer  
Minority Leader  
322 Hart Bldg.  
Washington, DC 20510

Hon. Steny Hoyer  
Minority Whip  
1705 Longworth Office Building  
Washington, DC 20515

Hon. Richard J. Durbin  
Minority Whip  
711 Hart Bldg.  
Washington, DC 20510

Hon. Sherrod Brown  
Ranking Member  
Senate Committee on Banking,  
Housing & Urban Affairs  
534 Dirksen Senate Building  
Washington, DC 20510

Dear Congressional Leaders:

We are a bipartisan group of state attorneys general who recognize that the states and federal government share a strong interest in protecting public safety and bringing grey market activities into the regulated banking sector. To address these goals, we urge Congress to advance legislation that would allow states that have legalized medical or recreational use of marijuana to bring that commerce into the banking system.

Twenty-nine states and several U.S. territories have legalized the medical use of marijuana. Among those, eight states and the District of Columbia, also allow recreational use by adults over 21 years of age. However, because the federal government classifies marijuana as an illegal substance, banks providing services to state-licensed cannabis businesses could find themselves subject to criminal and civil liability under the Controlled Substances Act and certain federal banking statutes. This risk has significantly inhibited the willingness of financial institutions to provide services to these businesses.

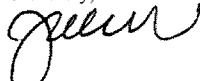
Despite the contradictions between federal and state law, the marijuana industry continues to grow rapidly. Industry analysts report that sales grew by 30% to \$6.7 billion in 2016 and expect those totals to exceed \$20 billion by 2021. Yet those revenues often exist outside of the regulated banking space. Businesses are forced to operate on a cash basis. The grey market makes it more difficult to track revenues for taxation purposes, contributes to a public safety threat as cash intensive businesses are often targets for criminal activity, and prevents proper tracking of large swaths of finances across the nation.

To address these challenges, we are requesting legislation that would provide a safe harbor for depository institutions that provide a financial product or service to a covered business in a state that has implemented laws and regulations that ensure accountability in the marijuana industry such as the SAFE Banking Act (S. 1152 and H.R. 2215) or similar legislation. This would bring billions of dollars into the banking sector, and give law enforcement the ability to monitor these transactions. Moreover, compliance with tax requirements would be simpler and easier to enforce with a better-defined tracking of funds. This would, in turn, result in higher tax revenue.

Prior Department of Justice guidance outlined how financial institutions could provide services to state-licensed marijuana businesses consistent with their obligations under federal law and created some space for the banking industry to work with those businesses, though challenges remained in many areas. The recent rescission of that guidance has made the need for Congressional action to get the cash generated by this industry into a regulated banking sector even more urgent.

Our banking system must be flexible enough to address the needs of businesses in the various states, with state input, while protecting the interests of the federal government. This includes a banking system for marijuana-related businesses that is both responsive and effective in meeting the demands of our economy. We look forward to working with you as you move forward in this process and lending our voice and expertise as you develop legislation.

Sincerely,



Jenna Lindemuth  
Alaska Attorney General



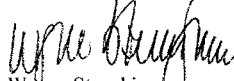
Doug Chin  
Hawaii Attorney General



Xavier Becerra  
California Attorney General



Karl A. Racine  
District of Columbia Attorney General



Wayne Stenehjem  
North Dakota Attorney General



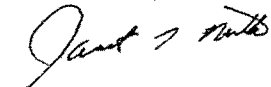
Cynthia Coffman  
Colorado Attorney General



George Jepsen  
Connecticut Attorney General



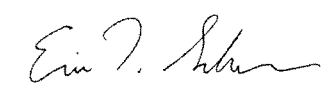
Lisa Madigan  
Illinois Attorney General



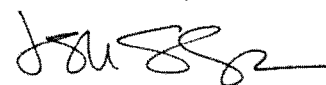
Janet T. Mills  
Maine Attorney General



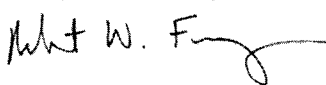
Maura Healey  
Massachusetts Attorney General



Eric T. Schneiderman  
New York Attorney General



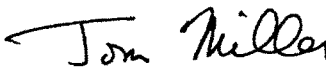
Josh Shapiro  
Pennsylvania Attorney General



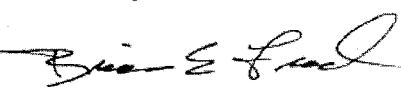
Robert W. Ferguson  
Washington Attorney General



Elizabeth Barrett-Anderson  
Guam Attorney General



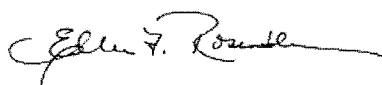
Tom Miller  
Iowa Attorney General



Brian Frosh  
Maryland Attorney General



Hector Balderas  
New Mexico Attorney General



Ellen F. Rosenblum  
Oregon Attorney General



T.J. Donovan  
Vermont Attorney General



February 12, 2019

The Honorable Edwin Perlmutter  
U.S. House of Representatives  
1226 Longworth House Office Building  
Washington, DC 20515-0607

The Honorable Dennis Heck  
U.S. House of Representatives  
2452 Rayburn House Office Building  
Washington, DC 20515-4710

Dear Congressman Perlmutter and Congressman Heck,

On behalf of Surterra Wellness, I am writing to express our strong support for legislation you have introduced to enable federally insured depositories to bank with legitimate cannabis businesses, as defined by your bill.

Surterra is among the largest cannabis operators in the country. We have licenses in Florida and Texas and expect to have an established retail presence in Nevada and Massachusetts by the close of Q1, pending certain regulatory approvals. Currently, we employ 600 individuals. If our growth continues on a year-over-year basis and our estimates are accurate, we will employ over 2,000 individuals by the close of 2019.

Access to banking services is the heart of any successful and legitimate US business. We must have reliable banking relationships to safeguard the cash that comes in the door, to enable our employees to get direct deposit, to contract with payroll service providers, to secure real estate, to get a bank loan to grow our business, and to contract with any other basic service providers (snow removal, cleaning crews, etc.). These relationships must be grounded in the dependability and certainty that any other U.S. business enjoys. The Perlmutter-Heck bill is absolutely critical to providing this certainty, and we commend you for your work on this thoughtful approach to rationalizing our federal banking system with quickly evolving state law. Importantly, the bill does not mandate that any bank take deposits from a cannabis-related legitimate business or provide any other services. The bill simply gives financial institutions the certainty that if they *do* choose to take money from such businesses, they are not at risk of regulatory or criminal enforcement actions simply for undertaking the relationship.

Opponents of the bill have intimated that there are many banks willing to do business with Surterra and our competitors. Opponents of the bill have intimated that the number of banks willing to engage us is growing. However, this is not our experience. In our experience, banking relationships are uncertain and subject to forces outside of our performance as a client. Our last relationship was terminated on short notice because our bank had submitted a merger application and heard from their regulator that they would have to terminate all cannabis customers before the application could be considered. Indeed, in Florida last year we saw a large bank terminate a relationship with a state-wide candidate because she had accepted contributions from cannabis operators. All of this despite the fact that Florida's Amendment 2, which created our medical cannabis regime, passed with 71% of the vote.



in 2016. We suspect those who contend that a large number of banks are working with the cannabis industry are misinterpreting raw data from FinCEN which shows not only Suspicious Activity Reports (SAR)s filed by banks who work with operators, but also SARs related to proceeds activity, individual investors who do not "touch the plant" as operators, and data from terminations.

Surterra strongly supports the legislation which you have introduced. We believe the bill is improved over the previous version by addressing the critical issue of "proceeds." This language will give not only our bank partners certainty, but also our service-providers and their bank partners.

We look forward to the Committee's consideration of this bill and encourage both the Committee and the House of Representatives to pass it expeditiously.

Sincerely,

A handwritten signature in dark ink, appearing to read "James Whitcomb", is written over a horizontal line.

**James Whitcomb**  
Chief Financial Officer, Surterra Wellness

cc:  
The Honorable Maxine Waters, Chairman  
The Honorable Patrick McHenry, Ranking Member



February 12, 2019

The Honorable Maxine Waters  
U.S. House of Representatives  
2221 Rayburn House Office Building  
Washington, DC 20515-0543

The Honorable Patrick McHenry  
U.S. House of Representatives  
2004 Rayburn House Office Building  
Washington, DC 20515-3310

The Honorable Gregory Meeks  
U.S. House of Representatives  
2310 Rayburn House Office Building  
Washington, DC 20515-3205

The Honorable W. Blaine Luetkemeyer  
U.S. House of Representatives  
2230 Rayburn House Office Building  
Washington, DC 20515-2503

Dear Chairman Waters, Chairman Meeks, Ranking Member McHenry, and Ranking Member Luetkemeyer:

*"The Cole Memorandum and FinCEN guidance constitute a roadmap for how banks can permissibly services the cannabis industry." – John Vardaman, Executive Vice President and General Counsel of Hypur, Inc., and former Justice Department Official*

*"The Cole Memorandum cannot be considered a safe harbor." – Julie Robinson, Senior Vice President and Compliance Risk Manager, River City Bank*

On behalf of Surterra Wellness (Surtterra), I appreciate the opportunity to submit testimony for the record of the hearing: "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses." My name is James Whitcomb, and I am the Chief Financial Officer of Surterra Wellness.

Surtterra is among the largest cannabis operators in the country. We have licenses in Florida and Texas and expect to have an established retail presence in Nevada and Massachusetts by the close of Q1, pending certain regulatory approvals. Currently, we employ 600 individuals. If our growth continues on a year-over-year basis and our estimates are accurate, we will employ over 2,000 individuals by the close of 2019. Knowing of the Committee's interest, we are proud of the diversity of our workforce: 52.1% of our workforce is female; 40.5% of our workforce are non-gender specific minorities; and additionally, 8.2% of our workforce are military veterans.

Surtterra is pleased to see the Committee examining this important issue of access to banking services for the cannabis industry. The two quotes at the top of my statement, highlight the tension in our current regulatory environment and why, in our opinion, we and the providers from whom we secure basic business services are in an untenable situation.





Cannabis is fully legalized in 10 states.<sup>1</sup> Medical cannabis programs exist in 23 states.<sup>2</sup> CBD-only products are legal in 13 states<sup>3</sup> and Nebraska has decriminalized cannabis without a supporting program. Only Idaho, Kansas, Nebraska and South Dakota do not have cannabis programs.<sup>4</sup> Until recently, the United States (US) Department of Justice (DOJ) altered their policy around the Cole Memorandum putting at risk our patients, our employees, and our business-services providers. It is this last point that is at the heart of this hearing and the legislation that we hope the Committee will consider and approve in the near future.

Access to banking services is the heart of any successful and legitimate US business. We must have reliable banking relationships to safeguard the cash that comes in the door, to enable our employees to get direct deposit, to contract with payroll service providers, to secure real estate, to get a bank loan to grow our business, and to contract with any other basic service providers (snow removal, cleaning crews, etc.). These relationships must be grounded in the dependability and certainty that any other US business enjoys. The Perlmutter-Heck bill is absolutely critical to providing this certainty, and we commend the Congressmen for their work on this thoughtful approach to rationalizing our federal banking system with quickly evolving state law. Importantly, the bill does not mandate that any bank take deposits from a cannabis-related legitimate business or provide any other services. The bill simply gives financial institutions the certainty that if they *do* choose to take money from such businesses, they are not at risk of regulatory or criminal enforcement actions simply for undertaking the relationship.

FinCEN has issued guidance related to banking cannabis-related legitimate businesses and they should be commended for not altering (or eliminating) their guidance in the face rescission of the Cole Memorandum, but the mere fact that a change of heart (or personnel) at the DOJ could undo the will of millions of voters and thousands of state legislators highlights the need for a federal solution. Indeed, a federal solution and clarity surrounding banking issues is an urgent public safety issue for (at least) three reasons:

- Large amounts of cash can make cannabis businesses, their employees, and their customers prime targets and victims of violent crime;
- State and local government agencies that collect taxes and fee payments in cash from the cannabis industry incur added expenses, demands on staff time, and risks to employee safety; and
- Normal access to banking services is an essential part of taking the cannabis industry out of the shadows and establishing it as a transparent, regulated, and tax-paying part of the economy.

<sup>1</sup> Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington.

<sup>2</sup> Arkansas, Arizona, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, and West Virginia.

<sup>3</sup> Alabama, Georgia, Indiana, Iowa, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.

<sup>4</sup>“State Medical Marijuana Laws.” National Conference of State Legislatures. February 11, 2019. Last accessed on February 12, 2019: <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.



Banking relationships can help law enforcement officials and regulators distinguish between legal businesses and illegal ones.<sup>5</sup> According to the State of California Treasurer's Report of 2017, the Cole Memorandum and the FinCEN guidance constitute a reasonable roadmap for how banks can permissibly service the industry, but they cannot be considered a safe harbor.<sup>6</sup>

Opponents of the bill have intimated that there are many banks willing to do business with Surterra and our competitors. Opponents of the bill have intimated that the number of banks willing to engage us is growing. However, this is not our experience. In our experience, banking relationships are uncertain and subject to forces outside of our performance as a client. Our last relationship was terminated on short notice because our bank had submitted a merger application and heard from their regulator that they would have to terminate all cannabis customers before the application could be considered. Indeed, in Florida last year we saw a large bank terminate a relationship with a state-wide candidate because she had accepted contributions from cannabis operators. All of this despite the fact that Florida's Amendment 2, which created our medical cannabis regime, passed with 71% of the vote in 2016. We suspect those who contend that a large number of banks are working with the cannabis industry are misinterpreting raw data from FinCEN which shows not only Suspicious Activity Reports (SAR)s filed by banks who work with operators, but also SARs related to proceeds activity, individual investors who do not "touch the plant" as operators, and data from terminations.

Surterra strongly supports the legislation which has been reintroduced by Congressmen Perlmutter and Heck. We believe the bill is improved over the previous version by addressing the critical issue of "proceeds." This language will give not only our bank partners certainty, but also our service-providers and their bank partners. While the bill does not allow us to access capital markets, provide a pathway to accessing insurance markets or guarantee us access to payment rails, it is a critical step in enhancing accessibility for our patients, benefits for our employees and certainty for our business. We urge the Committee to move expeditiously to report the bill favorably to the full House. Surterra offers to be a resource to any and all Members of Congress who have questions about this quickly evolving cannabis business in the U.S.

We appreciate the opportunity to submit this statement and thank you for your consideration.

Sincerely,

**James Whitcomb**

Chief Financial Officer, Surterra Wellness

<sup>5</sup> "Banking Access Strategies for Cannabis-Related Businesses: A Report from the State Treasurer's Cannabis Banking Working Group." Executive Summary. November 7, 2017. Last accessed on February 12, 2019: <https://www.treasurer.ca.gov/cbwg/resources/reports/110717-cannabis-report.pdf>.

<sup>6</sup> *Ibid.* Page 7.



February 12, 2019

Chairwoman Maxine Waters  
United States House Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, D.C. 20515

Ranking Member Patrick McHenry  
United States House Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, D.C. 20515

Chairwoman Waters:

I serve on the Board of Directors at Trulieve, the first and leading medical cannabis company in the state of Florida, which is now the third most populous state in the United States. Our company is a vertically-integrated "Seed to Sale" operation and has a growing presence in the state. Our 24 dispensaries and over 100 car delivery fleet provide important, much-needed access to thousands of patients every day throughout the state.

Earlier this year, Trulieve was recognized as the 2018 Diversity and Inclusion Champion of the Year Award recipient by Minorities for Medical Marijuana, a 501c3 non-profit organization focused on providing cannabis advocacy, education, outreach and training to communities of color throughout the country. The annual award acknowledges a leading cannabis organization for its leadership efforts in diversity and inclusion in two categories: Organizational Diversity, which celebrates company initiatives developed to increase diversity and inclusion within the organization, and Inclusion and Market Outreach Strategies, which recognizes initiatives designed to increase outreach and marketing while educating and attracting consumers from diverse communities.

Our company continues to grow, bringing new jobs and new opportunities throughout the entire state, while providing important medical benefits to those who were unable to find relief with other treatments. We help provide dramatic relief for nausea and vomiting associated with cancer chemotherapy, the ability to control an otherwise unmanageable seizure disorder in some patients with Epilepsy, and pain relief for many of our Veterans without the need for dangerous opioids.

Madam Chair, as you are aware, more than two thirds of our states have recognized the needs and the benefits of medical cannabis. Despite the growing number of states that recognize the use of legal medical cannabis, most companies are precluded from accessing banks to make deposits, pay their employees, and pay taxes to the state, local, and federal governments. Often, employees of cannabis companies have no choice of but to carry large sums of cash that could make them easy targets for criminals.

Trulieve, Inc.  
3494 Martin Hurst Road, Tallahassee, Florida 32312



FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES  
COMMISSIONER NICOLE "NIKKI" FRIED  
THE CAPITOL

February 13, 2019

U.S. House Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, DC 20515

Dear Chairwoman Maxine Waters and Ranking Member McHenry,

On behalf of Florida's farmers, our medical marijuana professionals, and consumers, I want to thank you for your efforts to provide the cannabis industry access to traditional banking and express my strong support for the Secure and Fair Enforcement Banking Act (H.R. 2215).

Conflicting guidance from the federal government has unnecessarily led to a higher level of risk and hurdles for businesses in this emerging market. This is an issue that affected me personally – while running for this office, our campaign had two bank accounts closed due to my advocacy for medical marijuana access and cannabis. The absence of traditional banking services forces state-licensed businesses to resort to all cash operations, which is inefficient and a public safety concern. Businesses can't operate proficiently with irregularities restricting their growth, stability, and the ability to pay bills, rent, and employees, when their accounts are inevitably closed. This is an issue impacting our state and national economy.

One of the important provisions of the recently signed 2018 Farm Bill (the Agriculture Improvement Act of 2018) is the relisting of hemp as an agricultural commodity. But without congressional action, continued confusion and misinformation regarding hemp could discourage financial institutions from partnering with our farmers on this new commodity.

The Secure and Fair Enforcement Banking Act (H.R. 2215) is a strong first step in providing legitimate cannabis related and state-licensed farmers, business, and consumers with access to an efficient and safe banking system, and traditional loans and capital markets.

Sincerely,

Nicole Fried  
Commissioner of Agriculture



Florida

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(850) 617-7700

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**TESTIMONY**

Statement of

**David H. Carpenter**  
Legislative Attorney

Before

Committee on Financial Services  
Subcommittee on Consumer Protection and Financial Institutions  
U.S. House of Representatives

Hearing on

**“Challenges and Solutions: Access to Banking  
Services for Cannabis-Related Businesses”**

February 13, 2019

Congressional Research Service  
7-5700  
[www.crs.gov](http://www.crs.gov)

## Introduction

Chairman Meeks, Ranking Member Luetkemeyer, and Members of the Subcommittee, my name is David Carpenter, and I am a legislative attorney at the Congressional Research Service (CRS). Thank you for inviting me to testify on behalf of CRS on access to banking services for marijuana-related businesses.

My testimony provides a brief overview of how marijuana is currently regulated under the federal Controlled Substances Act. It then discusses the legal obligations of financial institutions under the Bank Secrecy Act and federal anti-money laundering laws, and the potential legal risks associated with providing financial services to entities that manufacture, produce, cultivate, sell, transport, or purchase marijuana (“marijuana-related businesses”). It then provides an overview of the discussion draft of the Secure And Fair Enforcement Banking Act of 2019 (SAFE Banking Act), dated February 6, 2019 (10:58 a.m.) and notes some potential uncertainties regarding how the SAFE Banking Act might apply to financial institutions with regard to serving marijuana businesses operating in compliance with state marijuana laws.

In serving the U.S. Congress on a non-partisan and objective basis, CRS takes no position on the efficacy of the SAFE Banking Act.

## Brief Summary of the Regulation of Marijuana Under the Controlled Substances Act<sup>1</sup>

The federal Controlled Substances Act (CSA)<sup>2</sup> establishes the legal regime through which the federal government: (1) regulates and facilitates the lawful production, possession, and distribution of controlled substances; (2) prevents diversion<sup>3</sup> of these substances from legitimate purposes; and (3) penalizes unauthorized activities involving controlled substances.<sup>4</sup> The CSA places various plants, drugs, and chemicals into one of five schedules based on the substance’s medical use, potential for abuse, and safety or dependence liability.<sup>5</sup> The five schedules are progressively ordered with the substances generally considered the most dangerous and addictive classified as Schedule I substances and those generally regarded as the least dangerous and addictive classified as Schedule V substances.<sup>6</sup> By law, Schedule I substances have “a high potential for abuse” with “no currently accepted medical use in treatment in the

<sup>1</sup> For a detailed discussion and analysis of federal marijuana law and policy, see CRS Report R44782, *The Marijuana Policy Gap and the Path Forward*, coordinated by Lisa N. Sacco

<sup>2</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§ 801–904) (enacting the CSA).

<sup>3</sup> The Drug Enforcement Administration (DEA) of the Department of Justice (DOJ) has explained that the term “diversion,” used in the context of the CSA, refers to “the redirection of controlled substances which may have lawful uses into illicit channels.” Controlled Substances Quotas, 83 Fed. Reg. 32,784, 32,784 (July 16, 2018) (codified at 21 C.F.R. pt. 1303).

<sup>4</sup> See CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh (listing CSA’s criminal provisions regarding unauthorized trafficking, possession, or other prohibited activities involving controlled substances).

<sup>5</sup> 21 U.S.C. § 812(b).

<sup>6</sup> When Congress enacted the CSA in 1970, it established “initial schedules” of controlled substances, *id.* § 812(c), but specified that the schedules “shall be updated” periodically, *id.* § 812(a). The current list of controlled substances within their designated schedules may be found in 21 C.F.R. §§ 1308.11–15.

United States” and cannot safely be dispensed under a prescription.<sup>7</sup> Schedule I substances may be lawfully used only for bona fide, federal government-approved research studies.<sup>8</sup>

Marijuana is currently classified as a Schedule I controlled substance and is, therefore, subject to the most severe restrictions and penalties under the CSA.<sup>9</sup> As a result, it is a federal crime to grow, sell, or merely possess the drug.<sup>10</sup> In addition to facing the prospect of federal criminal prosecution, imprisonment, and criminal fines, those who violate the CSA may suffer a number of additional adverse consequences under federal law.<sup>11</sup> For example, federal authorities may confiscate, through civil or criminal forfeiture proceedings, any property used to grow marijuana or facilitate its sale or use, as well as all proceeds derived from the sale of marijuana.<sup>12</sup>

In spite of these federal prohibitions, a number of states and localities have established laws and policies that permit certain marijuana-related activities.<sup>13</sup> While the Department of Justice (DOJ) and the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) have previously issued guidance on the interplay of federal marijuana laws and conflicting state legalization efforts,<sup>14</sup> Congress has not passed comprehensive legislation to address state and local marijuana legalization laws. Thus, regardless of state and local laws purporting to authorize marijuana use, federal law prohibits cultivation, distribution, and possession of marijuana, except by those who engage in federally approved research.<sup>15</sup>

## Financial Services for Marijuana Businesses

### Bank Secrecy Act<sup>16</sup> and Federal Anti-Money Laundering Laws

When financial institutions provide financial services to business customers, they generally are not directly involved in the sale, possession, or distribution of their customers’ products. However, financial

<sup>7</sup> 21 U.S.C. § 812(b).

<sup>8</sup> *Id.* § 823(f).

<sup>9</sup> *Id.* § 812(c)(a)(c)(10); 21 C.F.R. § 1308.11(d)(23).

<sup>10</sup> 21 U.S.C. §§ 841-890.

<sup>11</sup> *Id.* For a detailed description of the CSA’s civil and criminal provisions, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

<sup>12</sup> 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1). For information on the procedural requirements and potential defenses associated with asset forfeiture, see CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

<sup>13</sup> *Map of Marijuana Legality by State*, DISA Global Solutions, <https://disa.com/map-of-marijuana-legality-by-state>, (last visited February 12, 2019).

<sup>14</sup> For example, in 2013, former Deputy Attorney General James Cole issued a subsequently rescinded memorandum to U.S. attorneys that reiterated the fact that marijuana cultivation, sale, distribution, and possession remain unlawful under federal law and outlined eight federal enforcement priorities. Memorandum from James M. Cole, Deputy Attorney Gen. to All United States Attorneys Regarding Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) [hereinafter 2013 Cole Memorandum], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>. The 2013 Cole Memorandum and other DOJ marijuana-related guidance was rescinded on January 4, 2018. Memorandum from Jefferson B. Sessions, Attorney Gen. to All United States Attorneys Regarding Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>. FinCEN also “issu[ed] guidance to clarify Bank Secrecy Act (‘BSA’) expectations for financial institutions seeking to provide services to marijuana-related businesses,” which as of the date of this testimony remained in effect. U.S. DEP’T OF THE TREASURY, FIN. CRIMES ENF’T NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESS, FIN-2014-G001 (Feb. 14, 2014) [hereinafter FinCEN Marijuana Guidance 2014], <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>; see *infra* “FinCEN Guidance to Financial Institutions” section of this testimony.

<sup>15</sup> 21 U.S.C. § 812(c); 21 C.F.R. § 1308.11(d)(23).

<sup>16</sup> The “Bank Secrecy Act” is commonly used to refer to Titles I and II of Pub. L. No. 91-508, including its major component, the Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, Title II, 84 Stat. 1114, 1118–24 (1970) (as amended and

institutions commonly acquire the financial proceeds generated from the sale of customer products. To the extent that a bank acquires the proceeds derived from sales of marijuana in violation of federal law, federal authorities could potentially confiscate such funds through civil or criminal asset forfeiture proceedings,<sup>17</sup> even if the marijuana sales are permissible under state law.<sup>18</sup> For example, if a bank lends to a state-authorized medical marijuana dispensary, federal authorities might be able to require the bank to forfeit any proceeds that the bank generated from the loan on the grounds that such proceeds resulted from sales of marijuana in violation of federal law.<sup>19</sup>

In addition to the risk of asset forfeiture, federal anti-money laundering laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize certain transactions involving property that is known to be derived from certain unlawful activities,<sup>20</sup> including the sale and distribution of marijuana.<sup>21</sup> Violators of these anti-money laundering laws may be subject to fines and imprisonment,<sup>22</sup> and any real or personal property involved in or traceable to prohibited transactions is potentially subject to criminal or civil forfeiture.<sup>23</sup> For example, a bank employee could be subject to a 20-year prison sentence and criminal money penalties under Section 1956 for knowingly engaging in a financial transaction involving marijuana-related proceeds that is conducted with the intent to promote a further offense, such as withdrawing marijuana-generated funds from a business checking account in order to pay the salaries of medical marijuana dispensary employees.<sup>24</sup> Similarly, a bank officer could face a 10-year prison term and criminal money penalties under Section 1957 for knowingly receiving deposits or allowing withdrawals of \$10,000 or more in cash that is derived from distributing and selling marijuana.<sup>25</sup>

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codified at 12 U.S.C. §§ 1829b, 1951–59; 31 U.S.C. §§ 5311–32). The Bank Secrecy Act requires reports and records of transactions involving cash, negotiable instruments, or foreign currency and authorizes the Secretary of the Treasury to prescribe regulations to insure that adequate records are maintained of transactions that have a “high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.” Title II, 84 Stat. at 1118.

<sup>17</sup> 18 U.S.C. § 981(a)(1) (“The following property is subject to forfeiture to the United States . . . (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title) [i.e., the list of predicate offenses for money laundering (18 U.S.C. § 1956)], or a conspiracy to commit such offense.”).

<sup>18</sup> *United States v. McIntosh*, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016).

<sup>19</sup> 18 U.S.C. § 981(a).

<sup>20</sup> 18 U.S.C. §§ 1956(c)(7), 1957(f)(3). For a full list of predicate offenses, see the “Specified Unlawful Activities” section of CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>21</sup> 18 U.S.C. §§ 1956, 1957. For a detailed analysis of federal anti-money laundering laws, see CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>22</sup> Section 1956 violations are punishable by imprisonment for not more than 20 years and fines of up to \$500,000 or twice the value of the property involved, whichever is greater. 18 U.S.C. § 1956(a)(1). Section 1957 violations are punishable by imprisonment for not more than 10 years and fines of up to \$250,000 (or \$500,000 for organizations) or twice the value of the property involved in the transaction, whichever is greater. *Id.* §§ 1957(b), 1957(h), 3571, 3559. Conspiracy to violate either section carries the same maximum penalties, as does aiding and abetting the commission of either offense. *Id.* §§ 2, 1956(h). See e.g., *United States v. Lyons*, 740 F.3d 702, 715 (1st Cir. 2014). For a detailed description of the penalties for violating these laws, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

<sup>23</sup> 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1).

<sup>24</sup> *Id.* § 1956(a)(1)(A)(i).

<sup>25</sup> *Id.* § 1957(a), (d).



Under federal law, financial institutions<sup>26</sup> must aid law enforcement in investigating and prosecuting those who violate federal laws, including the CSA.<sup>27</sup> For example, the Secretary of the Treasury has exercised authority to require financial institutions to file suspicious activity reports (SARs)<sup>28</sup> with FinCEN regarding financial transactions<sup>29</sup> suspected to be derived from illegal activities,<sup>30</sup> including sales of marijuana.<sup>31</sup> Depository institutions<sup>32</sup> also must establish and maintain anti-money laundering programs designed to prevent institutions from facilitating money laundering and financing terrorist activity, as well as to ensure that the institutions' officers and employees have sufficient knowledge of their customers and their customers' businesses to identify when filing SARs is appropriate.<sup>33</sup>

Additionally, financial institutions, their employees, and certain other affiliated parties<sup>34</sup> could be subject to administrative enforcement actions by federal regulators for violating the Bank Secrecy Act or anti-

<sup>26</sup> For the purposes of the Bank Secrecy Act and anti-money laundering laws, the term "financial institution" is defined broadly to include banks, savings associations, credit unions, broker dealers, insurance companies, pawnbrokers, automobile dealers, casinos, cash checkers, travel agencies, and precious metal dealers, among others. 31 U.S.C. § 5312(a)(2).

<sup>27</sup> 12 U.S.C. §§ 1951–59; 31 U.S.C. §§ 5311–32.

<sup>28</sup> 31 U.S.C. § 5318(g). Filing suspicious activity reports (SARs) are mandatory under certain circumstances, but financial institutions may file SARs even when not mandated by law. *See, e.g.* 12 C.F.R. §§ 1020.320(a) (banks); 31 CFR § 1022.320(a) (money services businesses).

<sup>29</sup> 31 C.F.R. § 1010.100(bbb), "Transaction" is defined as:

means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

<sup>30</sup> 18 U.S.C. §§ 1956(c)(7), 1957(f)(3). For a full list of predicate offenses, *see* the "Specified Unlawful Activities" section of CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>31</sup> 21 U.S.C. §§ 841–90; 31 U.S.C. § 5318(g); 31 C.F.R. § 1020.320.

<sup>32</sup> There are several different types of depository institutions, including state- and federally chartered banks, savings associations, and credit unions.

<sup>33</sup> *See generally* 31 U.S.C. § 5318(h)(1); 31 C.F.R. §§ 1020.200–220. *See also* 12 U.S.C. § 1786(q)(1) (credit unions); 12 U.S.C. § 1818(s) (banks and savings associations). Even in the absence of suspicion, financial institutions must file currency transaction reports (CTRs) with FinCEN relating to transactions involving \$10,000 or more in cash or other "currency." 31 U.S.C. § 5313; 31 C.F.R. §§ 1020.300–320; 31 C.F.R. §§ 1010.300–370. 31 C.F.R. § 1010.100(m), "Currency" is defined as:

The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

The willful failure to file SARs and CTRs is punishable by imprisonment for not more than five years or not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity. 31 U.S.C. § 5322. Structuring a transaction to avoid the reporting requirement exposes the offender to the same maximum terms of imprisonment. *Id.* § 5324(d). For a detailed description of penalties for violations of Bank Secrecy Act reporting and monitoring requirements, *see* CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle.

<sup>34</sup> *See, e.g.*, 12 U.S.C. §§ 1813(u) (defining "institution-affiliated party" to include, among others, "any director, officer, employee, or controlling stockholder . . . of, or agent for an insured depository institution," as well as any independent contractor . . . who knowingly or recklessly participates in any violation of any law or regulation; any breach of fiduciary duty; or any unsafe or unsound practice which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.").

money laundering laws.<sup>35</sup> For example, federal banking regulators<sup>36</sup> implement comprehensive supervisory regimes that are designed to ensure that depository institutions are managed and operated in a safe and sound fashion to maintain profitability and in compliance with applicable state and federal law. To further this mandate, banking regulators may exercise strong, flexible administrative enforcement powers against depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates that act unlawfully, including by engaging in marijuana-related activities that violate the CSA or the anti-money laundering laws.<sup>37</sup> Banking regulators have legal authority, for instance, to issue cease and desist orders, impose civil money penalties, and issue removal and prohibition orders that temporarily or permanently ban individuals from working for any depository institution.<sup>38</sup> Banking regulators also have authority, under certain circumstances, to revoke an institution's federal deposit insurance coverage and to take control of and liquidate a depository institution.<sup>39</sup> A criminal conviction for violating the Bank Secrecy Act or anti-money laundering laws is an explicit ground for appointing the Federal Deposit Insurance Corporation "as receiver [to] place the insured depository institution in liquidation."<sup>40</sup>

Because of these potential legal risks, many financial institutions have reportedly been unwilling to provide financial services to the marijuana industry.<sup>41</sup> This has often left marijuana businesses without the ability to accept debit or credit card payments, to use electronic payroll services, to maintain checking accounts, or to avail themselves of other common banking services. Consequently, many marijuana businesses are reportedly operating exclusively in cash,<sup>42</sup> raising concerns about tax collection and public safety, among other things.<sup>43</sup>

<sup>35</sup> See, e.g., 12 U.S.C. §§ 1786, 1818, 1831o.

<sup>36</sup> For these purposes, the federal banking regulators are: the Office of the Comptroller of the Currency (OCC) for national banks and federal savings associations; the Board of Governors of the Federal Reserve System for domestic operations of foreign banks and state-chartered banks that are members of the Federal Reserve System; the Federal Deposit Insurance Corporation (FDIC) for state savings associations and state-chartered banks that are not members of the Federal Reserve System; and the National Credit Union Administration (NCUA) for federally insured credit unions. *Id.* §§ 1766, 1813(q). The Bureau of Consumer Financial Protection (CFPB) also has certain consumer compliance regulatory authority over depository institutions. *Id.* §§ 5481 – 5603.

<sup>37</sup> See, e.g., *id.* § 1786 (credit unions); *id.* §§ 1818, 1831o (banks and savings associations). See also Press Release, Off. of the Comptroller of the Currency, *OCC Assesses \$2.5 Million Civil Money Penalty Against Gibraltar Private Bank and Trust Company for Bank Secrecy Act Violations* (Feb. 25, 2016), <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-20.html> (ordering the payment of a civil money penalty and remedial actions for allegedly "fail[ing] to maintain an effective Bank Secrecy Act/Anti-Money Laundering (BSA/AML) compliance program.").

<sup>38</sup> See, e.g., 12 U.S.C. § 1786 (credit unions); *id.* §§ 1818, 1831o (banks and savings associations).

<sup>39</sup> See, e.g., *id.* §§ 1786, 1787 (credit unions); *id.* §§ 1818, 1821, 1831o (banks and savings associations).

<sup>40</sup> *Id.* § 1821(c)(5)(M), (d)(2)(E).

<sup>41</sup> See, e.g., GUIDANCE ON PROVISION OF FINANCIAL SERVICES TO MEDICAL MARIJUANA & INDUSTRIAL HEMP-RELATED BUSINESSES IN NEW YORK STATE, N.Y. Dep't of Financial Services, 2, (Jul. 3, 2018) ("Because marijuana currently is still listed on Schedule I under the Federal Controlled Substances Act, medical marijuana . . . businesses operating in accordance with New York State laws and regulations continue to have difficulty establishing banking relationships at regulated financial institutions. The ability to establish a banking relationship is an urgent issue today for the legal cannabis industry. So long as it remains difficult to open and maintain bank accounts, the industry will largely rely on cash to conduct business and operate.")

<sup>42</sup> *Id.*

<sup>43</sup> See Tom Angell, *Trump Treasury Secretary Wants Marijuana Money in Banks*, FORBES (Feb. 6, 2018), <https://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks/#3c9bc4ed3a53> (last visited Feb. 12, 2019).

## FinCEN Guidance to Financial Institutions

In response to state and local marijuana legalization efforts, FinCEN issued guidance with respect to marijuana-related financial crimes on February 14, 2014.<sup>44</sup> This guidance appears to provide a roadmap for financial institutions to comply with suspicious activity reporting requirements when providing financial services to marijuana businesses operating in compliance with state or local laws, while also alerting FinCEN to transactions that might trigger federal enforcement priorities.<sup>45</sup>

The guidance notes that:

[b]ecause federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and [FinCEN regulations].<sup>46</sup>

FinCEN advised financial institutions that, in providing services to a marijuana business, they must file one of three types of special SARs:

1. A marijuana limited SAR should be filed when a financial institution determines, after the exercise of due diligence, that a marijuana business is not engaged in any activities that violate state law or implicate the investigation and prosecution priorities outlined in the guidance, including distribution to minors and supporting drug cartels or similar criminal enterprises;<sup>47</sup>
2. A marijuana priority SAR must be filed when a financial institution believes a marijuana business is engaged in activities that implicate prosecution priorities;<sup>48</sup> and
3. A marijuana termination SAR should be filed when a financial institution finds it necessary to sever its relationship with a marijuana business to maintain an effective anti-money laundering program.<sup>49</sup>

The FinCEN guidance also lists examples of “red flags” that may indicate that a marijuana priority SAR is appropriate.<sup>50</sup>

As of April 30, 2018, FinCEN has reported that it has received more than 50,000 marijuana-related SARs and that over 400 depository institutions reported providing some form of financial services to marijuana-related businesses.<sup>51</sup> However, it is not clear precisely what level of financial services these depository

<sup>44</sup> FinCEN Marijuana Guidance 2014, *supra* note 14. Although DOJ rescinded several marijuana-related guidance documents, FinCEN’s guidance remains in effect. The Administration could reverse or otherwise make significant changes to its enforcement priorities and policies. See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

<sup>45</sup> FinCEN Marijuana Guidance 2014, *supra* n. 14.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 3–4.

<sup>48</sup> *Id.* at 4. These enforcement priorities were originally outlined in the 2013 Cole Memorandum. 2013 Cole Memorandum, *supra* note 14.

<sup>49</sup> FinCEN Marijuana Guidance 2014, *supra* note 14, at 4–5.

<sup>50</sup> *Id.* at 5–7. Some examples of “red flags” noted in the guidance are: “[t]he business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law”; and “[a] customer seeks to conceal or disguise involvement in marijuana-related business activity.” *Id.* at 6.

<sup>51</sup> MARIJUANA BANKING UPDATE, Dep’t of Treasury, Financial Crimes Enforcement Network, [https://www.fincen.gov/sites/default/files/shared/277157%20EA%202nd%20Q%20MJ%20Stats\\_Public.pdf](https://www.fincen.gov/sites/default/files/shared/277157%20EA%202nd%20Q%20MJ%20Stats_Public.pdf).

institutions are providing marijuana businesses.<sup>52</sup> Moreover, it remains uncertain whether these depository institutions are directly serving businesses that are actually involved in cultivating and selling marijuana, or are only serving entities that are indirectly involved in the marijuana business, such as landlords renting office space to marijuana businesses.<sup>53</sup>

## Overview of the SAFE Banking Act

The discussion draft of the SAFE Banking Act<sup>54</sup> would not remove marijuana from the CSA schedules or move marijuana from Schedule I to a different schedule. As a result, even if the SAFE Banking Act became law, it would continue to be a federal crime to grow, sell, or merely possess the drug.<sup>55</sup> Instead, the legislation would appear to attempt:

- to constrain federal banking regulator<sup>56</sup> authority to penalize depository institutions<sup>57</sup> for providing financial services to marijuana businesses operating in compliance with state or local laws;<sup>58</sup> and
- to protect depository institutions and their personnel from some legal liability under the CSA, anti-money laundering laws, and other federal laws when providing financial services to, or investing proceeds derived from serving, marijuana businesses operating in compliance with state or local laws.

More specifically, Section 2 of the draft bill would, among other things, prohibit federal banking regulators from “terminat[ing] or limit[ing] the deposit insurance or share insurance . . . solely because the depository institution provides or has provided financial services to a cannabis-related legitimate business” or “prohibit[ing], penalize[ing], or otherwise discourage[ing] a depository institution from providing financial services to a cannabis-related legitimate business.”<sup>59</sup> The draft bill would define “cannabis-related legitimate business” generally to mean entities engaged in marijuana-related business activities “pursuant to” state and local laws.<sup>60</sup>

<sup>52</sup> Robert Rowe, *Compliance and the Cannabis Conundrum*, ABA Banking J. Sep. 11, 2018, <https://bankingjournal.aba.com/2018/09/compliance-and-the-cannabis-conundrum/> (“According to FinCEN, by the end of the third quarter 2017, it had received nearly 40,000 SARs reporting activity associated with a marijuana-related business. The great majority of those were marijuana limited SARs, indicating that the industry continues to offer some level of services to the cannabis industry. No one knows, though, how extensive those offerings are or what kinds of banking relationships do exist. Anecdotal reporting suggests it is very limited.”).

<sup>53</sup> *Id.*

<sup>54</sup> Discussion Draft of the Secure And Fair Enforcement Banking Act of 2019, dated February 6, 2019 (10:58 a.m.) (hereinafter SAFE Banking Act).

<sup>55</sup> See 21 U.S.C. §§ 841–90.

<sup>56</sup> The bill would define “Federal banking regulator” to be the Federal Reserve Board, OCC, FDIC, CFPB, “or any other Federal agency or department that regulates banking or financial services, as determined by the Secretary of the Treasury.” SAFE Banking Act § 8(5).

<sup>57</sup> The draft bill would define “depository institution” to mean state and federal credit unions and banks, savings associations, and any other “depository institution” as defined by 12 U.S.C. § 1813(c). SAFE Banking Act § 8(4). Although non-depository institutions also offer financial services, my testimony, like the SAFE Banking Act, focuses on depository institutions.

<sup>58</sup> The draft bill would also apply to marijuana laws and regulations of Indian tribes. For simplicity, references to the term “state” in relation to the SAFE Banking Act in this testimony encompasses an “Indian Tribe” within “Indian Country” as those terms are defined in Section 6 of the SAFE Banking Act.

<sup>59</sup> SAFE Banking Act § 2.

<sup>60</sup> *Id.* § 8(3).

Section 3 of the draft bill appears designed to reduce legal liability under federal anti-money laundering laws for financial institutions serving the marijuana industry.<sup>61</sup> Section 3 would clarify that “the proceeds from a transaction conducted by a cannabis-related legitimate business shall not be considered as proceeds from an unlawful activity solely because the transaction was conducted by a cannabis-related legitimate business” for the purposes of federal anti-money laundering laws “and all other provisions of Federal law.”<sup>62</sup>

Section 4(a) appears designed to protect depository institutions and their “officers, directors, and employees” from liability under federal law or regulation based solely on their providing “financial services to cannabis-related legitimate businesses” “[i]n a State, political subdivision of a State, or Indian country” that “allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to the law or regulation of” that jurisdiction.<sup>63</sup>

Similarly, Section 4(b) of the draft bill appears designed to encourage depository institutions to provide loans to marijuana businesses by providing some protection from asset forfeiture laws.<sup>64</sup> Specifically, Section 4(b) would generally protect depository institutions from “criminal, civil, or administrative forfeiture of” “a legal interest in the collateral for a loan or another financial service provided to an owner or operator of a cannabis-related legitimate business” or to entities that rent or sell property to a cannabis-related legitimate business.<sup>65</sup>

The draft bill would not expressly eliminate a financial institution’s responsibility to file SARs associated with marijuana-related transactions. Instead, Section 6 of the draft bill would require FinCEN to issue guidance on marijuana-related suspicious activity reporting requirements that “is consistent with the purpose and intent of the SAFE Banking Act.”<sup>66</sup> The draft bill would also require banking regulators to “develop uniform guidance and examination procedures for depository institutions that provide financial services to cannabis-related legitimate businesses.”<sup>67</sup>

## Impact the SAFE Banking Act Might Have on Depository Institutions Serving Marijuana Businesses

It is unclear how enactment of the SAFE Banking Act would affect the financial services industry. The discussion draft of the SAFE Banking Act, if enacted, might reduce some legal and financial risks that financial institutions face when serving the marijuana industry, but significant risks likely would remain. The remaining risk of providing financial services to marijuana businesses will likely depend on factors that are unknowable at this time.

For example, federal banking regulators have strong and flexible enforcement powers that they may exercise to ensure depository institutions comply with state and federal laws,<sup>68</sup> and some discretion in

<sup>61</sup> *Id.* § 3.

<sup>62</sup> *Id.* The draft bill’s liability provisions in Section 3 would appear to extend to marijuana-related transactions generally, regardless of whether a depository institution is involved.

<sup>63</sup> SAFE Banking Act § 4(a).

<sup>64</sup> *Id.* § 4(b).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 6 (amending 31 U.S.C. § 5318(g)).

<sup>67</sup> *Id.* § 7. Section 5 of the bill would expressly provide that depository institutions would not be required to provide services to marijuana businesses. *Id.* § 5.

<sup>68</sup> See *supra* nn.34–40 and surrounding text.

how they interpret and enforce the laws within their jurisdictions.<sup>69</sup> The draft bill also contains a number of potentially ambiguous provisions that might be subject to multiple reasonable interpretations. Consequently, a depository institution's decision on whether to serve the marijuana industry likely will depend on the supervisory and enforcement guidance banking regulators provide for the SAFE Banking Act.<sup>70</sup> Moreover, there is always the possibility that the SAFE Banking Act could spark litigation between financial institutions that serve marijuana businesses and their regulators, meaning that the Act's effect may ultimately depend on how courts interpret its language.

For instance, Section 2 of the draft bill would generally prohibit banking regulators from "penaliz[ing], or otherwise discourag[ing] a depository institution from providing financial services to a cannabis-related legitimate business."<sup>71</sup> However, the draft bill does not appear to absolve depository institutions entirely from their responsibilities to implement customer due diligence and certain other anti-money laundering program compliance standards when serving marijuana-related businesses. Questions remain regarding how banking regulators would resolve the tension between ensuring that depository institutions are effectively evaluating money laundering and other compliance risks while also abiding by the bill's proscription on penalizing and discouraging institutions from serving the marijuana industry.

It is also unclear how FinCEN would interpret Section 6 in conjunction with Section 3 for the purpose of suspicious activity reporting. As explained above, financial institutions generally must file a SAR regarding financial transactions<sup>72</sup> suspected to be derived from "illegal activities."<sup>73</sup> The SAFE Banking Act does not expressly eliminate a financial institution's suspicious activity reporting requirements associated with marijuana-related transactions. Instead, Section 6 of the draft bill appears to envision that financial institutions would continue to be required to file SARs on marijuana businesses in accordance with "appropriate guidance issued by FinCEN," which must be "consistent with the purpose and intent of the SAFE Banking Act of 2019."<sup>74</sup> Additionally, Section 3 of the draft bill provides that the proceeds from transactions with "cannabis-related legitimate business" no longer constitute proceeds of "unlawful activity" for purposes of "all . . . provisions of Federal law."<sup>75</sup> If the proceeds of such covered transactions are no longer unlawful under the SAFE Banking Act, could FinCEN determine that financial institutions would no longer have to file SARs associated with marijuana-related transactions?

It is also unclear how banking regulators would respond to issues that are not explicitly addressed by the draft bill. For instance, in order to process customer debit or credit card payments and to transfer funds electronically, depository institutions generally need access to the Federal Reserve's payment system through a master account at a regional Federal Reserve Bank.<sup>76</sup> In the past, at least one Federal Reserve

<sup>69</sup> See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey and CRS Report R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, by Todd Garvey.

<sup>70</sup> Financial institutions might also desire guidance from DOJ, FinCEN, and state criminal law enforcement agencies.

<sup>71</sup> SAFE Banking Act § 2.

<sup>72</sup> 31 C.F.R. § 1010.100(bbb), "Transaction" is defined as:

means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

<sup>73</sup> See, e.g. 31 C.F.R. § 1020.30 (banks).

<sup>74</sup> SAFE Banking Act § 6.

<sup>75</sup> *Id.* § 3.

<sup>76</sup> See generally RETAIL PAYMENT SYSTEM IT EXAMINATION HANDBOOK, Fed. Financial Institution Examination Council,

Bank had refused to approve an application for a master account for a credit union that openly proposed to serve marijuana businesses in violation of federal law.<sup>77</sup> The draft bill does not explicitly address access to the Federal Reserve's payment system. Refusing to approve master account applications because a depository institution intends to serve marijuana businesses could arguably qualify as an action "discourag[ing]" depository institutions from providing financial services to marijuana businesses within the meaning of Section 2 of the SAFE Banking Act. However, the precise scope of that provision would be left to the Federal Reserve and the courts to determine.

Even if the SAFE Banking Act became law, financial institutions that provide services to the marijuana industry would likely continue to have a legal obligation to ensure that the businesses they serve comply with a complex and not fully consistent web of relevant state and local marijuana laws.<sup>78</sup> Furthermore, because the draft bill would not decriminalize marijuana under the CSA, marijuana businesses and their officers, directors, and employees could still face federal criminal prosecution, criminal fines, and asset forfeiture.<sup>79</sup> Thus, financial institutions would likely continue to face significant financial risks when providing services to marijuana businesses because of the potential legal exposure of such businesses. For example, a marijuana business owner might have trouble repaying a bank loan if he is subject to criminal prosecution, criminal fines, and asset forfeiture proceedings for violating the CSA. Although Section 4(b) of the draft bill might protect against the forfeiture of a depository institution's legal interest in assets securing financial transactions, those protections would not necessarily guarantee that a depository would not, for example, suffer losses on a defaulted secured loan. As a result, compliance costs associated with serving the marijuana industry might be significantly higher than costs associated with more typical business industries.<sup>80</sup> In light of these legal and financial risks, banking regulators might consider imposing heightened or particularized examination procedures, anti-money laundering due diligence standards, or other regulatory measures on depository institutions serving marijuana businesses. However, it is unclear to what extent such additional measures would comply with the proscription on "penaliz[ing],

<https://it handbook.fiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement.aspx>, (last visited Feb. 11, 2019); STATE-BACKED FINANCIAL INSTITUTION (PUBLIC BANK) FOR THE STATE OF CALIFORNIA SERVICING THE CANNABIS INDUSTRY FEASIBILITY STUDY 2018, Level 4 Ventures, Inc., JADE Compliance Solutions, and RLR Management Consulting Inc., 17, Dec. 6, 2018 ("To be clear, without a master account issued by the Federal Reserve the bank cannot function. It would have no ability to accept and clear customer checks drawn on other banks; no ability to issue checks or otherwise make payments other than in cash; and no ability to transfer funds to other banks."); Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City, 154 F. Supp. 3d 1185, 1187 (D. Col. 2016) ("The newly minted credit union promptly applied to open a 'master account' at the Federal Reserve Bank of Kansas City. Despite its name, the Bank is not a federal agency. Rather, it is a private corporation created by an Act of Congress and run by its own board of directors. Depository institutions can only access the Federal Reserve payments system through a master account or through a correspondent bank that has a master account. This access is necessary for the electronic transfer of funds. Simply put, without this access The Fourth Corner Credit Union is out of business."), *vacated and remanded on other grounds*, Fourth Corner Credit Union v. Fed. Reserve Bd., 861 F.3d 1052 (10th Cir. 2017).

<sup>77</sup> Fourth Corner Credit Union v. Fed. Reserve Bd., 861 F.3d 1052 (10th Cir. 2017).

<sup>78</sup> See *supra* "FinCEN Guidance to Financial Institutions" section of this testimony. See also REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA, Commonwealth of Mass., 75, Mar. 8, 2016 ("In February, 2014, the Department of the Treasury's Financial Crimes Enforcement Network issued guidance concerning how financial institutions can service marijuana businesses without violating the federal Bank Secrecy Act. Banks must undertake rigorous due diligence and compliance efforts to ensure a marijuana business is in compliance with all state laws, and to identify any suspicious or criminal activity. Notwithstanding this guidance, the large national banks have not participated in the industry to this point, perhaps because dealing with a marijuana business requires a higher level of compliance and effort or because they fear future federal policy changes could leave them and their customers exposed to risk.").

<sup>79</sup> See SAFE Banking Act § 4(b).

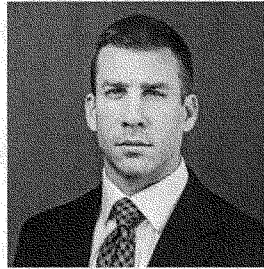
<sup>80</sup> REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA, Commonwealth of Mass., 75, Mar. 8, 2016 ("Banks must undertake rigorous due diligence and compliance efforts to ensure a marijuana business is in compliance with all state laws, and to identify any suspicious or criminal activity. . . . The banks must comply with daunting requirements for due diligence and compliance reporting, which can be time consuming and expensive.").

or otherwise discourag[ing] a depository institution from providing financial services to a cannabis-related legitimate business” under Section 2 of the draft bill.



**Figure A-1. Photo and Biography**

David H. Carpenter, Legislative Attorney, Congressional Research Service

**Biography**

B.A., University of North Carolina at Chapel Hill; J.D., University of North Carolina School of Law. Member of the North Carolina Bar.



December 6, 2017

The Honorable Paul D. Ryan  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Mitch McConnell  
Majority Leader  
U.S. Senate  
Washington, DC 20510

Dear Speaker Ryan and Leader McConnell:

On behalf of the Faith & Freedom Coalition, a grassroots public policy organization with 1.5 million members and supporters committed to strengthening the family and advancing Judeo-Christian values, I write to request that you oppose the inclusion of any pro-marijuana riders in annual appropriations bills.

Marijuana use, whether by young people or adults, will not contribute to a shared culture of hard work, self-improvement, and care for the least among us. Instead, use of marijuana is connected to workplace absenteeism<sup>i</sup>, impairments in memory and learning<sup>ii</sup>, and increase in welfare dependency<sup>iii</sup>. In particular, for adolescents and children whose brains are still developing, the harms of marijuana are magnified as the drug causes long-lasting changes in the brain<sup>iv</sup>.

The increasing social acceptability of marijuana appears to be increasing the overall rate of marijuana use, with 13.9% of Americans now using marijuana, and approximately four million Americans with a marijuana use disorder<sup>v</sup>. Further, marijuana has been shown in animal studies to cross-sensitize the brain with opioids<sup>vi</sup>. Marijuana users are three times more likely to use heroin, according to the Centers for Disease Control and Preventions (CDC)<sup>vii</sup>.

Our members and friends in the law enforcement community have shared story after story of marijuana legalization enabling black market and cartel activity<sup>viii</sup>. In the words of the Colorado Attorney General, "[Legalization] will not stop crime. You're just making it easier for people who want to make money. What we've done is give them cover<sup>ix</sup>."

Additionally, drugged driving accidents and fatalities have been rising at a disturbing rate in legalized states<sup>x</sup>. Such concerns have led the American Automobile Association (AAA) to oppose legalization measures<sup>xi</sup>. And marijuana gummies and candies are finding their ways into schools<sup>xii</sup> and landing children in emergency rooms<sup>xiii</sup>.

We therefore urge you to oppose pro-marijuana policy riders, including those that grant marijuana businesses access to the U.S. banking system, for the good of our youth and our country. Thank you for your work on this important issue.

Sincerely,



Timothy R. Head  
Executive Director

<sup>i</sup> Substance Abuse and Mental Health Services Administration (SAMHSA). National Survey on Drug Use and Health. Rockville, MD: Office of Applied Studies, SAMHSA. 2014.

<sup>ii</sup> Meier MH, Caspi A, Ambler A, et al. Persistent cannabis users show neuropsychological decline from childhood to midlife. *Proc Natl Acad Sci U S A*. 2012;109(40):E2657-E2664.

<sup>iii</sup> Fergusson DM, Boden JM. Cannabis use and later life outcomes. *Addiction*. 2008 Jun; 103(6):977-8.

<sup>iv</sup> Batalla A, Bhattacharyya S, Yücel M, et al. Structural and functional imaging studies in chronic cannabis users: a systematic review of adolescent and adult findings. *PLoS One*. 2013;8(2):e55821. <https://doi.org/10.1371/journal.pone.0055821>.

<sup>v</sup> Substance Abuse and Mental Health Services Administration (SAMHSA). National Survey on Drug Use and Health. Rockville, MD: Office of Applied Studies, SAMHSA. 2017.

<sup>vi</sup> Cadoni C, Pisanu A, Solinas M, Acquas E, Di Chiara G. Behavioral sensitization after repeated exposure to Delta 9-tetrahydrocannabinol and cross-sensitization with morphine. *Psychopharmacology (Berl)*. 2001;158(3):259-66. 10.1007/s002130100875.

<sup>vii</sup> Centers for Disease Control and Prevention. Today's Heroin Epidemic Infographics [Web page].

<https://www.cdc.gov/vitalsigns/heroin/infographic.html>.

<sup>viii</sup> Oregon State Police. A Baseline Evaluation of Cannabis Enforcement Priorities in Oregon. Salem, January 2017.

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Retrieved from <http://www.denverpost.com/2016/07/07/illegal-marijuana-grow-mexican-cartel-confiscated-pueblo/>;

Mamdooh, Sally. (2016, April 7). Mexican drug cartels are taking full advantage of Colorado's marijuana laws.

*Denver ABC 7News*. Retrieved from [http://www.thedenverchannel.com/news/local-news/marijuana/mexican-drug-](http://www.thedenverchannel.com/news/local-news/marijuana/mexican-drug-cartels-are-taking-full-advantage-of-colorados-marijuana-laws)

[cartels-are-taking-full-advantage-of-colorados-marijuana-laws](http://www.thedenverchannel.com/news/local-news/marijuana/mexican-drug-cartels-are-taking-full-advantage-of-colorados-marijuana-laws).

<sup>ix</sup> Hughes, Trevor. (2017, July 31). Marijuana's Legalization Fuels Black Market in Other States. *USA Today*, p. A1. July 31, 2017. Retrieved from [https://www.usatoday.com/story/news/nation/2017/07/31/marijuana-black-](https://www.usatoday.com/story/news/nation/2017/07/31/marijuana-black-market/507417001/)

[market/507417001/](https://www.usatoday.com/story/news/nation/2017/07/31/marijuana-black-market/507417001/).

<sup>x</sup> AAA Foundation for Traffic Safety. Prevalence of Marijuana Involvement in Fatal Crashes: Washington, 2010-2014. May 2016. Retrieved from: [https://publicaffairsresources.aaa.biz/wp-content/uploads/2016/04/Prevalence-of-](https://publicaffairsresources.aaa.biz/wp-content/uploads/2016/04/Prevalence-of-Marijuana-Involvement-Report-FINAL.pdf)

[Marijuana-Involvement-Report-FINAL.pdf](https://publicaffairsresources.aaa.biz/wp-content/uploads/2016/04/Prevalence-of-Marijuana-Involvement-Report-FINAL.pdf).

<sup>xi</sup> AAA Against Marijuana Legalization Legislation. *Tire Business*. (2017, October 10). Retrieved from <http://www.tirebusiness.com/article/20161010/NEWS/161019996/aaa-against-marijuana-legalization-legislation>.

<sup>xii</sup> KGTV (ABC Affiliate). "One arrested after marijuana gummy bears sicken Chula Vista students." Posted April 27, 2017. Retrieved from Web September 7, 2017. [http://www.10news.com/news/one-arrested-after-marijuana-](http://www.10news.com/news/one-arrested-after-marijuana-gummy-bears-sickens-chula-vista-students)

[gummy-bears-sickens-chula-vista-students](http://www.10news.com/news/one-arrested-after-marijuana-gummy-bears-sickens-chula-vista-students)

<sup>xiii</sup> NBC News. "ER Visits for Kids Rise Significantly After Pot Legalized in Colorado." Posted May 5, 2017. Retrieved from Web September 7, 2017. [http://www.nbcnews.com/health/health-news/er-visits-kids-rise-](http://www.nbcnews.com/health/health-news/er-visits-kids-rise-significantly-after-pot-legalized-colorado-n754781)

May 16, 2018

The Honorable Rodney Frelinghuysen  
Chairman  
Committee on Appropriations  
H-305, The Capitol  
Washington, DC 20515

The Honorable Nita Lowey  
Ranking Member  
Committee on Appropriations  
1016 Longworth House Office Building  
Washington, DC 20515

The Honorable John Culberson  
Chairman  
Subcommittee on Commerce, Justice, Science,  
and Related Agencies  
H-310, The Capitol  
Washington, DC 20515

The Honorable José Serrano  
Ranking Member  
Subcommittee on Commerce, Justice, Science,  
and Related Agencies  
1016 Longworth House Office Building  
Washington, DC 20515

Dear Chairman Frelinghuysen, Ranking Member Lowey, Chairman Culberson, and Ranking Member Serrano:

As members of the broader law enforcement community, including narcotics officers, chiefs, sheriffs, prosecutors and front line officers, we write to urge you to reject the inclusion of marijuana policy amendments in the Fiscal Year 2019 Commerce, Justice, Science Appropriations Act.

We are sworn to protect the safety of our citizens and communities. Unfortunately, the legalization of marijuana has made our task much more difficult. The narrative suggests that the legalization of marijuana frees up resources allowing our members to focus on more serious crimes. Instead, we spend a disproportionate amount of time responding to citizen complaints about violations of state marijuana laws, including illegal grows, public use and intoxication, and drugged driving.

Additionally, states that legalized marijuana have been unable to control the black market for the drug. The Oregon State Police reported that 70 percent of the marijuana transactions remain illegal, despite legalization laws. Such marijuana is sold on the street in legalized states and exported in vast quantities to other, non-legalized jurisdictions. There are even reports of foreign drug cartels, including Mexican cartels, moving operations to Colorado to take advantage of lax marijuana laws.

Legalization has also triggered disturbing changes in the attitudes and opinions of young people. We are responding to increased complaints from schools for illegal use and possession of marijuana. We want to be a constructive partner in getting students and citizens back on their feet and contributing to their communities.

We ask that you give the Attorney General the full set of tools available to disrupt and prosecute illegal networks of organized drug crime. Reject marijuana policy amendments that are allowing illegal businesses to flourish and expose our communities and young people to harmful substances.

Sincerely,

National Sheriffs Association  
Major Cities Chiefs Association  
The Major County Sheriffs of America (MCSA)  
Association of State Criminal Investigative Agencies (ASCIA)  
The National District Attorneys Association  
The National Narcotic Officers' Associations' Coalition (NNOAC)  
National Alliance of State Drug Enforcement Agencies (NASDEA)  
The National HIDTA Directors Association



## MAJOR CITIES CHIEFS ASSOCIATION

Albuquerque  
Arlington  
Atlanta  
Aurora  
Austin  
Baltimore  
Baltimore Co.  
Boston  
Buffalo  
Calgary, Canada  
Charlotte-Mecklenburg  
Chicago  
Cincinnati  
Cleveland  
Columbus  
Dallas  
DeKalb Co.  
Denver  
Detroit  
Edmonton, Canada  
El Paso  
Fairfax County  
Fort Worth  
Fresno  
Honolulu  
Houston  
Indianapolis  
Jacksonville  
Kansas City  
Las Vegas Metro  
Long Beach  
Los Angeles  
Los Angeles Co.  
Louisville  
Memphis  
Mesa  
Miami  
Miami-Dade  
Milwaukee  
Minneapolis  
Montgomery Co.  
Montreal, Canada  
Nashville  
Nassau Co.  
New Orleans  
New York City  
Newark  
Oakland  
Oklahoma City  
Omaha  
Orlando  
Ottawa, Canada  
Peel Region, Canada  
Philadelphia  
Phoenix  
Pittsburgh  
Portland  
Prince George's Co.  
Raleigh  
Sacramento  
Salt Lake City  
San Antonio  
San Diego  
San Francisco  
San Jose  
Seattle  
St. Louis  
Suffolk Co.  
Tampa  
Toronto, Canada  
Tucson  
Tulsa  
Vancouver, Canada  
Virginia Beach  
Washington  
Wichita  
Winnipeg, Canada  
York, Canada

June 8, 2018

The Honorable Rodney Frelinghuysen  
2306 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Nita Lowey  
2365 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Frelinghuysen and Ranking Member Lowey:

On behalf of the Major Cities Chiefs Association, representing the largest urban areas in the Nation, we are writing to express our strong opposition to inclusion of any proposed amendments to the Fiscal Year 2019 Financial Services Appropriations Act that would allow marijuana businesses full access to banking privileges.

The facts are undeniable: The legalization of marijuana has only hindered local law enforcement's efforts to keep communities safe. Any amendment that allows banking privileges to marijuana businesses creates a dangerous precedent that could allow access for other criminal activity and Schedule 1 drugs, giving money laundering access to drug cartels that are already using the cover of legalization.

We appreciate the opportunity to add our voice to this vital national discussion, and we respectfully urge you to reject any proposed amendments that would have a detrimental impact to the health and safety of our communities.

Sincerely,

J. Thomas Manger  
Chief of Police  
Montgomery County Police Department  
President, Major Cities Chiefs Association



**NATIONAL  
FRATERNAL ORDER OF POLICE®**

328 MASSACHUSETTS AVE., N.E.  
WASHINGTON, DC 20002  
PHONE 202-547-8189 • FAX 615-202-547-8190

**CHUCK CANTERBURY**  
NATIONAL PRESIDENT

**JAMES O. PASCO, JR.**  
EXECUTIVE DIRECTOR

17 May 2018

The Honorable Rodney P. Frelinghuysen  
Chairman  
Committee on Appropriations  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Nita M. Lowey  
Ranking Member  
Committee on Appropriations  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman and Representative Lowey,

I am writing on behalf of the members of the Fraternal Order of Police to advise you of our strong opposition to any amendments offered in Committee markups on any appropriations measure that would serve to further efforts to legalize or reschedule marijuana.

Under the Controlled Substances Act, marijuana is a Schedule I drug and is classified as such because of the high potential for abuse and because there is no accepted medical use for marijuana that is recognized by the Federal government.

In 1998, the National Fraternal Order of Police was among the first national organizations to oppose State and local efforts to legalize this dangerous drug. Despite consistent and vigorous opposition from the FOP as well as other law enforcement, public safety and public health organizations, certain States have legalized the use, sale, production and possession of marijuana for recreational and purported medicinal reasons which is at variance with existing Federal law. At the FOP National Conference in 2017, our members passed a resolution reaffirming our support for the prohibition of marijuana.

Public safety is threatened by the growing use of marijuana nationwide with the greatest negative impact in States that no longer comport with existing Federal law. Studies have shown that persons who use marijuana at age 17 or younger are four times more likely to become addicted to opioids, contributing to the national epidemic of opioid-related deaths that now claim more lives per year than automobile crashes and firearms combined. Studies have also shown, that teens who use marijuana at least once per month are 13 times more likely to use another drug like cocaine, heroin, or methamphetamine.

Researchers from the University of Colorado, Johns Hopkins University, and Harvard Medical School who analyzed the impact of legalization in Colorado determined the following:

- Evidence of a persistent black market for marijuana which may increase the presence of Mexican drug cartels which are bringing in other drugs like heroin.

— BUILDING ON A PROUD TRADITION —

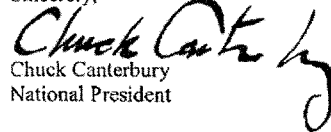
FOP 6

- Some cartels have stopped shipping marijuana into Colorado, but now control growing operations and export it to other markets.
- Higher rates of traffic fatalities while driving under the influence of marijuana.
- Increase in marijuana-related poisonings and hospital visits.
- No reduction in crime or significant increase in tax revenues.
- Use of marijuana by children less than 17 years of age is rising faster than the national average and arrests of juveniles for marijuana-related offenses are up 5%.

Marijuana, like any illegal drug, brings a risk to public safety. It has been intrinsically linked to the violence of drug trafficking and is not “harmless.” Driving under the influence of marijuana is a growing public safety issue as well. There is no standard or reliable analysis available to law enforcement officers to identify impairment of a driver who has used marijuana. The National Highway Traffic Safety Administration’s 2013-2014 study of weekend nighttime drivers showed that 12.6% of drivers tested positive for THC, an increase of 48% from that number in 2007.

We urge all members of the Committee and Subcommittees to reject amendments that would enable more of our fellow citizens to use drugs like marijuana—the risk to public safety and health is just too great. On behalf of the more than 335,000 members of the Fraternal Order of Police, thank you for considering our views on this issue. If I can be of any further assistance to you, please do not hesitate to contact me or my Senior Advisor, Jim Pasco, in my Washington office.

Sincerely,

  
Chuck Canterbury  
National President





DAVID C. DAMSCHEN  
STATE TREASURER

## State Of Utah

OFFICE OF STATE TREASURER  
UTAH STATE CAPITOL COMPLEX  
350 N STATE STREET, SUITE 180  
SALT LAKE CITY, UTAH 84114-2315  
TEL: (801) 538-1042

KIRT W. SLAUGH  
CHIEF DEPUTY STATE TREASURER

ALLEN ROLLO  
STATE INVESTMENT OFFICER

February 11, 2019

Hon. Mike Lee  
U.S. Senate  
361A Russell Senate Office Building  
Washington, DC 20510-7720

Hon. Rob Bishop  
U.S. House of Representatives  
123 Cannon House Office Building  
Washington, DC 20515-0001

Hon. Ben McAdams  
U.S. House of Representatives  
130 Cannon House Office Building  
Washington, DC 20515-0001

Hon. Mitt Romney  
U.S. Senate  
B33 Russell Senate Office Building  
Washington, D.C. 20510-7720

Hon. John Curtis  
U.S. House of Representatives  
125 Cannon House Office Building  
Washington, DC 20515-0001

Hon. Chris Stewart  
U.S. House of Representatives  
2242 Rayburn House Office Building  
Washington, DC 20515-0001

Dear Utah Members of Congress:

We are at a tipping point. As you know, in Utah our constituents and Legislature have both made clear that patients suffering from certain conditions should have access to medical cannabis. Moreover, to date nationally, *forty-six states and the District of Columbia* have passed laws broadly legalizing cannabis in some form.

Utah voters approved medical cannabis in Utah with the passage of Proposition 2, "The Utah Medical Cannabis Act" on November 6, 2018 and on December 3, 2018, the Utah Legislature passed HB 3001 Sixth Substitute, the "Utah Medical Cannabis Act," enacting a compromise approach to patients' access to medical cannabis in Utah. Governor Herbert signed HB 3001 into law on the day it was passed by the Legislature.

As you know, cannabis remains a federally prohibited Schedule I drug, and banking regulations prohibit the State, or any other entity in Utah, from using a federally regulated financial institution to deposit funds from the production and distribution of cannabis, even if doing so is permitted under state law.

The inability of insured financial institutions to handle cannabis-related transactions has forced businesses and governments throughout the U.S. to resort to cash to settle transactions. This represents an enormous public safety issue, increasing risk of violent crime, fraud, and theft. Providing regulated

and insured financial services to cannabis businesses allows law enforcement, and specifically the Financial Crimes Enforcement Network (FinCEN) within the U.S. Department of Treasury, the transparency needed to distinguish legal cannabis businesses from illegal activity.

I ask your help in enacting federal legislation that ensures each state has the right to determine for itself the best approach to cannabis within its borders and that provides common-sense guardrails to ensure that states, territories, and tribes legalizing cannabis do so in a manner that is safe and respectful of the impacts on their neighbors.

I know that you share my love for the U.S. Constitution and the framework for federalism that it establishes. I believe in the Jeffersonian maxim, "the government closest to the people serves the people best." Based on the preponderance of ballot initiatives and legislative actions effecting legalized cannabis at the state level, clearly "the people have spoken," and overwhelmingly so.

States, financial institutions, and legal cannabis businesses now desperately need Congress to advance legislation that will bring these legal activities into the safety and scrutiny of the regulated and insured financial system.

I urge you to work with your colleagues in the House and Senate to resolve this critical issue, and please let me know of any way in which I can assist you in the effort.

Sincerely,

A handwritten signature in black ink, appearing to read "David Damschen", with a long horizontal flourish extending to the right.

David Damschen  
Utah State Treasurer  
(801) 538-1042  
[ddamschen@utah.gov](mailto:ddamschen@utah.gov)



**FIONA MA, CPA**  
**TREASURER**  
 STATE OF CALIFORNIA

February 20, 2019

The Honorable Alexandria Ocasio-Cortez  
 Member of the House Subcommittee on Consumer Protection & Financial Institutions  
 229 Cannon HOB  
 Washington, DC 20515

**RE: Follow-up from Subcommittee Hearing on "Challenges and Solutions: Access to Banking  
 Services for Cannabis-Related Businesses"**  
**Information on Equity Programs in California's Regulated Cannabis Industry**

Dear Representative Ocasio-Cortez,

Thank you so much for your active participation in the House Subcommittee on Consumer Protection & Financial Institutions' hearing: "Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses." It was truly an honor to be able to testify on behalf of what California has learned through the regulation of the largest regulated cannabis industry currently in the United States. As mentioned in my statement to the Subcommittee, California has nearly 40 million residents and more than a million medical cannabis patients. California's market represents about a third of the North American cannabis market. In the first three quarters after legalizing adult-use cannabis in November 2016, we collected approximately \$228 million in tax revenue; with the cannabis market in California alone expected to exceed \$5.1 billion in overall revenue in 2020.

California is one of the states that others are looking to for guidance as regulated cannabis continues to gain traction nationally; thus, it is important we not only be leaders on the fiscal level, but also leaders for socially necessary programs within the industry. This is why when you mentioned the need for equity within the industry, I wanted to let you know California has begun working toward that goal at the state and local levels.

At the state level, I supported SB 1294 authored by Senator Steve Bradford and chaptered into law last year that created the Cannabis Collaboration & Inclusion Act of 2018. Minorities and people of color have been disproportionately affected by the nation's "War on Drugs" and SB 1294 was an important step to create opportunities and assistance to those entering California's growing cannabis industry and who have been negatively impacted by its criminalization. SB 1294 will ensure individuals from diverse backgrounds and underserved communities are able to participate in California's recently legalized cannabis industry by creating equity and support within the industry, specifically by:



**FIONA MA, CPA**  
**TREASURER**  
 STATE OF CALIFORNIA

1. Establishing a position within the Bureau of Cannabis Control (State Department of Consumer Affairs) to provide technical assistance and training for cannabis equity applicants and local cannabis equity programs.
2. Creating a cannabis equity task force to advise the bureau on the development and implementation of a statewide cannabis equity program.
3. Encouraging localities to document information annually regarding their equity programs and applicants, and posting their findings to the bureau's website.
4. Providing criteria and qualifications for a state equity plan and equity applicants seeking a state license.

It is important to note that this bill was signed into law in 2018 and is currently being put into effect in our state, but simultaneously cities and counties within California have also been proactive on the need for equity within their respective localized industries. Los Angeles, Oakland, Sacramento, and San Francisco have created equity programs that support inclusion of this population by providing technical support, giving priority license processing, providing free or reduced rent in some cases, and connecting people with larger scale cannabis businesses for support as well. The following are some key differences with these counties and others looking to help facilitate and create an inclusive cannabis industry:

- Oakland's equity program was intended to get non-retail (production, etc.) off the ground, while San Francisco's program was intended to focus on actually achieving workforce equity.
- Permit processing has been an issue in several counties: San Francisco and San Jose have seen a bottlenecking effect with cities' long list of applicants for permits, but very small Local Offices for cannabis that don't have the staff resources or bandwidth to meet the need quickly enough.

San Jose has come up with a unique approach that they're currently working on at the City Council level: The first, a minor difference with major implications is San Jose's effort to eliminate bottlenecking for permitting. In most cities, permitting occurs on a rolling basis. However, in San Jose, equity permits constitute a special, reserved portion of all permits. This eliminates an odd incentive for existing permit holders to monopolize.

The second, a major difference with major implications is San Jose's focus on being a true jobs program. Other cities just provide permits to existing small businesses. San Jose actually trains individuals from equity populations to *become* business owners. This is accomplished through a



**FIONA MA, CPA**  
**TREASURER**  
 STATE OF CALIFORNIA

provision in the original cannabis ordinance that directs a percentage of revenue generated from local cannabis taxes to fund programs that offer accounting, business planning, and legal services to these would-be or new business owners. This is different than Oakland's private-funded model which paired investors with equity permit holders; this was a source of bad press because equity permit holders were always getting the short end of the stick. Additionally, there is a program within local community colleges to recruit and train individuals to join the workforce; a similar program exists for reentry of incarcerated individuals.

Many feel that San Jose's program, and programs in all California cities for that matter, will become truly successful in promoting workforce equity once the plethora of municipal, county, and state regulations that indirectly or directly impact cannabis businesses catch up to reflect the reality of Prop 64's passage (passed in November 2016 with 55.8% of the vote). This is why it is imperative to have these conversations at all levels of government – from San Jose City Council, to the California Legislature, to speaking with the leaders in Congress to help enact change on a national scale – we must work together to ensure that the regulated cannabis industry is not only safe, efficient, and auditable for tax purposes – we must ensure that it is reflective and inclusive of our constituents that need and deserve our support to operate successfully in this emerging industry.

Thank you again for your time and attention to this important matter, and we look forward to continuing to work together to affect positive change here in California and at a national level. Please feel free to contact my Legislative Director, Kasey O'Connor, with any questions or concerns at (916) 653-2995.

**In Peace and Friendship,**

 A large, stylized handwritten signature in black ink, which appears to be "Fiona Ma".
 

FIONA MA, CPA  
 California State Treasurer

*Cc: Hon. Gregory W. Meeks, Chair of Subcommittee on Consumer Protection and Financial Institutions*

*Cc: Hon. Maxine Waters, Chair of House Financial Services Committee*

**Proposed Amendments to  
Discussion Draft  
H.R.- \_\_\_, the “SAFE Banking Act of 2019”  
(G:\M16\PERLMU\PERLMU\_009.XML)**

Page 3, after line 20, insert the following:

(b) Insurers.— A Federal agency may not —

(1) prohibit, penalize, or otherwise discourage an insurer from engaging in the business of insurance in connection with a cannabis-related legitimate business or to a State or Indian tribe that exercises jurisdiction over cannabis-related legitimate businesses;

(2) terminate or limit the policies of an insurer solely because the insurer has engaged in the business of insurance in connection with a cannabis-related legitimate business;

(3) recommend, incentivize, or encourage an insurer not to engaged in the business of insurance in connection with the owner, operator, or an individual that is a policyholder of a cannabis-related legitimate business, or downgrade or cancel insurance and insurance services offered to a policyholder of a cannabis-related legitimate business solely because—

(A) the policyholder later becomes a cannabis-related legitimate business; or

(B) the insurer was not aware that the policyholder is the owner or operator of a cannabis-related legitimate business; and

(4) take any adverse or corrective supervisory action on a policy to an owner or operator of—

(A) a cannabis-related legitimate business solely because the business owner or operator is a cannabis-related business without express statutory authority, as in effect on the day before the date of enactment of this Act; or

(B) real estate or equipment that is leased or sold to a cannabis-related legitimate business solely because the owner or operator of the real estate or equipment leased or sold the equipment or real estate to a cannabis-related legitimate business.

Page 5, line 7, before “to provide,” insert “or insurer”

Page 5, line 8, after “business,” insert: “; or interfere with the regulation of the business of insurance in accordance with the Act of March 9, 1945 (59 Stat. 33, chapter 20; 15 U.S.C. 1011 et seq.) (commonly known as the “McCarran-Ferguson Act”) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301 et seq.).”

Page 10, after line 19, insert: “(9) Insurer – The term insurer means any person engaged in the business of insurance, including reinsurance.”

Congressman Ed Perlmutter  
1226 Longworth House Office Building  
Washington, DC 2051

Dear Congressman Perlmutter,

As an owner of state permitted Cannabis grows and retail shops, I am writing you to thank you for your introduction of the banking legislation that permits access to traditional banking services in states where it has been legalized. Every day, myself and other Cannabis business owners worry about the safety of our patients, employees, and the public in general, due to the fact that we are forced to hold onto cash in our shops as we are not permitted to bank our money or to use bank credit cards.

My businesses have experienced armed robberies due to lack of banking services. As an example, one morning two armed individuals grabbed our security guard, pushed a gun down his throat, then took over \$20,000.00 in cash and five pounds of Cannabis. Fortunately, our clients and employees were not injured or killed. However, the incident could have resulted in severe injury or death to people in the shop. Why? Because the criminals knew that we are forced to retain cash in the shops due to the inability to bank our money.

Congressman Perlmutter, your bill which allows for banking for state licensed Cannabis businesses goes a long way in eliminating the public safety concerns that result from our inability to deposit our cash on a daily basis, or to use credit cards. This is not a partisan issue as the industry's customer base includes citizens representing all of our political parties. Thank you for helping eliminate the Cannabis industry's greatest fear, which is public safety for our clients, employees, and the general public.

Bruce Nassau  
Partner  
Lit Dispensary  
1630 Federal Blvd  
Denver, CO 80204

**Written Statement of A. Marc Perrone  
President, United Food and Commercial Workers International Union**

**Submitted to the U.S. House Committee on Financial Services  
Subcommittee on Consumer Protection and Financial Institutions  
Hearing on Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses**

**February 13, 2019**

As President of the United Food and Commercial Workers International Union (UFCW), I am proud to help build a better life for over 1.3 million hard-working men and women who work in highly regulated industries such as grocery and retail stores; manufacturing and chemical plants; health care facilities and pharmacies; food processing and meat packing plants; and in the emerging legal cannabis industry. Our cannabis members can be found across multiple states in growing and cultivating facilities, manufacturing and processing facilities, and in laboratories and dispensaries.

Wherever cannabis is legalized, the UFCW is committed to building a successful industry with a thriving, diverse, and skilled workforce. Union cannabis jobs provide good family-sustaining income and benefits, while generating spending in local communities, and supporting a robust economy.

Cannabis is legal in some form in 33 states and the District of Columbia, it operates in a strong and dynamic regulatory landscape. States employ a strict regulatory framework including seed-to-sale tracking system to monitor the growth, distribution, and sale of regulated cannabis to prevent diversion and create a transparent, accountable market.

All jobs have challenges, but few industries face the unique challenge of federal prohibition on access to legal banking. Without access to banks, cannabis businesses have little choice but to resort to cash. Customers pay in cash, workers are paid in cash, and large amounts of cash must be securely stored and transported. This creates safety and financial problems for businesses, customers, workers, and the communities they serve.

In order for workers in the legal cannabis industry to have the same opportunities as all other workers, Congress must directly address the cannabis banking challenge and align federal and state laws.

**This cash dominated industry puts workers at risk**

When cannabis businesses cannot accept checks, credit cards, or debit cards in their establishments, it means that workers, vendors, and tax collectors must change the way they do business. Without access to a federally-insured bank, employers must find alternative arrangements to pay their workers, including paying them with cash.

Mitch Bickar is a UFCW cannabis worker from Bothell, Washington where the state worked with local banks and credit unions to give workers and employers access to traditional banking. "I take pride in working in this growing industry in Washington," he explains. "My job as a Lead Inventory Coordinator at Have a Heart provides good wages, and because of the union my voice is heard at work. I am grateful that unlike other states, Washington provided us with the ability to have access to banking instead of being paid in cash. I would not feel safe walking out the door on payday with everyone knowing that I had two week's wages in cash on me."



#### **Outdated laws make it difficult for workers to borrow money**

Imagine this scenario: a cannabis worker applies for a house or car loan, but has difficulty proving they have income necessary to pay the loan back since their employer is prohibited from accessing traditional banking or payroll systems and cannot provide a paystub. Upon finally proving their income or accepting a loan at a significantly higher rate, they are ultimately denied because federal law deems their work to be illegal. Sadly, this is the reality for many workers in the cannabis industry<sup>i</sup>.

The lack of uniformity and antiquated classification of cannabis at the national level have caused workers across the country to find it difficult to get personal loans for homes and cars— even with high credit scores. In fact the Federal Housing Authority's (FHA) loan program explicitly denies loans for workers in this industry for this reason<sup>ii</sup>.

#### **Worker payroll tax and benefit programs deductions are ambiguous**

The decision to continue to classify cannabis as a Schedule 1 narcotic with all the associated prohibitions and limitations, while 33 states have legalized cannabis, has led to confusion and uncertainty for the workers who are just trying to do their jobs and support their families. When workers operate in an environment without the certainty of a conventional payroll system- even when employers have every intention of doing the right thing- it is unclear if benefits such as Social Security, disability, unemployment insurance, Medicare, and Medicaid will be there when they are needed.

**When employers gain access to conventional banking, their workers get the economic security of a steady paycheck, as well as the peace of mind knowing their payroll taxes and benefits are being properly funded.**

#### **The current patchwork of state laws could cost the U.S. economy billions in lost tax revenue**

Cannabis is currently a \$9 billion industry, which is equivalent to the entire market for snack foods.<sup>iii</sup> The industry is growing at a rapid rate and industry experts predict there will be \$75 billion in cannabis sales by 2030.<sup>iv</sup> The cannabis industry is also the fastest-growing job category in the United States with an estimated 125,000 – 160,000 full-time jobs in 2018, an increase of nearly 45 percent from 2017.<sup>v</sup> By 2022, the cannabis industry is expected to grow at a rate of approximately 21 percent per year and support up to 340,000 full time jobs.<sup>vi</sup>

Local, state, and federal governments are losing out on tax revenue while cannabis remains illegal at the federal level. If federal prohibition ended and cannabis were to become legal in all 50 states, it would generate \$132 billion in tax revenue, with the federal government alone collecting \$51.7 billion.<sup>vii</sup>

#### **The state of Washington shows that banking works**

States are leading the way in passing legislation and regulations that ensure a safe, legal, and thriving cannabis industry. In Washington state, the state government worked with local credit unions and small banks to encourage them to accept business from dispensaries.<sup>viii</sup> This resulted in the state collecting \$319 million in taxes and fees in the 2017 budget year, 95 percent of which came in forms other than cash.<sup>ix</sup> The state of California, on the other hand, was forced to shift resources in their Department of Tax and Fee Administration to accommodate businesses paying their taxes in cash,<sup>x</sup> delivered by armed

guards in armored trucks.<sup>iii</sup> By giving the industry access to banking in Washington, it became easier for business to pay taxes, and cost the state less to collect them - a benefit to both businesses and taxpayers.

UFCW members in Washington have said that they like the state cannabis laws because they provide payroll stability. A regular paycheck goes hand in hand with a good wage, quality affordable care, and a secure retirement- these are the keys to a better life, and the pillars of the UFCW.

#### **Congress should support safe, legal banking for cannabis workers**

On behalf of all the workers in the cannabis industry, we urge Congress to act quickly to give the same access to the financial systems and federal benefits that all other American workers already enjoy. A majority of states have some form of legal cannabis and it is imperative that the federal government update our nation's banking laws to include this new and growing industry. Hardworking Americans in the cannabis industry do not deserve to be treated as criminals and should not have to struggle with financial and legal ambiguity while on the job.

Chairman Meeks, Ranking Member Luetkemeyer, and members of the Subcommittee on Consumer Protection and Financial Institutions, thank you for your consideration.

<sup>i</sup> "Workers feel the effects of banking issues in the burgeoning marijuana industry." Faith Miller. 3 October 2018. Colorado Springs Independent. <https://www.csinvy.com/coloradosprings/workers-feel-the-effects-of-banking-issues-in-the-burgeoning-marijuana-industry/Content?oid=15777766>

<sup>ii</sup> "Federal Prohibition of Marijuana Restricts Lenders Ability to Issue Loans to Borrowers Employed in the Marijuana Industry." Hinshaw and Culbertson LLP. JDSupra.com. <https://www.jdsupra.com/legalnews/federal-prohibition-of-marijuana-43395/>

<sup>iii</sup> "Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch." Kevin Murphy. Forbes.com <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#43a9a5443c68>

<sup>iv</sup> "Cannabis: \$75B Opportunity; Category Cross-Currents Keep Us Cautious On Booze." Vivien Azer, Brian Nicholas Velez, and Gerald Pascarelli. Cowen.com <http://www.cowen.com/reports/cannabis-75b-opportunity-category-cross-currents-keep-us-cautious-on-booze/>

<sup>v</sup> "Marijuana Is The Fastest-Growing Job Category, Top Recruiting CEO Says," Tom Angell. Forbes.com <https://www.forbes.com/sites/tomangell/2018/04/09/marijuana-is-the-fastest-growing-job-category-top-recruiting-ceo-says/#834b3aa66874>

<sup>vi</sup> "Cannabis industry supports up to 160,000 full-time jobs, with more growth on horizon." Eli McVey. MJ Biz Daily. <https://mjbizdaily.com/chart-cannabis-industry-supports-over-125000-full-time-jobs/>

<sup>vii</sup> "Study: Legal marijuana could generate more than \$132 billion in federal tax revenue and 1 million jobs." Katie Zezima, The Washington Post. 10 January 2018. These estimates are based on a 15 percent retail sales tax, payroll tax deductions, and business tax revenue- not taking into consideration local taxes and license fees, or additional potential taxes specific to the industry.

<sup>viii</sup> "The Credit Unions and Small Banks That Solved the Cannabis Cash Crisis." Lester Black. TheStranger.com. 19 April 2017. <https://www.thestranger.com/green-guide-spring-2017/2017/04/19/25083313/the-credit-unions-and-small-banks-that-solved-the-cannabis-cash-crisis>

<sup>ix</sup> "Pot is legal in 10 states, but the industry still can't use banks. Will Congress change that?" Kate Irby. The Sacramento Bee. 11 February 2019. <https://www.sacbee.com/news/politics-government/capitol-alert/article225923620.html>

U.S. House of Representatives  
 U.S. House Committee on Financial Services  
 Consumer Protection and Financial Institutions Subcommittee  
 February 13, 2019

Written statement made by Gaynell Rogers to be submitted as part of the record for the Congressional hearing, “*Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses*.”

Chairman Meeks, Ranking Member Luetkemeyer and Subcommittee Members,

I offer this statement with first-hand experience of the challenges faced by the regulated Cannabis industry due to the shortage of traditional banking options. My name is Gaynell Rogers, a national and international expert and trusted media source for 20 years having worked in the cannabis industry for 10 years and 20+ years in national music and film. I’m a Co-Founder of Treehouse Global Ventures, a fund founded by women for women and minorities in the regulated Cannabis industry. I’m also a three-time cancer survivor and heavily engaged in philanthropy efforts and have served on nonprofit boards for years.

Thank you for holding a Congressional hearing to better understand the contemporary regulated Cannabis industry and for providing an opportunity for stakeholders to share their experiences. The U.S. regulated Cannabis industry is conservatively valued at \$7+ billion, and due to the federally scheduled status of Cannabis,<sup>1</sup> the only means to access a traditional bank is via a 2014 FinCEN guidance document (FinCEN Guidance).<sup>2</sup>

The FinCEN guidance has facilitated a pathway for 400 banks to engage with the regulated industry; however, that number is not nearly great enough to fully bank the regulated industry. Every stakeholder within the regulated industry – which includes business owners, third-party service providers, outside vendors, general public, customers and most importantly, patients – have been at risk for their own personal safety due to this shortage. Cash management is inefficient, expensive and incredibly dangerous. During my time as Head of Media Relations & Special Projects for Steve DeAngelo with Harborside Health Center – a national model and dispensary based in Oakland, California - I witnessed the public and staff safety issues when dealing with cash management.

Thank you for making the time for this hearing and we urge Congress to enact fair banking legislation to assure public and stakeholder safety.

Sincerely,

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<sup>1</sup> The term ‘Cannabis’ is proper botanical nomenclature and is to be used interchangeably with the term ‘marihuana,’ which is the term used in 21 U.S.C. §801 et al, Controlled Substances Act (CSA), to identify the plant subject to Schedule I of the CSA.

<sup>2</sup> Department of the Treasury Financial Crimes Enforcement Network, 14.Feb.2014 Guidance, *BSA Expectations Regarding Marijuana-Related Businesses* (FIN-2014-G001).



**Submitted on behalf of Lindsay Robinson, Executive Director**

**California Cannabis Industry Association**

**House Financial Services, Subcommittee on Consumer Protections & Financial  
Institutions**

*Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses*

February 13, 2019

I appreciate the opportunity to submit written remarks for the Subcommittee on Consumer Protections and Financial Institutions' historic hearing on the cannabis industry's need for access to traditional banking and the capital markets. I am the Executive Director of the California Cannabis Industry Association ("CCIA"), which is the leading cannabis trade association in the state of California. We represent a diversity of interests within the industry, including retail, cultivation, manufacturing, delivery, distribution, testing, insurance, packaging, and various ancillary services. CCIA is comprised of over 460 California businesses representing over 650 brands and more than 11,000 employees. Our association was formed to unite the legal cannabis industry to help educate and act as a resource to lawmakers and our members.

California is home to the country's oldest cannabis market, which was established in 1996 by the voter-approved Compassionate Care Act (Proposition 215). Since that time, the state has worked to continually expanded access to cannabis for its citizens. This expansion culminated in last year's implementation of voter-approved Proposition 64, which created an adult-use cannabis market in California. This conversion from medical to adult-use made California the largest cannabis market in the United States. Last year, California's industry sold

and estimated \$2.5 billion in cannabis to consumers throughout the states. Forecasts project that by 2025, California's cannabis industry will sell as much as \$4.72 billion of cannabis.

California is not alone. Throughout the country, states are legalizing cannabis at a historic rate. Today, 33 states plus the District of Columbia have legalized medical-use. Of those states, ten plus the District of Columbia have also legalized adult-use cannabis. The number of cannabis-legal states grows with each year, and several more states are working on joining the list in 2019. Within current cannabis-legal states, sales of medical-use and adult-use cannabis totaled a combined \$10.4 billion dollars in 2018. According to New Frontier Data, 2019 sales of cannabis will increase by almost quarter, to \$12.9 billion.

The legalization of cannabis is not a partisan issue. We have seen the legalization of cannabis across the political spectrum, and public support is at an all-time high. According to a recent Pew Research poll, 62 percent of Americans support the full legalization of cannabis. Support for medical-use is an astounding 93 percent among Americans, according to a Quinnipiac University poll. At a time of unprecedented partisanship, when consensus on any issue is difficult, cannabis stands out as an area of genuine bipartisan agreement.

The states where Americans voted to legalize cannabis have developed robust regulatory regimes for their respective cannabis industries. For example, California has spent the last several years working towards an advanced regulatory regime that traces cannabis from planting to processing to sale. California's system is now highly advanced and provides detailed information designed to protect consumers and prevent illicit- market diversion. Many other states have followed suit and are now implementing 'track and trace' systems. Despite these system, cannabis sales must be conducted in one of the least traceable transaction methods: cash. Due to the federal government's continued classification of cannabis as a Schedule I drug under the Controlled Substances Act, the multi-billion dollar U.S. cannabis industry is denied access to banking and capital markets, which are basic necessities for any legitimate industry. Access to banking for businesses operating in cannabis-legal states is critical to ensure the

safety of workers and consumers and to ensure the full inclusion of women and minorities as the industry grows.

The ability to use U.S. financial institutions for banking is essential to ensure the safety of the cannabis industry and cannabis consumers. Without access to banking, companies are forced to maintain large amounts of cash on hand, pay employees and vendors in cash, and use cash to pay taxes. All of this creates an untenable situation where the safety of consumers, employees, and companies is at risk. With more than \$2.5 billion in sales – mostly in cash – California's cannabis retail companies present prime targets for robbery or other forms of theft. Aside from the large amount of cash on hand at any time, dispensaries are forced to transport cash to pay vendors, which presents opportunity for theft and violence. Employees, who are paid in cash, are forced to leave their companies on payday with a full pay-period in cash. Unlike cash on location or cash in transport, employees do not have security guards watching over them.

Further, without access to the capital markets, cannabis entrepreneurs are hamstrung when trying to raise funds to expand or start new businesses. This creates especially significant obstacles for the full inclusion of women and minorities, who already face barriers to accessing capital. While still in its infancy stages, the cannabis industry has an opportunity to be more inclusive of women and minorities than many established industries. For minorities, the cannabis industry presents a chance to set right at least some of the wrongs committed during the War on Drugs. It is no secret that cannabis prohibition has been used to marginalize and incarcerate minorities for almost half a century. Even today, cannabis continues to be used to harass and persecute minorities. According to the ACLU, people of color are four times more likely to be arrested for cannabis possession than their white counterparts, despite similar rates of use. Now, the cannabis industry can provide a chance to start to repair the destruction caused by the War on Drugs to communities of color through minority inclusion and ownership within the industry.

The lack of access to capital markets, however, means that federal cannabis prohibition continues to place women and minorities at a disadvantage. Although some states have sought to address the issue of diversity in the cannabis space, the costs associated with starting a cannabis company are prohibitively high for those without easy access to capital. Banks' inability to lend to cannabis entrepreneurs perpetuates the exclusion of women and minorities from the cannabis industry and concentrates opportunities in the hands of a predominantly white, male segment of society who traditionally has more access to capital. The injustices of the past cannot begin to be remedied within the cannabis industry until disadvantaged women and minorities are able to access the capital markets and enter the industry in truly representative numbers.

Cannabis companies operating pursuant to state law must have the same access to banking as other industries in the U.S. These companies are bringing cannabis out of the hands of organized crime and into the legally regulated market. They employ tens of thousands of U.S. citizens, contribute hundreds of millions in tax revenues, and provide opportunities to advance race and gender equity in economic opportunity.

For these reasons, CCIA supports the Secure and Fair Enforcement (SAFE) Banking Act. This bill will provide our membership with the access to banking and capital markets that they desperately need. It will increase the safety of the industry by eliminating the need to operate on a cash basis and will help to ensure that women and minorities have access to the capital needed to enter the cannabis industry. We applaud the Subcommittee for holding today's hearing and look forward to working with members of Congress to ameliorate the issues created by the federal government's continued policy of prohibition.

Henry G. Wykowski  
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**Submission to the Finance Committee by Henry Wykowski Esq.**

Allow me to introduce myself and share some of my background so that the Committee may better evaluate my statement and understand the gravamen of being denied an equal opportunity to utilize banking merely because I represent cannabis industry associations and operators.

After graduating from Tulane Law School in 1974, I briefly worked for a small law firm in New Orleans before joining the Carter Presidential Campaign. After President Carter's election, I accepted a position in the Tax Division, Criminal Section, U. S. Department of Justice. My assignment was to investigate and prosecute tax crimes in multiple jurisdictions throughout the country. In that position it became apparent that the best way to address the underground economy and eliminate underreporting of income, was to encourage the deposit of all proceeds to better track their source, use and accurate reporting for tax purposes. In 1979, I was assigned a high-profile investigation and prosecution in San Francisco. At the conclusion of the case, I accepted an offer to become an Assistant U.S. Attorney in that office, where I continued to prosecute tax and other financial crimes.

In late 1982, I entered private practice, accepting an offer as a mid-sized firm's trial counsel. In 1986, I started my own firm. My practice involved the defense of white-collar federal crimes and civil litigation involving financial fraud matters. Around 2005, I was asked to represent a well-regarded cannabis dispensary in connection with an alleged tax deficiency based on IRC 280E. At the conclusion of trial, the tax court awarded the IRS approximately 1% of the amount they were seeking. Thereafter, the IRS began to aggressively assert IRC Sec. 280E in audits of numerous dispensaries, who in turn retained me to represent them. In 2012, the U.S. Department of Justice filed forfeiture actions against three well known cannabis dispensaries in the San Francisco Bay area: Harborside Health Center (the largest cannabis dispensary in the country), Berkeley Patients Group (the oldest operating dispensary in the country) and Shambhala Cannabis Collective. I and my firm represented each of them and obtained dismissals with prejudice in each of the actions, thus defeating the government's attempt to eliminate the medical cannabis industry.

When I began my practice in 1986, I established my bank account at University National Bank which was subsequently consolidated with Comerica Bank. When I undertook representation of the dispensaries in the forfeiture actions noted above, I contacted my banker and explained that these clients would be paying me in cash (because they were denied traditional banking accounts). I inquired if this would cause any problems with my account. After she assured me it would not, we began depositing our cash fees into the account. Shortly thereafter I received a letter from Comerica's corporate offices advising me that my accounts (my attorney trust account and my operating account) would be closed. I immediately called my banker to determine what had happened and was assured by her that it was a mistake, that I had been a wonderful client for 25+ years, and they "would never let me go." A few days later, she apologetically informed me that she had been instructed to close the accounts and was not provided any reason.



Assuming the cash deposits triggered the account closings, I opened an account with First Republic Bank down the street from my office. During the intake I explained that I had a general practice and my income was derived solely from fees generated from my clients, some of whom were state licensed medical cannabis dispensaries. They opened the accounts and I banked there from early 2013 until mid-2018, when they advised me that my accounts would be closed because I represented cannabis clients. While acknowledging that this was disclosed when the accounts were opened, they advised the rescission of the Cole Memo by Attorney General Sessions changed their position. I next went to Chase, again disclosing my practice included licensed cannabis dispensaries. The account manager confirmed the following day that the bank had “goggled” me and it was apparent that I was known for my representation of the industry. A few months later, the manager called to tell me that the accounts would be closed pursuant to a decision by the compliance department.

I then began the search for a new bank without immediate success. Each time I disclosed my representation of cannabis dispensaries our business was declined. In desperation I reached out to an attorney I met during my representation of Harborside in the forfeiture action. He represented the bank which held the mortgage on Harborside’s location. He agreed to recommend the bank take on the account because what I was doing was providing legal representation to those in the industry who were licensed and in compliance with state law. Besides, he noted that I gave good advice and had a successful record to prove it. The bank agreed to take on the accounts, but then reversed its decision after they entered negotiations for a sale/merger with another banking entity. I have until mid-March to find another bank.

When I asked why my accounts were being closed, I was told that it was because I was involved in a “cannabis related” business. Of course, if my business was a “cannabis related” business, so was theirs because they received mortgage payments for the building from which Harborside operated. Indeed, anyone who sold gas to licensed distributors, provided electricity or water to licensed cultivators, or states and municipal entities who collected tax revenue or licensing fees were also now a “cannabis related” business.

My inability to open and maintain a bank account is wrong on many levels. As a proud former federal prosecutor whose work resulted in awards, it is contrary to my principles as an attorney. Everyone is entitled to representation and this is an interference with that recognized constitutional right. When I pursued civil rights cases in New Orleans, I was allowed to bank. When I represented individuals or entities charged with criminal conduct, I was allowed to bank. Indeed, it is well recognized in federal criminal law that if a defendant’s assets are seized, enough of those funds to secure representation would be released for that purpose.

I am proud of the work I have done for the cannabis industry. I am a founder of the National Cannabis Industry Association and serve as its counsel (nearly 2000-member businesses and professionals). The California Cannabis Industry Association (approximately 500 members) and the National Cannabis Bar Association (nearly 600 members) have each asked me to serve as their counsel as well. Together these three organizations represent an industry that has gained acceptance with a majority of American citizens, with medical use allowed in thirty-three states and adult use in ten states, along with the District of Columbia.

There is something fundamentally wrong when laws and policies meant to maintain the legal integrity of our financial institutions get in the way of people seeking legitimate advice. My clients, and others in the industry, depend on my firm to advise them on how to operate in compliance with state law. The employees of my firm depend on me for a pay check. My firm and others doing similar work for the cannabis industry should be permitted banking access without restriction or fear of reprisal.

Thank you for your consideration and in advance for your assistance.

QFR For Hearing titled Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses

**See responses below from Greg Deckard, Chairman, President & CEO of State Bank Northwest in Spokane, Washington.**

Representative Roger Williams

Did any state officials offer guidance or advice about how to properly tax, enforce, and ensure compliance with their state's excise tax on marijuana?

**My bank does not serve cannabis-related businesses. However, in order to respond to your question, I contacted an official in the office of the Washington State Treasury. She sent me a link to an FAQ on the taxation of cannabis-related businesses on the website for the Liquor Control Board:**  
**<https://lcb.wa.gov/mj2015/faqs-on-taxes>**.

Do you feel as if the overall tax compliance was adequate?

**My bank does not serve cannabis-related business; therefore I cannot comment on the adequacy of tax compliance.**

Are there any lessons you took away from these discussions about taxation at the state level that you feel are worth conveying to Congress should we debate the merits of a federal excise tax as a component of federal marijuana legalization?

**I have not had discussions with any state official about the taxation of cannabis-related business.**

**QFR For Hearing titled Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses**

**Representative Roger Williams**

*Response from witness Rachel Pross, Chief Risk Officer of Maps Credit Union in Salem, Oregon.*

**Did any state officials offer guidance or advice about how to properly tax, enforce, and ensure compliance with their state's excise tax on marijuana?**

*Maps Credit Union has not received any specific guidance from the State of Oregon pertaining to enforcement and compliance with Oregon's state excise tax on marijuana.*

**Do you feel as if the overall tax compliance was adequate?**

*This question is not applicable based on my response to your first question.*

**Are there any lessons you took away from these discussions about taxation at the state level that you feel are worth conveying to Congress should we debate the merits of a federal excise tax as a component of federal marijuana legalization?**

*This question is not applicable based on my response to your first question.*

