
FAQs – Secure and Fair Enforcement (SAFE) Banking Act

What is the SAFE Banking Act?

The SAFE Banking Act (H.R. 1595) is a bill designed to increase the access to banking and other financial services for Cannabis Related Legitimate Businesses (CRLBs) and their service providers and to promote regulatory certainty for banks that chose to offer financial services to CRLBs. The Act accomplishes these goals by creating a Safe Harbor that prevents federal banking regulators from taking adverse actions against a bank solely because that bank offers financial services to a CRLB, provided that CRLB is conducting its business in compliance with state law.

Why is the SAFE Banking Act necessary?

The federal government still considers marijuana a Schedule I Controlled Substance. Therefore, even in states that have legalized the growth and sale of marijuana, many bankers fear that if they offer financial services to CRLBs they could face backlash from federal regulators. This has forced many CRLBs to operate on a cash only basis, creating public safety concerns, difficulties regarding accounting and taxation, and limiting the industry's growth.

Does the SAFE Banking Act make the use and sale of marijuana federally legal?

The SAFE Banking Act does not make marijuana federally legal, nor does it change the DEA's classification of marijuana as a Schedule I Controlled Substance. Instead, it provides a tailored Safe Harbor to financial institutions that offer financial services to cannabis businesses that operate in compliance with state law.

What is a Cannabis Related Legitimate Business (CRLB)?

According to Sec. 14(4) of the SAFE Act, a CRLB is a business "that participates in any business or organized activity that involves handling cannabis or cannabis products" and does so "pursuant to a law established by a State or a political subdivision of a State." In short, any business that grows, transports, dispenses, or sells cannabis products in a manner that is consistent with state and local law is a CRLB.

A critical component of this definition is the requirement that the CRLB complies with state law. If it fails to do so, it ceases to be a CRLB and the Safe Harbor ceases to apply to banks that provide it with financial services. Therefore, it is imperative for banks to conduct their own due diligence in order to

ensure that the cannabis companies with which they do business are rigorously complying with state and local law.

On the other hand, ancillary businesses, also referred to in the bill as ‘service providers,’ are businesses that sell any kind of good or service to a CRLB, including business services like property management or providing legal advice, but that do not handle cannabis itself. Financial institutions that provide financial services to CRLBs are themselves considered ancillary businesses.

What actions does the Safe Harbor prevent federal regulators from taking?

According to Sec. 2 of the Act, federal bank regulators *may not* take any of the following actions solely because a bank offers financial services to a CRLB:

- Terminate or limit a bank’s deposit insurance.
- “[P]rohibit, penalize, or otherwise discourage” a bank from providing financial services to a CRLB.
- “[R]ecommend, incentivize, or encourage” a bank not to offer financial services to a CRLB or to downgrade or cancel the services offered to an account holder solely because of their association with a CRLB.
- Take any adverse or corrective supervisory action on a loan made to a CRLB, its service providers, or its employees.
- Prohibit, penalize, or discourage a bank from engaging in a financial service on behalf of a CRLB (i.e. acting as an intermediary).

This is a robust Safe Harbor that protects banks across the full range of financial services and its provisions apply whether a bank is doing business with a CRLB, employees of a CRLB, or ancillary businesses that provide services to a CRLB like landlords, equipment suppliers, contractors, and lawyers.

However, it should be noted that these actions are only prohibited *solely* because a bank provides financial services to a CRLB. The SAFE Banking Act does not limit the discretion of federal bank regulators or their ability to take supervisory actions except relating to the provision of financial services to cannabis businesses that comply with state law.

Which federal regulators are prohibited from taking adverse actions by the Safe Harbor?

The Act applies to all “federal banking regulators,” which is defined to include the:

- Board of Governors of the Federal Reserve System (FRB);
- Bureau of Consumer Financial Protection (CFPB);
- Federal Deposit Insurance Corporation (FDIC);

- Federal Housing Finance Agency (FHFA);
- Financial Crimes Enforcement Network (FINCEN);
- Office of Foreign Asset Control (OFAC);
- Office of the Comptroller of the Currency (OCC);
- National Credit Union Administration (NCUA);
- Department of the Treasury; and
- Any Federal agency or department that regulates banking or financial services, as determined by the Secretary of the Treasury.

What should be immediately noticeable about this list is its breadth. Not only are all of the prudential banking regulators covered by the Act, but the Secretary of the Treasury is also given the ability to designate other agencies or departments as “federal banking regulators” if they regulate banking or financial services. This gives the Secretary broad discretion to name other agencies as “federal banking regulators” in order to ensure that depository institutions are protected by the Safe Harbor.

Does the SAFE Banking Act provide legal protections for the employees of financial institutions that provide financial service to CRLBs?

Section 4 of the Act creates additional protection for the “officers, directors, and employees” of banks that offer financial services to CRLBs by providing that they, “may not be held liable pursuant to any Federal law or regulation” solely for providing financial services to a CRLB or for further investing the income derived from the provision of such services.

Unlike the Safe Harbor, which protects the financial institution itself from adverse actions taken by its federal banking regulators, this protection applies to the individuals that make up a bank. It provides slightly greater protection than the Safe Harbor because it prevents criminal prosecution or civil liability solely for providing financial services to a CRLB, full stop. This protection prevents all federal and state regulators from taking adverse actions against the officers, directors, and employees of banks that provide financial services to CRLBs in their individual capacities. It is not limited to providing protection from “federal banking regulators.”

Does the Act require banks to offer financial services to CRLBs in states that have legalized the use and sale of marijuana?

No. Section 5(a) of the Act explicitly states that, “Nothing in this Act shall require a depository institution ... to provide financial services to a cannabis-related legitimate business, service provider, or any other business.”

If my bank is located in a state where marijuana has not been legalized, can I offer financial services to a CRLB located in a state that has legalized marijuana?

Unfortunately, there is not a perfectly simple answer to this question. The Safe Harbor provision of SAFE would still prevent ‘federal banking regulators’ from taking adverse action against the institution itself. However, the Safe Harbor does not apply to state banking regulators. Therefore, if you are a state-chartered bank in a state where marijuana remains illegal, your state regulator may still decide to pursue adverse actions.

Likewise, when dealing with interstate transactions, the legal protection that SAFE provides “officers, directors, and employees” becomes murkier. Protection under federal law for officers, directors, and employees as individuals applies “[w]ith respect to providing a financial service to a cannabis-related legitimate business or service provider *within 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.” (emphasis added).

The key question surrounding this “within a State” language is whether it applies to the location of the CRLB or to the provision of the financial service. If the law is saying that the CRLB must be located “within a State” that allows the sale of marijuana, then it is likely that the federal law protection for “officers, directors, and employees” would apply, even if the bank was located in a state that has not legalized marijuana. However, if it is interpreted to mean that the financial service must be provided “within a State” that allows the production and sale of marijuana, then it seems more likely that the protections for “officers, directors, and employees” would not apply.

As with all ambiguous areas of law, it is important to consult with your own legal counsel in order to determine how SAFE will apply to your specific circumstances.

Does the SAFE Banking Act create protections for ancillary businesses?

Ancillary businesses are business that provide goods or services to CRLBs but don’t handle cannabis themselves. The Act provides protection to these service providers by clarifying that the proceeds from legitimate services provided to CRLBs are not considered “proceeds from an unlawful activity” under 18 U.S.C. 1956, 18 U.S.C. 1957, or any other provision of federal law. This means that these proceeds may be spent or invested exactly as money obtained from a transaction with any other business and without violating federal prohibitions against money laundering.

Does the Act apply to de novo financial institutions?

Yes. According to Section 2(b) of the bill, the Safe Harbor will apply to new depository institutions that are applying for a charter in the same way that it applies to established institutions.

How does the SAFE Banking Act affect the filing of Suspicious Activity Reports (SARs)?

Section 6 of the Act requires the Financial Crimes Enforcement Network (FinCEN) to issue guidance where “the reason for the report relates to a cannabis-related legitimate business or service provider.” The Treasury Secretary must ensure that this guidance is “consistent with the purpose and intent of the SAFE Banking Act of 2019 and does not significantly inhibit the provision of financial services to a cannabis related legitimate business or service provider in a State, political subdivision of a State, or Indian country that has allowed the cultivation, production, manufacture, transportation, display, dispensing, distribution, sale, or purchase of cannabis.”

The full implications of SAFE on SARs is impossible to discuss until this guidance is issued, but in general, SAR reporting relating to transactions with CRLBs is required to not “significantly inhibit” the provision of financial services to CRLBs or their service providers.

Does the SAFE Banking Act provide protections for offering financial services to businesses that sell hemp and CBD products?

SAFE states that the Agriculture Improvement Act of 2018 (Public Law 115–334) legalized the production and distribution of hemp nationwide by removing hemp (defined as cannabis with less than 0.3% THC) from the definition of ‘marihuana’ in the Controlled Substances Act. Despite this, some hemp businesses have reported difficulty obtaining financial services due to the confusing legal landscape that surrounds the product. In order to increase the access to financial services for producers of legal hemp, SAFE requires the federal banking regulators to issue joint guidance to financial institutions which clarifies that hemp (and hemp-derived CBD products) are federally legal and that recommends best practices for providing financial services to businesses involved in the sale of hemp, hemp-derived CBD products, and other hemp-derived cannabinoid products.