

January 9, 2020

The Honorable Michael Crapo
Chairman
U.S. Senate Banking, Housing and Urban Affairs Committee
Washington, D.C. 20510

Dear Chairman Crapo:

The American Bankers Association (ABA)¹ appreciates the Committee's interest in addressing the detrimental impact that the divide between state and federal cannabis laws is having on America's communities and the banks that serve them. As noted in your December memo, 33 states have approved some form of retail marijuana sales, but federal law prevents financial institutions from providing financial services to both state-sanctioned cannabis businesses and the ancillary businesses that provide them with goods and services. As a result, these businesses are forced to operate in cash, which in turn has introduced pressing public safety, tax collection and regulatory oversight challenges in those states.

The SAFE Banking Act (S. 1200) and the recently passed House version (H.R. 1595) represent a narrowly tailored bipartisan solution to address the specific public policy challenges created by the federal prohibition on banking cannabis-related funds. The primary goal is to get state-sanctioned cannabis cash off the streets and into regulated financial institutions, where it will be safer and more transparent to state regulators and law enforcement. The bill would not change the status of cannabis at the federal level but, as further detailed below, respects state sovereignty. It also does not facilitate cannabis sales in states that have chosen not to legalize it.

ABA shares your dedication to ensuring that the bill is carefully crafted to prevent bad actors and drug cartels from laundering illegal proceeds into the financial system under the guise of state-sanctioned cannabis businesses. Consequently, it is critical that the bill provide the Financial Crimes Enforcement Network (FinCEN) and the federal financial regulators the authority to clearly delineate the Bank Secrecy Act (BSA) obligations of financial institutions when engaging in business with state-sanctioned cannabis-related businesses.

While we appreciate that there is a wide universe of cannabis-related public policy concerns that require the attention of Congress, we strongly urge the Committee to maintain the narrow focus of the SAFE Banking Act on enabling the provision of basic financial services to state-sanctioned businesses. The SAFE Banking Act enjoys broad bipartisan support in large part

¹ The American Bankers Association is the voice of the nation's \$18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard more than \$14 trillion in deposits, and extend \$10.4 trillion in loans.

because it eschews broader questions of cannabis regulation policy and instead focuses on the immediate practical needs that communities, law enforcement and banks face today. Quick bipartisan action to pass the SAFE Banking Act would provide a safer and more responsible status quo from which to tackle the challenging non-banking questions outlined in your December memo.

ABA appreciates your leadership in elevating and advancing these important policy issues in a thoughtful, inclusive and transparent fashion. We look forward to working with your office and the rest of the committee to address any remaining concerns with the legislative language, and ask that this legislation remain a high-priority for quick movement in the Committee.

Issue 1: Options for addressing public health and safety concerns.

The SAFE Banking Act is not the appropriate vehicle to address public health and other non-banking related cannabis policy challenges. Any attempt to regulate the state cannabis industry through its banking relationships sets a dangerous precedent for using access to banking services as a method to control the behavior and activity of an unrelated industry. Moreover, it is likely to be ineffectual, as many cannabis businesses will simply continue to forgo banking services in order to avoid the new restrictions. Requiring banks to act as the *de facto* federal regulator of the cannabis industry would also directly undermine the purpose of this legislation, as fewer banks would likely be willing to work with the industry under the regime described in this memo than under the current status quo.²

We acknowledge and agree that there are public policy questions and concerns related to cannabis regulation that should be addressed by Congress. Many, in fact most, of those issues fall outside the jurisdiction of the banking committee and must be taken up and resolved by the appropriate committees of jurisdiction, and addressed by Congress in due course. However, within the confines of the banking committee, there is an opportunity to resolve a small, but vital, piece of the cannabis conundrum that will substantially improve public safety, tax collection and remittance, and cannabis regulation and oversight in the 33 states that have legal cannabis industries. We ask that rather than putting this important opportunity on hold until all cannabis policy questions can be addressed, you instead quickly advance this narrowly tailored solution that would reap immediate benefits for our local communities and their economies.

Addressing the banking challenge does not undermine the ability of Congress to address the important public health and safety concerns raised in a separate, more appropriate vehicle. The

² The negative consequences of expecting banks to serve as *de facto* supervisors for customers was recently emphasized in a GAO report on money transmitters access to banking services, *BANK SECRECY ACT: Examiners Need More Information on How to Assess Banks' Compliance Controls for Money Transmitter Accounts*, GAO-20-46, Dec 3, 2019.

SAFE Banking Act has been narrowly constructed to permit basic banking services to cannabis-related legitimate businesses and their service providers. It is not intended or designed to encourage broader expansion of the cannabis industry. At the appropriate time, Congress can address the broader public policy implications of changing our nation's drug policies.

Issues 2, 3: Options for addressing legacy cash and money laundering.

ABA agrees that clear direction from FinCEN regarding the provision of financial services to cannabis-related businesses and ancillary businesses is a necessary step in enabling safe and sound financial services for the cannabis industry. Banks need clarity regarding Bank Secrecy Act compliance expectations for cannabis-related businesses.

It is important to note that any directive to FinCEN must be accompanied by clearly defined compliance expectations that let financial institutions provide financial services to cannabis-related legitimate businesses under federal law. The SAFE Banking Act codifies the critical change to federal law that is necessary to let banks serve cannabis-related businesses by providing that the proceeds of state authorized cannabis-related businesses do not violate federal anti-money laundering statutes, or any other provision of federal law. Without that change to federal law, FinCEN lacks the authority to provide guidance for banks on how to bank state-sanctioned cannabis businesses.

The current FinCEN guidance, for example, merely provides limited guidance to help banks comply with their responsibilities for reporting suspicious activities when an activity is legal under state law but illegal under federal law. While these guidelines are useful for financial institutions that have independently made the decision to provide services to cannabis-related businesses, they do nothing to encourage financial institutions to enter this market. More important, the FinCEN guidance, which is currently the only guidance available to banks, does not outline how banks can address the money laundering and terrorist financing risks associated with banking this market. At the same time, as a result of the divide between state and federal laws, banks adhering to the existing FinCEN guidance tend to over-report information because every transaction is inherently suspicious under federal law. This over-reporting is counter-productive for law enforcement, something that the SAFE Banking Act would enable FinCEN to address.

By updating and revising its guidance to conform to the SAFE Banking Act, FinCEN would be able to refine reporting expectations to ensure that information submitted by financial institutions through Suspicious Activity Reports would have the greatest benefit to law enforcement. At the same time, FinCEN would be able to address the issue of legacy cash, outlining the parameters and expectations for financial institutions when a business becomes a new customer of the bank. For example, FinCEN could specify what types of records or information is needed to verify the legitimacy of legacy cash as well as what red flags would indicate legacy cash might be suspect.

FinCEN is in the best position to determine what shape the guidance should take to ensure that financial institutions can effectively identify and report illicit activity. Generally, cannabis-related businesses authorized and regulated under state law should be evaluated under the same standards as any other legal business.

Another benefit from the SAFE Banking Act is that it would require the federal banking regulators to outline examination procedures. This would alleviate much of the confusion that currently exists among examiners and banks, since there currently is no official guidance from the prudential regulators. Similarly, since guidance and examination procedures for depository institutions as they pertain to cannabis-related legitimate businesses and service providers will be largely focused on BSA expectations, it is sensible to require the Federal Financial Institutions Examination Council (FFIEC) to consult with FinCEN during the development of those procedures.

Issue 4: Options for addressing interstate commerce and banking.

The bill, as drafted, does not facilitate interstate commerce of cannabis. The bill provides that the proceeds from a transaction conducted by a cannabis-related legitimate business or service provider shall not be considered to be proceeds from an unlawful activity (Section 3), and that banks can provide financial services to a cannabis-related legitimate business operating within a state that allows cannabis sales pursuant to the law or regulation of that state (Section 4). A cannabis-related legitimate business is defined as a business that involves handling cannabis or cannabis products pursuant to a law established by a state or a political subdivision of a state, as determined by such state or political subdivision. As a result, the protections of the act extend only to transactions conducted within a state that has legalized cannabis, in accordance with the laws of that state.

In order to address the challenges to interstate commerce created by the unique legal status of cannabis, it is critical that the SAFE Banking Act successfully separate the treatment of cannabis sales from the treatment of the proceeds of those sales. Specifically, it should provide that the proceeds from the sale of cannabis are lawful (and therefore freely transferrable across state lines) as long as the sale of cannabis was legal under the state law where the transaction occurred. For example, a cannabis business operating in compliance with Colorado law would still be prohibited from selling cannabis outside of Colorado, but banks and other businesses would be able to accept deposits and payments from that cannabis business as though the money came from any other legal business. Sections 3 and 4 of the SAFE Banking Act are drafted to achieve this result, but we would be interested in working with your office on strengthening and clarifying the language pertaining to interstate commerce.

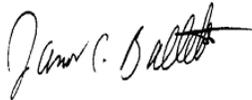
Issue 5: Options for addressing hemp provisions and “Operation Choke Point.”

Given its relationship to cannabis, banks face some unique challenges in financing hemp and hemp-derived products. Recently, the federal banking agencies and FinCEN issued interagency guidance to help banks finance hemp growers and producers.³ Nevertheless, there remains concern for bankers in connection with hemp exceeding the 0.3% THC threshold, as well as the expectations surrounding businesses selling CBD products. Even though the interagency guidance indicated that FinCEN would provide additional clarity in the coming weeks, we believe including the House approved hemp provision in the Senate bill will help ensure that banks receive the clarity and certainty they need in order to fully serve the hemp industry.

The proposed amendments to the Financial Institution Customer Protection Act, as passed in the House, are more than adequate to curb potential future choke point scenarios. While we are not aware of instances where “Operation Choke Point” was implemented or ever progressed beyond the administrative stage and put into operation in bank exams, the added language codifies existing practice at the federal banking agencies to ensure that regulators do not inappropriately limit access to vital financial services for specific customers or groups of customers.

Again, we thank you for taking such an interest in addressing this important issue. With more than two-thirds of the states having approved some form a legalized cannabis, it is vitally important that Congress intervene to address the apparent conflict between federal and state law. While we very much support the SAFE Banking Act, as approved in the House of Representatives, we hope that you will use the input provided by stakeholders to craft a proposal that can be expeditiously approved in the Senate Banking Committee and the U.S. Senate this session.

Sincerely,



James C. Ballentine

cc: Members of the Senate Banking, Housing and Urban Affairs Committee

³ *Joint Guidance on Providing Financial Services to Customers Engaged in Hemp-Related Businesses*, issued December 3, 2019.