

IS IT REALLY SAFE TO PROVIDE BANKING SERVICES TO MARIJUANA-RELATED BUSINESSES? THE MARIJUANA BANKING DILEMMA

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ABSTRACT

As more and more states begin to legalize marijuana, marijuana-related businesses such as dispensaries are cropping up all over the United States. Like most other legitimate businesses, marijuana-related businesses need a safe place to keep their money. However, unlike most other legitimate businesses, marijuana-related businesses often cannot find banks that are willing to do business with them. This is because banks are heavily governed and regulated by federal law, and marijuana is still illegal on a federal level—even where states have legalized its use. Although federal guidance on the subject has been issued, many legal “gray areas” continue to exist, making banks unwilling to take the risk of working with marijuana-related clients.

In order to solve this problem, several bills have been proposed to legalize some aspects of the marijuana business on a federal level. Such proposed bills include the SAFE Banking Act, which, had it become law, would have prevented federal regulatory agencies from punishing banks working with legally operating marijuana-related clients while fully legalizing such banking activities under federal law. However, this kind of piecemeal legislation has some serious flaws that would allow the federal illegality of marijuana to hinder the growth of marijuana-related businesses. A lack of protection for end users of marijuana products, the omission of provisions providing relief from a myriad of cumbersome regulatory paperwork requirements, and the bill’s failure to address the federal ban on marijuana research are just a few of the reasons that the SAFE Banking Act (and similar piecemeal marijuana legislation) would be much too narrowly tailored to accomplish its goal of aiding the growth of the marijuana industry by allowing banks to legally handle marijuana-related clients. Thus, complete legalization of marijuana on the federal level is the best path forward for banks and their marijuana-related clients.

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I. INTRODUCTION

In 2012, a medical marijuana dispensary owner spent an extravagant weekend in Las Vegas with a few of his closest suppliers.¹ Unfortunately for the dispensary owner, his display of wealth and excess on the trip would come back to haunt him.² Upon learning that the dispensary owner was a very wealthy man, one of his greedy suppliers began plotting to kidnap and rob him.³ The supplier, Kyle Shirakawa Handley, and his two friends, Hossein Nayeri and Ryan Kevorkian, burglarized the dispensary owner’s home, kidnapping the dispensary owner and his girlfriend in the process.⁴ The three friends drove the victims to the desert, where they believed the dispensary owner had been burying his millions in marijuana profits.⁵ In an attempt to elicit the location of

¹ Kate Briquetlet, *Escaped California Inmate Cut Off Pot Dealer’s Penis*, DAILY BEAST (Jan. 25, 2016), <https://www.thedailybeast.com/escaped-california-inmate-cut-off-pot-dealers-penis> [<https://perma.cc/U58M-CG4E>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

the cash, the perpetrators burned the dispensary owner with a blowtorch, cut off his penis, and drenched him in bleach.⁶ Once they realized that they would not be successful in learning the location of the “secret stash,” the perpetrators dumped both victims on the side of the road.⁷

On the surface, it might seem like the dispensary owner’s story has nothing to do with federalism. However, this story is closely related to a major federalism problem facing the United States today.⁸ As of April of 2021, thirty-five states and Washington, D.C. have legalized the use of marijuana in some capacity.⁹ However, the use, sale, and distribution of marijuana remain illegal under federal law.¹⁰ This poses a particular problem in the banking industry: the inability of banks to provide services to marijuana-related businesses (“MRBs”) without facing criminal liability under federal law or punishment from federal regulatory agencies.¹¹ As a result of this issue, MRB workers like the dispensary owner in our story are forced to keep large amounts of cash on hand.¹² Such stockpiles of cash are incredibly attractive targets for criminals like Handley, Nayeri, and Kevorkian.¹³ If MRBs or their owners were able to obtain

⁶ *Id.*; Richard P. Ormond, *Cannabis, Cash, and Crime*, L.A. LAW., July/Aug. 2018, at 22, 22. In the opening of his article, Ormond uses this story as one “chilling” example of the types of crime that cash-based marijuana businesses attract. *Id.* The effectiveness of Ormond’s use of the dispensary owner’s story to introduce readers to the marijuana banking issue inspired me to use it in the introduction to my Note.

⁷ Ormond, *supra* note 6, at 22; Briquet, *supra* note 1 (“But before they took off, the sickos grabbed the man’s penis so that it could never be reattached, according to prosecutors. The man spent an extensive recovery in the hospital but survived, authorities said.”).

⁸ Ormond, *supra* note 6, at 22. Cornell Law School’s Legal Information Institute defines federalism as “a system of government in which the same territory is controlled by two levels of government” and further explains:

Generally, an overarching national government is responsible for broader governance of larger territorial areas, while the smaller subdivisions, states, and cities govern the issues of local concern.

Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other.

In the United States, the Constitution has established a system of “dual sovereignty,” under which the States have surrendered many of their powers to the Federal Government, but also retained some sovereignty.

Federalism, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/federalism> [<https://perma.cc/48ZY-HAK9>].

⁹ Sarah Rense, *Here Are All the States That Have Legalized Weed in the U.S.*, ESQUIRE (Nov. 4, 2020), <https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/> [<https://perma.cc/U8WC-7TDS>]. *State Medical Marijuana Laws*, NAT’L CONF. OF STATE LEGISLATURES (May 17, 2021) <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

¹⁰ *Id.*

¹¹ Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RESV. L. REV. 597, 600 (2015).

¹² Ormond, *supra* note 6, at 22.

¹³ *See id.*; Briquet, *supra* note 1.

banking services, stories about such violent crimes against MRB owners and staff might not be so common.¹⁴ But how exactly can this federalism-related banking problem be solved? The issue obviously requires some type of federal legislation, but what kind?

This Note provides an analysis of those questions. First, Part II of this Note explains how and why federal and state law are at odds when it comes to marijuana-related laws, and why the issue is particularly glaring regarding the banking industry.¹⁵ This discussion will explore the real-world example of Fourth Corner Credit Union and its inability to obtain a master account and federal deposit insurance in order to bank MRBs due to the illegality of marijuana at the federal level.¹⁶ I will also discuss some of the issues resulting from MRBs' lack of access to banking services, including violent crimes like the one previously mentioned and issues involved in taxing MRBs.¹⁷ Lastly, Part II will explore the federal guidance that has been provided to banks wishing to provide banking services to MRBs.¹⁸

Part III discusses the several legislative solutions that have been proposed to solve the marijuana banking problem. Those solutions include both the legalization of marijuana at the federal level and piecemeal legislative solutions with a narrower scope.¹⁹ I discuss the legislative proposals that have been made and rejected in the past, as well as those currently under consideration. In Part III, I analyze the strengths and weaknesses of each type of proposed legislative solution. I argue that piecemeal or narrow-scope legislative solutions will not fully solve the marijuana banking problem and are have historically failed to become law, and that in order for the marijuana industry to be successful, legalization of marijuana at the federal level is necessary. Narrow-scope laws that target only the banking industry may not provide the level of legal and financial protection required to get banks on board with providing services to MRBs.²⁰ First, such narrow-scope legislative solutions have

¹⁴ AM. BANKERS ASS'N, *THE PUBLIC BENEFITS OF BANKING CANNABIS BUS.* 1, 1 (2019), <https://www.aba.com/-/media/documents/white-paper/cannabis-white-paper.pdf> [<https://perma.cc/6FM3-GBMG>].

¹⁵ Hill, *supra* note 11, at 601–02.

¹⁶ *Fourth Corner Credit Union v. FRB*, 861 F.3d 1053 (10th Cir. 2017); *NCUA Says Fourth Corner Should Reapply for Share Insurance Coverage*, NAT'L ASS'N OF FEDERALLY-INSURED CREDIT UNIONS, (Feb. 23, 2018), <https://www.nafcu.org/newsroom/ncua-says-fourth-corner-should-reapply-share-insurance-coverage> [<https://perma.cc/Q9VN-MUFZ>].

¹⁷ AM. BANKERS ASS'N, *supra* note 14, at 1; Hill, *supra* note 11, at 602.

¹⁸ Memorandum from James M. Cole, Deputy Att'y Gen., to United States Att'ys, (Aug. 29, 2013) [hereinafter Cole Memorandum I], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/CV8Z-G2X6>]; Memorandum from James M. Cole, Deputy Att'y Gen., to United States Att'ys, (Feb. 14, 2014) [hereinafter Cole Memorandum II], <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf> [<https://perma.cc/2L2A-7MLM>]; Dep't of the Treasury Fin. Crimes Enf't Network, (Feb. 14, 2014) [hereinafter FinCEN Guidance], <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [<https://perma.cc/3EP3-9SJ3>].

¹⁹ H.R. 1595, 116th Cong. (2019)

²⁰ Ian Stewart & Ruben Espinosa, *An Expert Analysis of the SAFE Banking Act*, MG MAG. (June 3, 2019), <https://mgretailer.com/business/legal-politics/an-expert-analysis-of-the-safe>

historically failed to pass and are unlikely to become law.²¹ In addition, even if such legislation is passed and provides the level of protection needed to shield banks from federal liability, such laws do not solve other issues involved in the business of state-legal marijuana, such as MRBs' lack of access to potential consumers²² and scientists' inability to legally obtain marijuana for research purposes.²³ I conclude that such solutions will not be successful in removing the federally created hindrances facing state-legal marijuana businesses.

II. BACKGROUND

Why is the federal illegality of marijuana powerful enough to scare banks and financial institutions away from banking state legal MRBs? The answer to this question has several layers. First, banks are subject to several federal laws that can punish banks for associating with MRBs, including the Controlled Substances Act ("CSA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and federal anti-money laundering statutes.²⁴ In addition, banks are heavily subject to regulation by federal government agencies, regardless of whether a bank is state-chartered or federally chartered.²⁵ Lastly, all banks and many credit unions are required to obtain federal deposit insurance.²⁶ All of these issues of federal oversight and control combine to make banks wary of banking MRBs, even when the businesses in question are following state law.²⁷

banking-act/ [https://perma.cc/9EHQ-CSTB]; see Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 94–95 (2015).

²¹ Jeremy Nobile, *Marijuana Banking Bill Stalls in Senate to No One's Surprise*, CRAIN'S CLEV. BUS. (Dec. 20, 2019) <https://www.craigslist.com/jeremy-nobile-blog/marijuana-banking-bill-stalls-senate-no-ones-surprise> [https://perma.cc/4GQW-GTFT]; *H.R. 1595 (116th): Secure and Fair Enforcement Banking Act of 2019*, GOVTRACK <https://www.govtrack.us/congress/bills/116/hr1595> [https://perma.cc/JAP8-6PDD].

²² See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); Nelson D. Cary & Michael C. Griffaton, Vorys, Sater, Seymour and Pease LLP, Presentation at Ohio Bankers League Cannabis Banking Conference: Pot, Politics, and Preemption: Medical Marijuana in the Workplace (Aug. 20, 2019); Yvette Farnsworth Baker, *Do Disability Laws Cover Medical Marijuana Use?*, SHRM (Oct. 22, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-disability-laws-medical-marijuana.aspx> [https://perma.cc/9GMX-PUVR]; Donald C. Davis, *Employing Medical Marijuana Users: Does Federal Law Give Employers a Pass?* MINTZ (Sept. 25, 2018), <https://www.mintz.com/insights-center/viewpoints/2226/2018-09-employing-medical-marijuana-users-does-federal-law-give> [https://perma.cc/D7AJ-6J5X].

²³ Craig Giammona & Kristine Oworm, *Even Nobel-Winning Chemists Don't Know What's in Your Weed Vape*, BNN BLOOMBERG (Sep. 26, 2019), <https://www.bnnbloomberg.ca/even-nobel-winning-chemists-don-t-know-what-s-in-your-weed-vape-1.1322348> [https://perma.cc/QRG4-TCZ8].

²⁴ Hill, *supra* note 11, at 607–18; *FAQs: Marijuana Banking for Credit Unions*, NAT'L ASS'N OF FEDERALLY-INSURED CREDIT UNIONS, <https://www.nafcu.org/faqs-marijuana-banking-credit-unions> [https://perma.cc/P5ZW-N57Y] (last updated Nov. 2019).

²⁵ Hill, *supra* note 11, at 604.

²⁶ *Id.* at 617–18.

²⁷ See generally *id.*

A. Federal Statutes

While thirty-five states and Washington D.C. have legalized the use, sale, and distribution of marijuana in some capacity,²⁸ there are several federal laws that pose liability for banks and other persons involved with the sale or distribution of marijuana.²⁹ Due to the Supremacy Clause contained in Article VI of the United States Constitution, which reads “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land,” whenever state and federal law are incompatible, federal law rules.³⁰ As a result of this federal pre-emption, federal statutes creating criminal liability for involvement in the sale, distribution, or use of marijuana are valid restraints on financial institutions that wish to provide services to state-legal MRBs.³¹

The CSA is one such federal law that imposes liability for involvement with MRBs.³² The CSA lays out different schedules of drugs, according to “the substance’s medical use, potential for abuse, and safety or dependence liability.”³³ According to this system, the Act ranks marijuana as a Schedule I drug, placing it on the same level of seriousness as heroin.³⁴ The Schedule I designation indicates drugs with “no currently accepted medical use” and a “high potential for abuse.”³⁵ Because of the seriousness of a Schedule I designation, the federal legalization of marijuana would need to be accompanied by the removal of marijuana from Schedule I of the CSA in exchange for a higher schedule designation recognizing some medical purpose and lower potential for abuse.³⁶ As it stands, persons or entities involved in the sale,

²⁸ Rense, *supra* note 9.

²⁹ Hill, *supra* note 11, at 607–18; AM. BANKERS ASS’N, *supra* note 14, at 1.

³⁰ U.S. CONST. art. VI, cl. 2; *Fourth Corner Credit Union v. FRB*, 861 F.3d 1055 (10th Cir. 2017) (citing *Planned Parenthood of Kan. & Mid.-Mo. v. Moser*, 747 F.3d 814 (10th Cir. 2014)); *see also* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (upholding the CSA as it applies to those growing marijuana for personal medical use in California, where such use is legal under state law). Justice O’Connor wrote a dissenting opinion in this case, citing that states should be allowed to carry out their role as laboratories of democracy without interference from the federal government. *Gonzales*, 545 U.S. at 42 (O’Connor, J., dissenting). Justice Thomas also dissented on the grounds that he disagreed with the court’s interpretation of Congress’s power under the commerce clause. *Id.* at 57–58 (Thomas, J., dissenting).

³¹ *Fourth Corner Credit Union*, 861 F.3d 1055.

³² 21 U.S.C. § 801 (2019).

³³ *The Controlled Substances Act*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/controlled-substances-act> [<https://perma.cc/G6S4-H5XC>].

³⁴ 21 C.F.R. § 1308.11 (2019).

³⁵ 21 U.S.C. §§ 812(b)(1)(B).

³⁶ *See generally* DRUG POL’Y ALL., REMOVING MARIJUANA FROM THE SCHEDULE OF CONTROLLED SUBSTANCES 1 (2019), http://www.drugpolicy.org/sites/default/files/marijuana-scheduling_january_2019_0.pdf [<https://perma.cc/Q6Y5-QEQ9>]. The Drug Policy Alliance suggests removing marijuana from the Schedule of Controlled Substances altogether and regulating it “in a manner similar to alcohol.” *Id.* at 3. The alliance asserts that “the current system for classifying illegal (and most legal) drugs is flawed, outdated and unscientific.” *Id.* at 1. The group suggests:

distribution, or use of Schedule I drugs can be found criminally liable under the CSA even if the drugs are considered legal at the state level.³⁷ Such liability extends to those who are “accessories” to such crimes, such as banks who aid MRBs by providing them with credit cards and loans or accepting for deposit money derived from marijuana sales.³⁸ The Supreme Court has held that the federal government may enforce the Act “even against those complying with more lenient state marijuana laws.”³⁹ With laws like the CSA, then, it’s no wonder that banks are afraid to provide services to MRBs. However, financial institutions’ exposure to federal liability does not end with the CSA.

Banks may also face liability for providing services to MRBs under RICO.⁴⁰ RICO is a federal law passed for the purpose of “seeking to eradicate organized crime in the United States.”⁴¹ The law states that “it is unlawful for anyone employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”⁴² RICO was originally passed for the purpose of prosecuting organized

[S]imply moving marijuana to a less restrictive schedule would not protect existing state medical marijuana programs or change federal penalties for possessing, cultivating and distributing marijuana. It would not prevent people from being arrested and punished for using marijuana. Nor would it remove obstacles to research or force the DEA and NIDA to allow research to move forward. Even if vital research were permitted, the FDA approval process would take several years, perhaps decades.

Id. at 3. However, this assertion seems to be made under the assumption that re-scheduling the drug would not occur simultaneously with other legalization efforts, which is what this article is suggesting as the ultimate solution to the marijuana banking dilemma.

³⁷ Hill, *supra* note 11, at 609; 21 U.S.C. §§ 801–904.

³⁸ Hill, *supra* note 11, at 608; 21 U.S.C. § 846.

³⁹ Chmerinsky, *supra* note 20, at 103 n.104, (first citing *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 486 (2001); then citing *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)), both of which uphold the federal government’s right to enforce the CSA even where marijuana is legal at the state level.

⁴⁰ U.S. DEP’T OF JUST., JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL 109 (2018).

⁴¹ *Id.* (first citing *Russello v. United States*, 464 U.S. 16, 26–27 (1983); and then citing *United States v. Turkette*, 452 U.S. 576, 589 (1981)).

⁴² U.S. DEP’T OF JUST., *supra* note 40, at 1; 18 U.S.C. § 1962(c). In her article *Civil RICO: The Legal Galaxy’s Black Hole*, Virginia M. Morgan explains that RICO defines a “pattern” of racketeering activity as the commission of two or more predicate acts, with at least two of those acts committed within 10 years of each other. Virginia M. Morgan, *Civil RICO: The Legal Galaxy’s Black Hole*, 22 AKRON L. REV. 107, 110 (1989). However, she also notes:

[T]he Court stated that the word “requires” is not synonymous with the word “means.” That is to say that while two acts are necessary, they may not be sufficient. The Court explained: “the target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one single ‘racketeering activity’ and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.”

Id. at 110 (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985)).

crime, and its broad prohibition on participation in such operations allowed prosecutors to seek punishment for those involved at any level of a criminal “organization.”⁴³ However, RICO also allows for civil suits based on violation of the provisions of the law.⁴⁴ As the popularity of RICO prosecutions have waned over the years, many lawsuits have arisen based on RICO’s civil component.⁴⁵

In 2017, a bank was accused of running afoul of this law by providing banking services to an MRB.⁴⁶ In the end, the case was dismissed by the Second Circuit because the bank in question had “followed the guidance on risk assessment, filed Suspicious Activity Reports (“SARs”), and performed customer due diligence as required by the Financial Crimes Enforcement Network (“FinCEN”).”⁴⁷ However, the National Association of Federally-Insured Credit Unions warns that there is still “a threat” that financial institutions “may be subjected to RICO lawsuits.”⁴⁸ This fear of civil RICO lawsuits is not unfounded, as “in fiscal year 2018, a total of 213 criminal defendants were prosecuted under RICO, as compared to the 1,405 civil suits filed.”⁴⁹ According to Peter Henning with the *New York Times*, many are attracted to RICO lawsuits because “[RICO’s civil component] allows it to be used to turn ordinary business disputes that would be filed in state courts into federal cases. Proving a violation results in the award of triple damages plus attorney’s fees, so plaintiffs have an incentive to look for ways to turn their grievances into a RICO suit.”⁵⁰

⁴³ Walter Pavlo, *Once Meant to Nail Mobsters, RICO Sees Resurgence in Civil Cases in 2018*, FORBES (Oct. 31, 2018), <https://www.forbes.com/sites/walterpavlo/2018/10/31/once-meant-to-nail-mobsters-rico-sees-resurgence-in-civil-cases-in-2018/#456deff52421> [<https://perma.cc/US2T-7VC3>].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ NAT’L ASS’N OF FEDERALLY-INSURED CREDIT UNIONS, *supra* note 24.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Pavlo, *supra* note 43.

⁵⁰ *Id.* (quoting Peter Henning, *RICO Lawsuits Are Tempting, but Tread Lightly*, N.Y. TIMES: DEALBOOK (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/business/dealbook/harvey-weinstein-rico.html> [<https://perma.cc/3GEJ-MVMB>]). Peter Henning’s article discusses how several unlikely disputes have turned into RICO lawsuits, focusing specifically on the sexual harassment claims lodged against Harvey Weinstein and the Weinstein Company:

The class action, filed on behalf of women who dealt with Mr. Weinstein, claims that the enterprise was designed “to harass, threaten, extort and mislead both Weinstein’s victims and the media to prevent, hinder and avoid the prosecution, reporting or disclosure of his sexual misconduct.” How can that be a RICO case? The statute requires proving that an “enterprise” engaged in a “pattern of racketeering activity” in violation of federal criminal laws over a substantial period. In this case, the plaintiffs claim that part of covering up the harassment involved obstruction of justice and “multiple instances of mail and wire fraud” to show the criminal pattern, and that by acting to help Mr. Weinstein, the defendants formed an enterprise alleged to be an “association in fact.”

Henning, *supra*.

In addition to the potential liability posed by CSA and RICO, banks face potential liability under federal anti-money laundering statutes.⁵¹ According to the American Bankers Association, “any 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.”⁵² While banks face criminal liability under such laws, as well as acts like RICO and the CSA, such liability is not the only reason for financial institutions to fear providing services to MRBs. There is another layer to the dilemma: banks and other financial institutions can also face punishment by federal regulatory agencies for breaking these federal laws.⁵³

B. Federal Bank Regulatory Agencies

Although banks can choose either a federal charter with the Office of the Comptroller of the Currency (“OCC”) or a state charter through a state banking agency, both state-chartered and federally chartered banks are subject to regulation by federal government agencies.⁵⁴ Federally chartered banks are regulated by the OCC, the same agency that issues federal bank charters.⁵⁵ State-chartered banks that choose to become part of the Federal Reserve System are regulated by the Board of Governors of the Federal Reserve System (“FRB”), while banks that choose not to become members of the Federal Reserve System are subject to regulation by the Federal Deposit Insurance Corporation (“FDIC”).⁵⁶ Each of these agencies has the ability to punish banks for running afoul of federal law, and in some circumstances, the agencies may even force a financial institution to close its doors.⁵⁷ Due to this heavy federal oversight of even state-chartered banks, some have argued that “the current banking regulatory scheme is so pervaded by federal regulation that the availability of a state bank charter has little impact on the banking system.”⁵⁸

The story of Fourth Corner Credit Union is a good example of the struggles that financial institutions wishing to bank MRBs encounter due to the broad powers of federal banking regulatory agencies.⁵⁹ Fourth Corner Credit Union was formed for the specific purpose of providing banking services to MRBs.⁶⁰ As part of the process of setting up its business, the credit union applied for a master account with the FRB.⁶¹

⁵¹ *Cannabis Banking: Bridging the Gap between State and Federal Law*, AM. BANKERS ASS’N, <https://www.aba.com/advocacy/our-issues/cannabis> [<https://perma.cc/W5E2-TXXR>]; Hill, *supra* note 11, at 610; 18 U.S.C. §§ 1956–57.

⁵² AM. BANKERS ASS’N, *supra* note 51.

⁵³ Hill, *supra* note 11, at 630.

⁵⁴ *Id.* at 606; MARK JICKLING & EDWARD V. MURPHY, CONG. RSCH. SERV., R40249, WHO REGULATES WHOM? AN OVERVIEW OF U.S. FINANCIAL SUPERVISION 14 (2010).

⁵⁵ JICKLING & MURPHY, *supra* note 54, at 14.

⁵⁶ *Id.*

⁵⁷ Hill, *supra* note 11, at 630.

⁵⁸ *Id.* at 606.

⁵⁹ *See generally* Fourth Corner Credit Union v. FRB, 861 F.3d 1052 (10th Cir. 2017).

⁶⁰ *Id.* at 1053.

⁶¹ *Id.*

“A master account is, put simply, a bank account for banks. It gives depository institutions access to the Federal Reserve System’s services, including its electronic payments system. In the credit union’s words, ‘without such access, a depository institution is nothing more than a vault.’”⁶² The FRB denied the credit union’s application, and the credit union sued in return.⁶³ In court, the FRB was successful in arguing an illegality defense; they would not provide a master account to a credit union that would break federal laws by providing services to MRBs.⁶⁴ The Colorado District Court dismissed the credit union’s claim with prejudice.⁶⁵ The Tenth Circuit Court of Appeals issued a per curiam opinion vacating the district court’s order and remanding with instructions to dismiss the credit union’s complaint without prejudice after the credit union amended its complaint to state that it would “serve MRBs only if it’s authorized to do so by law.”⁶⁶ In the end, the credit union was able to obtain a master account from the FRB after agreeing to provide services only to marijuana-adjacent customers such as marijuana advocates, and abandoning its attempt at banking true MRBs such as state-licensed dispensaries.⁶⁷

C. Federal Deposit or Share Insurance

Another facet of federal regulation for financial institutions addresses the need for most financial institutions to obtain federal deposit insurance.⁶⁸ As Julie Andersen Hill explains, “the Banking Act of 1933 created the Federal Deposit Insurance Corporation and required that all national banks obtain FDIC insurance. All states subsequently required that their state banks obtain FDIC insurance.”⁶⁹ The share insurance requirements for credit unions work a bit differently, but still result in heavy federal oversight.⁷⁰ While state-chartered credit unions in a few states are free to choose to purchase private share insurance, most states require their state-chartered credit unions to obtain federal share insurance from the National Credit Union Administration (“NCUA”).⁷¹ Likewise, federally chartered credit unions are required to obtain NCUA insurance.⁷² Federal insurance requirements pose problems for financial institutions that wish to bank MRBs, because the FDIC and NCUA, like other federal banking

⁶² *Id.*

⁶³ *Id.* at 1053–54.

⁶⁴ See generally *Fourth Corner Credit Union v. FRB of Kan. City*, 154 F. Supp. 3d 1185 (D. Colo. 2016).

⁶⁵ *Id.* at 1190.

⁶⁶ *Fourth Corner Credit Union*, 861 F.3d at 1054.

⁶⁷ *Fed Approves Fourth Corner CU's Request to Serve Marijuana Advocates*, NAT'L ASS'N OF FEDERALLY-INSURED CREDIT UNIONS (Feb. 6, 2018), <https://www.nafcu.org/newsroom/fed-approves-fourth-corner-cus-request-serve-marijuana-advocates> [https://perma.cc/V23A-UFKW].

⁶⁸ Hill, *supra* note 11, at 617.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 617–18.

⁷² *Id.* at 617.

agencies, can impose punishments on financial institutions for breaking federal laws.⁷³ In addition, the FDIC and NCUA can revoke or refuse to provide insurance to financial institutions that provide services to MRBs in violation of federal law.⁷⁴

Fourth Corner Credit Union again provides a vivid illustration of the issue at hand. The credit union applied for share insurance with the NCUA, and the NCUA denied the credit union's application.⁷⁵ Because Colorado is in the majority of states that do not allow credit unions to obtain private share insurance, obtaining private insurance was not an option for Fourth Corner Credit Union.⁷⁶ The credit union challenged the NCUA's decision in court, but the lawsuit was rendered moot when the credit union changed its business model and agreed to serve only marijuana advocates, not dispensaries or other companies that are directly involved with marijuana.⁷⁷ In 2018, the NCUA suggested that the credit union re-apply for share insurance in line with their business model changes.⁷⁸ As of that time, Fourth Corner Credit Union's CEO and president, Deirdra O'Gorman, indicated that the credit union is "still working with (state banking regulator) Colorado Division of Financial Services before we are able to proceed with any dialog with the NCUA. With Colorado DFS, our main goal is to provide an updated and workable business plan to them based on our current field of membership."⁷⁹ As a result, the credit union has yet to successfully open its doors.⁸⁰

D. Consequences of the Marijuana Banking Dilemma

I now turn to the consequences of the various federal laws and regulations discussed above. To begin, it is obvious that a lack of access to banking puts MRBs at a relative disadvantage, as they are not able to access financing opportunities that are available to other types of businesses.⁸¹ This lack of opportunities may hurt the

⁷³ *Id.* at 618–19.

⁷⁴ *Id.* at 619. *See generally* Fourth Corner Credit Union v. NCUA, No. 15-cv-01634, 2016 U.S. Dist. LEXIS 194221 (D. Colo. July 5, 2016).

⁷⁵ *Fourth Corner Credit Union*, 2016 U.S. Dist. LEXIS 194221, at *14.

⁷⁶ Peter Strozniak, *Pot Credit Union No Closer to Opening Date*, CREDIT UNION TIMES (Oct. 5, 2018), <https://www.cutimes.com/2018/10/05/pot-credit-union-no-closer-to-opening-date/?slreturn=20190908122429> [<https://perma.cc/L3GX-H2HQ>].

⁷⁷ *Id.*

⁷⁸ NAT'L ASS'N OF FEDERALLY-INSURED CREDIT UNIONS, *supra* note 16.

⁷⁹ Strozniak, *supra* note 76.

⁸⁰ *Id.* As of January 10, 2021, Fourth Corner Credit Union's website states that it is "not currently open for business," but encourages those interested to "please check back soon" for "more news about our credit union and our historic grand opening." The website still boasts a careers page as well as a tab where those interested in membership can fill out a form to be contacted by the credit union when it is "up and running." However, the latest press releases available from the website's media section are from July of 2015, and the website does not appear to have been updated recently. FOURTH CORNER CREDIT UNION, <https://www.4ccu.org/about-us> [<https://perma.cc/2PB7-JFVA?type=image>].

⁸¹ Hill, *supra* note 11, at 600–01. Dispensary owners are aware that their cash-driven businesses are easy targets for thieves, as evidenced by the story of Rocky Pedersen. In 2013, Rocky Pedersen's place of business, the New Age Wellness marijuana dispensary, was robbed at gunpoint. Surprisingly, the tables would soon turn; from 2016 through 2018, Pedersen would conduct his own string of violent robberies targeting marijuana dispensaries. Armed with an

economy; as the American Bankers Association stated in 2019, the cannabis industry “has great potential to boost local growth and expand the tax base, but that growth may be tempered if the industry’s employees, suppliers, and service providers are excluded from the banking system.”⁸²

As shown through the story of the dispensary owner who was tortured in order to elicit the location of the cash proceeds of his business, a lack of access to bank accounts puts those working for MRBs in danger of theft and other crimes.⁸³ In July 2019, the American Bankers Association reported that cannabis businesses were disproportionately burglarized in comparison with other types of businesses, and that murders, kidnappings, and home invasions had all been reported in connection with cash-based cannabis businesses.⁸⁴ According to Betty Aldworth, the former deputy director of the National Cannabis Industry Association, “[t]he lack of access to banking is hands down the single most dangerous aspect of legal marijuana.”⁸⁵

While a lack of access to banking is dangerous to MRBs, it can also be dangerous to the United States government.⁸⁶ Because cash-based businesses leave fewer “paper trails” than those who use traditional banking services, it is easier for cash-based operations to underreport taxes.⁸⁷ It has been reported that “cash-based businesses underreport their income by at least 50%,” and “self-employed individuals operating businesses on a cash basis (a description that fits most cannabis proprietors) report less than 20% of their income to the IRS.”⁸⁸ In short, MRBs’ lack of access to bank accounts and banking services is hurting both MRBs and their employees as well as the United States government and its honest tax-paying citizens.

AR-15, Pedersen robbed at least five marijuana-related businesses. Pedersen, a heroin addict, had a desperate need for a large amount of money to feed his habit. As a result of his experience in the marijuana industry, he knew that marijuana dispensaries were ideal targets for obtaining staggering amounts of cash. In the end, Pedersen’s crime spree came to a close when he was shot in the leg during a stick-up and arrested on 35 counts including robbery and attempted murder. Duke London, *Former Dispensary Owner Robs His Competition, Blames Heroin*, DAILY MARIJUANA OBSERVER (Mar. 13, 2018), <https://www.dailymarijuanaobserver.com/single-post/2018/03/13/Former-Dispensary-Owner-Robs-His-Competition-Blames-Heroin> [<https://perma.cc/6S4Y-VR4A>].

⁸² AM. BANKERS ASS’N, *supra* note 14, at 2.

⁸³ Ormond, *supra* note 6, at 22. In order to combat this problem, some marijuana businesses have begun utilizing armored car services in order to protect their cash. Niche armored truck companies such as the California-based Hardcar, partly owned and operated by former police officer Jeff Breier, have been opened exclusively for the use of the marijuana industry. Acknowledging the robberies of dispensary employees that have occurred in the past, Breier explains that the use of armored truck companies are a deterrent to criminals who are looking for “the soft target, ‘the Susie in the minivan.’” Chris Brown, *A Fleet Grows with the Cannabis Industry*, BUS. FLEET (Feb. 15, 2018), <https://www.businessfleet.com/279665/a-fleet-grows-with-the-cannabis-industry> [<https://perma.cc/44WA-ZKSF>].

⁸⁴ AM. BANKERS ASS’N, *supra* note 14, at 3.

⁸⁵ *Id.*

⁸⁶ *Id.* at 5; Hill, *supra* note 11, at 602.

⁸⁷ AM. BANKERS ASS’N, *supra* note 14, at 4; Hill, *supra* note 11, at 603.

⁸⁸ AM. BANKERS ASS’N, *supra* note 14, at 4.

E. A Brief History of Federal Guidance on Banking MRBs

In an effort to solve some of the issues involved with state-legal marijuana operations and the banking of MRBs, the United States Department of Justice (“DOJ”) and the Financial Crimes Enforcement Network (“FinCEN”) have both released marijuana-related guidance that can apply to banks that wish to deal with marijuana customers.⁸⁹ However, not all of this guidance is still in effect⁹⁰ and not all of it has been helpful.⁹¹ Unlike legislation, such guidance has no actual effect on the legality of marijuana in the United States.⁹²

In 2013, Deputy Attorney General James Cole and the DOJ issued a memorandum setting forth its guidelines for enforcing prosecution of marijuana offenses.⁹³ Known as the Cole Memo I,⁹⁴ the document sets forth eight enforcement priorities:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.⁹⁵

While the guidance offered in the first Cole Memo didn’t specifically address the issues banks face in serving marijuana-related customers, it did offer some reassurance that state-legal marijuana operations would not be the main targets for federal prosecution; as the National Association of Federally-Insured Credit Unions explains in its Marijuana Banking Issue Brief, the memorandum meant that state and local law enforcement agencies would be left in charge of prosecuting marijuana activity falling outside of the eight listed priorities “pursuant to their applicable state laws.”⁹⁶ The

⁸⁹ NAT’L ASS’N OF FEDERALLY-INSURED CREDIT UNIONS, ISSUE BRIEF: MARIJUANA BANKING 7–10 (2020) [hereinafter NAFCU ISSUE BRIEF], <https://www.nafcu.org/system/files/files/NAFCU%20Issue%20Brief%20-%20Marijuana%20Banking%20-%20December%202020.pdf> [https://perma.cc/PH3K-P38B].

⁹⁰ *Id.* at 8.

⁹¹ Hill, *supra* note 11, at 632.

⁹² NAFCU ISSUE BRIEF, *supra* note 89, at 3.

⁹³ *Id.* at 7; Cole Memorandum I, *supra* note 18, at 1.

⁹⁴ NAFCU ISSUE BRIEF, *supra* note 89, at 7.

⁹⁵ Cole Memorandum I, *supra* note 18, at 1–2.

⁹⁶ NAFCU ISSUE BRIEF, *supra* note 89, at 8; Cole Memorandum I, *supra* note 18, at 3.

memorandum explained the DOJ's basis for allowing state governments to take the lead on lower-priority marijuana activity, stating:

[I]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above.⁹⁷

In addition, the DOJ also cautioned that federal prosecutors should weigh state legality as a factor in deciding whether or not to prosecute a particular marijuana offense.⁹⁸

After the release of the first Cole Memo, Cole and the DOJ issued additional guidance pertaining specifically to banks.⁹⁹ This second memorandum, known as the Cole Memo II, was released in 2014 and addressed the "enforcement of money laundering and laws under the Bank Secrecy Act ("BSA"), including the filing of Suspicious Activity Reports ("SAR")."¹⁰⁰ This document reinforced the earlier Cole Memo's message, explicitly stating that the eight priorities listed in the earlier guidance should also guide prosecutors' discretion on whether to pursue investigations or prosecutions of a particular financial institution for "financial crimes" involving marijuana.¹⁰¹ The Cole Memo II provides examples of crimes which financial institutions may be prosecuted for:

For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers' activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.¹⁰²

In addition, the Cole Memo II was released alongside guidance from FinCEN and mandated that such guidance be followed by financial institutions.¹⁰³

⁹⁷ Cole Memorandum I, *supra* note 18, at 3.

⁹⁸ *Id.*

⁹⁹ NAFCU ISSUE BRIEF, *supra* note 89, at 8; Cole Memorandum II, *supra* note 18, at 1.

¹⁰⁰ NAFCU ISSUE BRIEF, *supra* note 89, at 7 (discussing Cole Memorandum II).

¹⁰¹ Cole Memorandum II, *supra* note 18, at 1–3.

¹⁰² *Id.* at 2–3.

¹⁰³ *Id.* at 3; NAFCU ISSUE BRIEF, *supra* note 89, at 7–8.

FinCEN's guidance provided banks and financial institutions with a series of expectations as far as due diligence, including the filing of suspicious activity reports for various levels of marijuana activity.¹⁰⁴ The guidance provides financial institutions with a laundry list of considerations to determine the legality of servicing MRBs and other marijuana-related customers:

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.¹⁰⁵

As discussed in Part III.D, these cumbersome requirements can deter banks from attempting to work with MRBs and likely will not be eradicated by narrowly targeted marijuana laws intended to affect only the banking industry.¹⁰⁶

In analyzing the reception of the DOJ and FinCEN guidance in 2015, Julie Andersen Hill noted that "financial institutions' response to the guidance was tepid."¹⁰⁷ A large part of the reason for banks' unenthusiastic response to the guidance was due to the fact that the guidance made no real difference in the danger of being prosecuted for serving MRBs.¹⁰⁸ One banking association CEO described the guidance as being less than satisfactory in this area: "At best, [it] amounts to 'Serve these customers at your own risk' and it emphasizes all those risks."¹⁰⁹

Financial institutions' fear of prosecution became even more real when it was announced that a large portion of the federal guidance on marijuana-related crimes had been rescinded.¹¹⁰ While the FinCEN guidance still stands, the Cole Memos were

¹⁰⁴ FinCEN Guidance, *supra* note 18, at 2.

¹⁰⁵ *Id.* at 2–3.

¹⁰⁶ See H.R. 1595, 116th Cong. (2019), which would require banks to continue complying with FinCEN guidance on banking the marijuana industry.

¹⁰⁷ Hill, *supra* note 11, at 632.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (quoting Pete Yost, *U.S. Offers Banks Rules on Marijuana*, BOS. GLOBE, Feb. 15, 2014, at B3 (statement by President and CEO of the Colorado Bankers Association Don Childears)).

¹¹⁰ NAFCU ISSUE BRIEF, *supra* note 89, at 11.

repealed by former Attorney General Jeff Sessions in 2018.¹¹¹ The National Association of Federally-Insured Credit Unions noted that the repeal of the Cole Memos while allowing the FinCEN guidance to stand has created a confusing situation for financial institutions and others involved in the marijuana industry, “because on the one hand, you have a financial regulator allowing the banking of a MRB, but on the other hand you could face federal prosecution by the DOJ.”¹¹² While the National Association of Federally-Insured Credit Unions noted that the DOJ “has not taken action against a financial institution for banking a MRB after the rescission of the Cole Memos” and that former “Attorney General William Barr stated that he would uphold the Obama-Era Cole memoranda and not “go after” people and businesses that relied on the memoranda,” the association also admits that “until [Barr] takes action on this issue uncertainty still persists.”¹¹³ As long as uncertainty remains regarding federal prosecution for banks’ involvement with marijuana, many banks are unlikely to accept customers who are involved in the marijuana industry.¹¹⁴ Clearly, federal guidance alone is not enough to solve the marijuana banking problem.¹¹⁵ Accordingly, changes in actual federal law are necessary to assuage financial institutions’ fears about potential federal prosecution for assisting MRBs with their financial needs. I suggest that the nature of such legislation must be that of federal legalization of marijuana accompanied by the removal of marijuana from Schedule I of the Controlled Substances Act.

III. ANALYSIS

How can the marijuana banking issue be solved? The problem obviously requires some sort of change in federal law, and legislative solutions to the problem have been proposed.¹¹⁶ Some of these proposed solutions involve laws that are drafted to specifically target the banking industry, making it legal for banks to provide services to MRBs while leaving the CSA, anti-money laundering statutes, and RICO otherwise intact.¹¹⁷ As I will explain, these types of narrowly tailored solutions will fall short of solving the marijuana banking dilemma. Unless marijuana is federally legalized and re-scheduled to a lower-severity category with reference to the CSA, the marijuana industry will not be able to grow into the prosperous business it is poised to become.

A. Issues Involved with Drafting Banking Industry-Targeted Marijuana Laws

How could proposed marijuana legislation, developed specifically for the banking industry, fall short of solving the marijuana banking problem? One obvious issue is that any legislation that is to be successful in solving the marijuana banking problem must be very carefully drafted to address each of the federal laws and regulations that

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Hill, *supra* note 11, at 632.

¹¹⁵ *Id.* at 637–38.

¹¹⁶ Stewart & Espinosa, *supra* note 20.

¹¹⁷ H.R. 1595, 116th Cong. (2019).

stand in the way of safely offering banking services to MRBs.¹¹⁸ For an example of this issue in action, consider the Secure and Fair Enforcement (hereinafter “SAFE”) Banking Act, a bill which has passed a floor vote in the House and headed for the Senate¹¹⁹ where it was never voted on and thus died at the end of the 116th Congress.¹²⁰ The bill was initially introduced in 2017, but it failed to receive a full vote or hearing in either house at that time.¹²¹ The bill was then re-introduced in 2019 with some substantial edits, including protection for “ancillary businesses,” which will be discussed later in this Note.¹²² In its 2019 form, the bill provided that federal banking regulators may not penalize financial institutions for banking “cannabis-related legitimate businesses.”¹²³ It also purported to eliminate liability under federal law for banks who provide financial services to marijuana-related businesses or invest income derived from those services pursuant to state law.¹²⁴ Experts have criticized the bill as failing to address all of the federal liability faced by banks who wish to provide services to MRBs:

While the SAFE Banking Act, if enacted in its current form, could be a significant step toward gaining access to badly needed financial services for [cannabis-related legitimate businesses], it remains to be seen whether the bill provides enough protection for financial institutions to offer services widely. On one hand, the bill arguably addresses the issue of liability under anti-money-laundering (AML) laws, but on the other hand it doesn’t appear to address liability under other federal laws such as RICO and the Controlled Substances Act. Without broader protections, financial institutions may continue to defer providing bank services to cannabis-related businesses.¹²⁵

Based on the above analysis, even the passage of a law such as the SAFE Banking Act may not actually increase MRBs’ access to banking services unless the law is meticulously drafted.¹²⁶ As long as financial institutions fear that there may be gaps in the “safe harbors” created by potential banking industry-targeted marijuana laws, they may be reluctant to engage with the marijuana industry until marijuana is fully legalized at the federal level, including a re-scheduling of the drug under the CSA.

¹¹⁸ Stewart & Espinosa, *supra* note 20.

¹¹⁹ Veronica Stracqualursi, *House Passes Cannabis Banking Bill, but It Faces Uncertainty in Senate*, CNN POLITICS (Sept. 26, 2019, 12:57 PM), <https://www.cnn.com/2019/09/26/politics/cannabis-banking-bill-house-vote/index.html> [<https://perma.cc/94YV-6UA7>].

¹²⁰ GOVTRACK, *supra* note 21.

¹²¹ Nathan Reiff, *SAFE Banking Act*, INVESTOPEDIA (Sept. 26, 2019) <https://www.investopedia.com/safe-banking-act-4587773> [<https://perma.cc/GM2K-DJW3>].

¹²² *Id.*

¹²³ H.R. 1595, 116th Cong. (2019).

¹²⁴ *Id.*

¹²⁵ Stewart & Espinosa, *supra* note 20.

¹²⁶ *See id.*

B. Narrowly Tailored Legislation Such as the SAFE Banking Act Has Historically Failed to Pass

While the SAFE Banking Act passed a vote in the House of Representatives in September of 2019,¹²⁷ the Senate never voted on the matter and the bill died.¹²⁸ In 2020, members of the House also unsuccessfully attempted to make provisions of the SAFE Banking Act federal law as a component of COVID relief legislation.¹²⁹

Initially, the prognosis for the standalone bill seemed favorable. Shortly after the bill passed by a 321 to 103 vote in the House, Senate Banking Committee Chairman Mike Crapo was quoted as saying that he thought there would be “good support” for the bill, and that support for marijuana banking was coming from “colleagues on both sides of the aisle.”¹³⁰ While many were optimistic that the bill would be voted on in the Senate before the end of 2019, Chairman Crapo dashed those hopes in mid-December.¹³¹ In explaining his opposition to the bill, Chairman Crapo stated that he has “significant concerns that the SAFE Banking Act does not address the high-level potency of marijuana, marketing tactics to children, lack of research on marijuana’s effects, and the need to prevent bad actors and cartels from using the banks to disguise ill-gotten cash to launder money into the financial system.”¹³²

Another roadblock to the passage of the SAFE Banking Act came from then-Senate Majority Leader Mitch McConnell. McConnell is known for attempting to block bills proposed and supported by Democrats and passed by the House of Representatives, even going as far as to call himself “the Grim Reaper” when it comes to such legislation.¹³³ McConnell had blocked other cannabis-related bills from being voted on by the full United States Senate in the past.¹³⁴ In addition, even though some

¹²⁷ Nobile, *supra* note 21.

¹²⁸ GOVTRACK, *supra* note 21.

¹²⁹ Katrinka Skinner, *Exclusion of the Safe Banking Act in Coronavirus Relief Doesn’t Mean It Won’t Pass in 2021*, JDSUPRA (Dec. 24, 2020), <https://www.jdsupra.com/legalnews/exclusion-of-the-safe-banking-act-in-38523/> [<https://perma.cc/AGA5-VN8X>] [hereinafter *Exclusion of the Safe Banking Act*]; Katrinka Skinner, *Does the Safe Banking Act Still Have a Chance?*, JDSUPRA (July 24, 2020), <https://www.jdsupra.com/legalnews/does-the-safe-banking-act-still-have-a-87478/> [<https://perma.cc/KJ4Q-XHBM>].

¹³⁰ Natalie Fertig et al., *Crapo Bullish About Banking*, POLITICO (Sept. 27, 2019), <https://www.politico.com/newsletters/morning-cannabis-preview/2019/09/27/crapo-bullish-about-banking-761462> [<https://perma.cc/BH8E-XPFU>].

¹³¹ Nobile, *supra* note 21.

¹³² *Id.*

¹³³ Benjy Sarlin, *Democrats Have Plans that “Grim Reaper” Mitch McConnell Won’t be Able to Block*, NBC NEWS (July 14, 2019), <https://www.nbcnews.com/politics/2020-election/democrats-have-plans-grim-reaper-mitch-mcconnell-won-t-be-n1028966> [<https://perma.cc/QFP2-6SS4>].

¹³⁴ Sean Williams, *The SAFE Banking Act Passes the House in a Landslide – Here’s What Happens Next*, MOTLEY FOOL (Sept. 28, 2019), <https://www.fool.com/investing/2019/09/28/the-safe-banking-act-passes-the-house-in-a-landslide.aspx> [<https://perma.cc/CUG4-EGGJ>] [hereinafter *Act Passes the House*]. In an earlier article, Sean Williams acknowledges McConnell’s support for hemp reform, but explains that McConnell has no interest in supporting the legalization of marijuana. See Sean Williams, *The*

were hopeful that the bill would get McConnell’s approval because its language was “less to do with weed and more about banking,” some suggested that the bill was not a good use of the small available window of the then–Majority Leader’s time and attention regarding marijuana reform.¹³⁵ “The idea that the cannabis industry has put so much stock in the SAFE Banking Act, at least enough to squander a rare meeting with the gatekeeper of federal marijuana reform on it,” asserted Mike Adams, “suggests that the suits out there overseeing marijuana operations in this country have no clue what their business really needs.”¹³⁶ Adams went on to explain that the SAFE Banking Act would not solve the vast array of problems faced by the marijuana industry for several reasons, many of which will be discussed further on in this Note.¹³⁷ Adams advocates for removal of marijuana from Schedule I of the Controlled Substances Act, a suggestion with which I agree.¹³⁸ The marijuana industry “doesn’t need more banking access to flourish,” Adam explains, “it needs Congress to eliminate the herb from the Controlled Substances Act so it can begin to relish in everyday commerce, just like any other legitimate industry.”¹³⁹

In addition to the concerns expressed by legislators above, some worry that a lack of lobbying attention on the issue from financial institutions might be a sign that even banks aren’t particularly interested in this type of legislation.¹⁴⁰ While the American Bankers Association “has been one of the most vocal supporters of the SAFE Banking Act,” several large banks had not mentioned the bill in recent lobbying reports as of September 2019.¹⁴¹ In addition, while Wells Fargo included the bill in their lobbying

SAFE Banking Act’s Big Day is Approaching, MOTLEY FOOL (Sept. 21, 2019), <https://www.fool.com/investing/2019/09/21/the-safe-banking-acts-big-day-is-approaching.aspx> [<https://perma.cc/AG8W-C42S>]. On the other hand, Williams recognizes:

If there is one sliver of hope, it’s that McConnell may break his traditional hardline stance on cannabis in order to put the GOP in better light heading into the 2020 elections. With a number of GOP Senate seats up for reelection, passing a bipartisan cannabis banking reform bill might aid his party’s chances of retaining their thin majority in the Senate.

Id.

¹³⁵ Mike Adams, *Marijuana Industry Finally Has the Attention of Senator McConnell, but is it Using it Wisely?*, FORBES (Oct. 10, 2019), <https://www.forbes.com/sites/mikeadams/2019/10/10/marijuana-industry-finally-has-the-attention-of-senator-mcconnell-but-is-it-using-it-wisely/#78db7bf04854> [<https://perma.cc/AW9A-4E9X>].

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Yeji Lee, *If the SAFE Banking Act Passes, Will Big Banks Work with the Cannabis Industry?*, CANNABIS WIRE (Sept. 25, 2019 6:50 AM), <https://cannabiswire.com/2019/09/25/if-the-safe-banking-act-passes-will-big-banks-work-with-the-cannabis-industry/> [<https://perma.cc/LGG2-E725>].

¹⁴¹ *Id.* According to Lee,

Cobank and Key Bank listed the SAFE Banking Act in their lobbying reports, but declined to comment for this story. Paypal and HSBC North America also disclosed the

disclosures, the company's Senior Vice President of Public Affairs Jennifer G. Dunn stated that the bill wasn't "necessarily a priority."¹⁴²

Other narrowly drafted marijuana-related bills have historically failed as well. The recently proposed STATES Act, while much more broadly drafted than the SAFE Banking Act, was criticized as failing to see the big picture.¹⁴³ The bill, which would have revised the CSA and made state-legal marijuana activity exempt from federal enforcement, was reintroduced in the House in 2019 after "[l]ittle was heard of the bill in the remainder of the 115th U.S. Congress."¹⁴⁴ Since its reintroduction, several criticisms of the bill have come to light.¹⁴⁵ In July 2019, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing regarding marijuana legislation entitled "Marijuana Laws in America: Racial Justice and the Need for Reform."¹⁴⁶ During the hearing, some expressed distaste for the bill on the premise that "does not go far enough" because it fails to provide solutions to "racial or social concerns."¹⁴⁷ Although the STATES Act was touted as "one of the most popular bills," Baltimore State's Attorney Marilyn Mosby expressed her opposition to the bill because the proposed legislation "fails to reinvest in those individuals and those communities that have been disproportionately impacted [by marijuana prohibition]."¹⁴⁸ In addition, Representative Matt Gaetz, though expressing support for the bill, recognized it as "a first step" in the legalization process, rather than a solution to the entire marijuana federalism issue.¹⁴⁹ Angelica LaVito with CNBC noted that "[d]espite the optimism" surrounding the meeting, "lawmakers did not appear to have a clear consensus on the best approach, such as whether to give states the right to legalize on their own, remove marijuana from Schedule I of the Controlled Substances

Act in their lobbying disclosures, but did not respond to multiple requests for comment. Banking giants Bank of America, Capital One, and Morgan Stanley did not list the SAFE Banking Act on their lobbying disclosures, and declined or could not be reached for comment.

Id.

¹⁴² *Id.* Although she stated that the bill "isn't necessarily a priority," Senior Vice President Dunn did acknowledge that the "confusion created by conflicts between federal and state laws regarding marijuana-related issues is an industry-wide problem for financial services-institutions and their customers." *Id.*

¹⁴³ Angelica LaVito, *US Lawmakers Look to Legalize Pot in 'Historic' Marijuana Reform Hearing*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/us-lawmakers-look-to-legalize-pot-in-historic-marijuana-reform-hearing.html> [<https://perma.cc/5RK6-SY5B>].

¹⁴⁴ Pete Danko, *Bipartisan Bill Protecting State-Legal Cannabis is Back in Congress*, PORTLAND BUS. J. (Apr. 4, 2019), <https://www.bizjournals.com/portland/news/2019/04/04/bipartisan-bill-protecting-state-legal-cannabis-is.html> [<https://perma.cc/G7PS-Q98E>].

¹⁴⁵ *See generally* LaVito, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Gaetz indicated that his "deep concern is that concerns over how far to go on some of the restorative elements in our policy could divide our movement." *Id.*

Act, legalize it or include promote social and racial equity in marijuana laws.”¹⁵⁰ The disagreement and criticism indicates that piecemeal marijuana legislation fails to appeal to many.

While some are hopeful that the SAFE Banking Act will be resurrected in 2021,¹⁵¹ as it stands, opposition to the SAFE Banking Act (and other potential bills like it) highlights two problems: the political and ideological divide that stands in the way of the passage of such bills,¹⁵² and the marijuana industry issues that will remain unsolved if such a bill were to pass.¹⁵³ Because resolving the latter issue may have a shifting effect on the former,¹⁵⁴ the full federal legalization of marijuana and removal of the drug from Schedule I of the CSA should be seriously considered rather than piecemeal, industry-targeted legislative solutions.

C. Statutes That Narrowly Target the Banking Industry Do Not Protect End Users of MRBs’ Products, and Such a Lack of Protection for Consumers Will Inhibit the Growth of MRBs Even If They Have Access to Banking Services

The issues involved with such narrowly targeted marijuana banking laws don’t end with the difficulty involved in properly wording them, so a simple re-drafting of current or past proposed legislation won’t make those proposals infallible. Another major issue with these types of proposed laws is that they will allow the incongruence between state and federal marijuana law to continue to affect other facets of the marijuana industry. While the “ancillary business” provision of the SAFE Banking Act will presumably protect attorneys, investors, landlords, and other businesses that are involved in the day-to-day activities of MRBs,¹⁵⁵ there are other entities and individuals that the law would not protect.¹⁵⁶ Leaving these other participants in the marijuana business unprotected¹⁵⁷ shows that Congress is attempting to put out one small “fire” (the marijuana banking problem) and leaving other “fires” to be dealt with later, rather than extinguishing the entire problem by addressing the federal legalization of marijuana at one time.¹⁵⁸ One of the main “fires” that still must be addressed is the lack of protection for consumers of the products MRBs produce.

¹⁵⁰ *Id.*

¹⁵¹ *Exclusion of the Safe Banking Act*, *supra* note 129.

¹⁵² *See generally* Sarlin, *supra* note 133.

¹⁵³ Nobile, *supra* note 21; *Act Passes the House*, *supra* note 134.

¹⁵⁴ Nobile, *supra* note 21; Adams, *supra* note 135.

¹⁵⁵ H.R. 1595, 116th Cong. (2019).

¹⁵⁶ *Id.* While the proposed SAFE Banking Act protects businesses by making transactions with MRBs legal, it does not purport to protect users of marijuana.

¹⁵⁷ *Id.*

¹⁵⁸ *Challenges for Cannabis and Banking: Outside Perspectives: Hearing Before the S. Comm. on Banking, Hous. & Urban Affs.*, 116th Cong. 44 (2019) [hereinafter *Challenges for Cannabis and Banking Hearing*] (statement of Garth Van Meter, Vice President, Government Affairs Smart Approaches to Marijuana). Van Meter criticizes Congress for wanting to pass this law in order to “skip[] ahead” of considering the full question of marijuana legalization. *Id.* While his criticisms focus mainly on the unsolved problem of inadequate medical research on marijuana, the same principle could be applied to the various issues that banking industry-targeted legislation leaves unsolved. *Id.* at 46.

Businesses and industries need customers in order to grow and be profitable,¹⁵⁹ and the marijuana industry is no different. However, the SAFE Banking Act protects only the financial institutions and ancillary businesses that work with MRBs, not the consumers of the products produced by them.¹⁶⁰ This is an issue that arises in at least two contexts: in the workplace,¹⁶¹ and in criminal prosecutions or interactions with the police.¹⁶²

Currently, although many states have passed laws allowing medical use of marijuana and some have even passed laws allowing the recreational use of marijuana,¹⁶³ such use is not protected in the workplace.¹⁶⁴ In fact, there are several federal laws that can result in marijuana users losing their jobs, even if their drug use is approved by a medical doctor and legal under state law.¹⁶⁵ The Americans with Disabilities Act, which provides for reasonable accommodations for Americans with disabilities, does not protect the use of marijuana as a reasonable accommodation for those with illnesses that the drug is used to treat.¹⁶⁶ In addition, the federal Drug Free Workplace Act requires employers to maintain “drug free” workplaces in order to remain eligible for federal funding or government contracts.¹⁶⁷ Employees who are governed by the Federal Motor Carrier Act face yet another barrier to consumption of marijuana products—the Department of Transportation has a zero-tolerance policy on

¹⁵⁹ Rieva Lesonsky, *10 Ways to Get New Customers*, U.S. SMALL BUS. ADMIN. (Apr. 6, 2017), <https://www.sba.gov/blog/10-ways-get-new-customers> [<https://perma.cc/CA7T-QL2U>].

¹⁶⁰ H.R. 1595, 116th Cong. (2019).

¹⁶¹ Cary & Griffaton, *supra* note 22, at 30; Farnsworth Baker, *supra* note 22; Davis, *supra* note 22. Evan Gibbs, a labor and employment attorney at Troutman Sanders, explains why ADA accommodations do not apply to those who use legally prescribed medicinal marijuana, and describes the bizarre situation created by current legislation in which an employee’s use of opioids is protected while the prescribed use of marijuana is not:

There are a lot of medical conditions that qualify as disabilities under the ADA for which physicians have begun prescribing medical marijuana as a treatment. Some of those conditions are cancer, PTSD, Parkinson’s disease, and many, many others. If a patient was taking, for example, an opioid for pain management for a medical condition, then the employee generally could not be fired for testing positive if they have a valid prescription for the medication from their doctor. But the ADA has a specific carve out exempting drugs that are illegal under federal law from its protections. Since marijuana is a Schedule I drug under the CSA, the ADA does not protect medical marijuana users. This was the conclusion reached by the Ninth Circuit in *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012). I’m not aware of a court reaching a different result under the ADA.

Evan Gibbs, *Labor and Employment Deep Dive: Marijuana and the Workplace*, ABOVE THE LAW (Apr. 26, 2019), <https://abovethelaw.com/2019/04/labor-and-employment-deep-dive-marijuana-and-the-workplace/> [<https://perma.cc/3AUA-2BRK>].

¹⁶² *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

¹⁶³ AM. BANKERS ASS’N, *supra* note 14, at 3.

¹⁶⁴ Cary & Griffaton, *supra* note 22, at 27; Farnsworth Baker, *supra* note 22.

¹⁶⁵ Cary & Griffaton, *supra* note 22, at 27-39, 64; Farnsworth Baker, *supra* note 22.

¹⁶⁶ Cary & Griffaton, *supra* note 22, at 27; Farnsworth Baker, *supra* note 22.

¹⁶⁷ Cary & Griffaton, *supra* note 22, at 27; Davis, *supra* note 22.

marijuana use.¹⁶⁸ Because many Americans fear losing their main source of income,¹⁶⁹ many would-be users of marijuana may be deterred from purchasing the product.

Potential MRB customers may also avoid purchasing marijuana products for fear of being criminally prosecuted or having their property seized by police. Prosecution of individual marijuana users is relatively rare due to the federal government's lack of resources to prosecute or become involved in every case of state-legal marijuana use, possession, or sale.¹⁷⁰ However, the CSA has been upheld as applicable to even those using marijuana under the guidance of a physician under state law.¹⁷¹ For example, in 2002, "after a 3-hour standoff," police confiscated Diane Monson's marijuana plants even after acknowledging that "her use of marijuana was entirely lawful as a matter of California law."¹⁷² Though Ms. Monson challenged the application of the CSA to those using the drug in compliance with state law, alleging that it would violate the Commerce Clause of the Constitution, the Supreme Court sided with the government.¹⁷³ Therefore, although federal enforcement of the CSA and other laws in regard to marijuana is somewhat rare,¹⁷⁴ it is a real concern for people who might otherwise, in the absence of such a threat, become consumers of marijuana products. Without protection for consumers of marijuana products, the marijuana industry will face barriers on its journey to national growth, prosperity, and job creation.¹⁷⁵

¹⁶⁸ Cary & Griffaton, *supra* note 22, at 27; 49 C.F.R. § 40.151(e) (2020).

¹⁶⁹ Jim Norman, *U.S. Workers' Fears of Job Loss Rise Slightly*, GALLUP (Apr. 27, 2018), <https://news.gallup.com/poll/232160/workers-fears-job-loss-rise-slightly.aspx> [<https://perma.cc/7XWP-BZDY>].

¹⁷⁰ TODD GARVEY, CONG. RSCH. SERV., R42398, *MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 1* (2010).

¹⁷¹ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *see also id.* at 62 (Thomas, J., dissenting).

¹⁷² *Id.* at 7 (majority opinion).

¹⁷³ *Id.* at 9.

¹⁷⁴ GARVEY, *supra* note 170.

¹⁷⁵ The federal legalization of marijuana is important for moral reasons as well as health reasons. Angel Raich, who challenged the CSA's constitutionality as applied to state-legal marijuana alongside Diane Monson, was prescribed medicinal marijuana for her inoperable brain tumor and resulting health issues. On her website, Ms. Raich described what her life would look like without access to the drug:

I suffer greatly from severe chronic pain every single day. The prolonged pain and suffering from my medical conditions significantly interferes with my quality of life. My treatment is complicated by the fact that I am violently allergic and have severe multiple chemical sensitivities to almost all pharmaceutical medicines. This interferes with the treatment of all of my medical conditions, and it means my suffering cannot be controlled by synthetic medications. This makes it extremely difficult for doctors to effectively help me combat my diseases. Without cannabis my life would be a death sentence.

Who is Angel McCleary Raich?, ANGEL JUSTICE, http://angeljustice.org/angel/Who_is_Angel_Raich.html [<https://perma.cc/HC2M-SV8F>]. Ms. Raich's primary care physician, Dr. Frank Lucido, backed Ms. Raich's claims, stating:

D. Marijuana Legislation Targeting Only the Banking Industry Will Not Remove Cumbersome Paperwork Requirements that Deter Banks from Providing Services to MRBs

Another issue with federal marijuana legislation that is narrowly tailored to the banking industry is that such legislation will not necessarily remove the requirement for banks to complete cumbersome paperwork in connection with the provision of services to MRBs.¹⁷⁶ As discussed in Section I.E, in 2013, the Financial Crimes Enforcement Network released the FinCEN Guidance Memorandum, which remains in effect as of October, 2019.¹⁷⁷ Although the FinCEN guidance provides helpful guidelines for financial institutions wishing to provide services to MRBs, it also requires banks serving MRBs to file Suspicious Activity Reports (“SARs”) determining the type of businesses served (distinguishing state-legal MRBs from those that may not be legal or are determined to be violating federal guidance)¹⁷⁸ and follow

Angel has no reasonable legal alternative to cannabis for the effective treatment or alleviation of her medical conditions or symptoms associated with the medical conditions because she has tried essentially all other legal alternatives to cannabis and the alternatives have been ineffective or result in intolerable side effects. Angel will suffer imminent harm without access to cannabis. Angel needs to medicate every two waking hours. After a certain number of medications have been tried, it would be malpractice to subject the patient to further unnecessary harm.

Id. Ms. Raich made a strong case that patients need to be shown compassion by the United States government when it comes to state-legal medical marijuana use. For the above arguments and additional information about Ms. Raich, see ANGEL JUSTICE, http://angeljustice.org/angel/Angel_Raichs_Website.html [<https://perma.cc/KV47-BQ66>].

Upon losing her case in the United States Supreme Court, Raich despaired: “the court has just sentenced me to death.” P. Smith, *Medical Marijuana: Federal Appeals Court Rules Angel Raich Can Be Prosecuted, Even If Only Marijuana Keeps Her Alive*, STOP THE DRUG WAR (Mar. 15, 2007), https://stopthedrugwar.org/chronicle/2007/mar/15/medical_marijuana_federal_appeal [<https://perma.cc/RB25-FLNM>].

¹⁷⁶ H.R. 1595, 116th Cong. (2019) would require banks to continue complying with FinCEN guidance on banking the marijuana industry.

¹⁷⁷ Ormond, *supra* note 6, at 24.

¹⁷⁸ *Id.*; FinCEN Guidance, *supra* note 18, at 3–7. FinCEN’s guidance specifies a great number of situations in which the filing of a Suspicious Activity Report must be filed, including when the MRB involved is state-legal:

A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose. Because 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’s suspicious activity reporting requirements and related thresholds.

burdensome due diligence guidelines.¹⁷⁹ Such requirements can be time-consuming and expensive, because FinCEN “expects financial institutions to conduct due diligence” as to whether the MRBs they are serving are in violation of state law or federal guidance.¹⁸⁰ The National Association of Federally-Insured Credit Unions reported in 2019 that “[t]he cost of properly training employees, adding more staff, if necessary, and acquiring software or other equipment to keep members and the credit union safe and compliant with FinCEN guidance might be prohibitively expensive.”¹⁸¹ As it stands, proposed banking industry-targeted marijuana legislation would require financial institutions to continue following FinCEN guidance.¹⁸² As long as adhering to such guidance continues to be a requirement and an expensive roadblock to banking the marijuana industry, financial institutions may remain reluctant to participate in such activities even if it is considered federally legal to do so.¹⁸³

E. The Federal Ban on Marijuana Research Makes All Narrowly Tailored Marijuana Legislation a Risky Endeavor

In addition to the issues posed by legislative solutions to the marijuana federalism issue that target the banking industry specifically, there is one overarching issue that applies to any narrowly tailored, industry-targeted legislative solution to the marijuana problem: the effect of federal illegality of marijuana on scientific and medical research.¹⁸⁴ As it stands, due to the federal illegality of marijuana, “researchers are restricted from walking into a marijuana store in Denver or Los Angeles and buying products for testing because their funding could be jeopardized if they run afoul of federal regulations.”¹⁸⁵ In addition to threats to their research funding, researchers must grapple with the illegality of bringing marijuana to the university campuses where they conduct their research.¹⁸⁶ In addition, the government has only approved a single farm for purposes of growing marijuana for research, and getting access to the government-approved plants “requires bureaucratic tap-dancing that deters researchers.”¹⁸⁷

Because it is difficult for researchers to access marijuana, there is a dearth of research on the health effects of the drug.¹⁸⁸ This is an issue that opponents of the SAFE Banking Act have picked up on, testifying that “by skipping ahead to a technicality over banking rules, the marijuana industry is hoping to gain many of the

¹⁷⁹ NAFCU ISSUE BRIEF, *supra* note 89, at 8.

¹⁸⁰ Hill, *supra* note 11, at 614.

¹⁸¹ *Marijuana Banking: The Pros and Cons*, NAT’L ASS’N OF FEDERALLY-INSURED CREDIT UNIONS, <https://www.nafcu.org/system/files/files/NAFCU%20on%20the%20Pros%20and%20Cons%20of%20Marijuana%20Banking.pdf> [<https://perma.cc/6GZ2-R5NB>].

¹⁸² H.R. 1595, 116th Cong. (2019).

¹⁸³ NAFCU ISSUE BRIEF, *supra* note 89.

¹⁸⁴ Giammona & Owrarn, *supra* note 23.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

benefits of federal legalization without a debate over the public health effects.”¹⁸⁹ Opponents propose that approving piecemeal marijuana legislation “will allow the expansion of an industry pushing new, exponentially more powerful forms of marijuana before any of its health . . . impacts are fully understood.”¹⁹⁰ This issue is particularly compelling in the face of a national addiction crisis, as well as an influx of vaping-related illnesses.¹⁹¹ Although most of the vaping-related illnesses reported have involved the use of THC vape products, there have not been any studies on marijuana vape products to date due to the illegality of obtaining such products for research purposes.¹⁹²

In addition to concerns about the health effects of marijuana in the general population, some who oppose legislation like the SAFE Banking Act have specifically expressed concerns about the health effects of marijuana products on children.¹⁹³ Former United States Surgeon General Jerome Adams stated that “[r]ecent increases in access to marijuana and in its potency, along with misperceptions of safety of marijuana endanger our most precious resource, our nation’s youth.”¹⁹⁴ There are

¹⁸⁹ *Challenges for Cannabis and Banking Hearing*, *supra* note 158, at 12 (statement of Garth Van Meter, Vice President, Government Affairs Smart Approaches to Marijuana).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; Giammona & Owrap, *supra* note 23. According to the CDC, “as of October 22, 2019, 1,604 cases of e-cigarette, or vaping, product use associated lung injury (EVALI) have been reported to CDC from 49 states (all except Alaska), the District of Columbia, and 1 U.S. territory. Thirty-four deaths have been confirmed in 24 states (as of October 22, 2019).” *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [<https://perma.cc/9ZAE-QKRV>] (last updated Feb. 25, 2020).

¹⁹² Giammona & Owrap, *supra* note 23. The CDC acknowledges its lack of knowledge as to what exactly has caused the illnesses, stating that:

[A]t this time, FDA and CDC have not identified the cause or causes of the lung injuries in these cases, and the only commonality among all cases is that patients report the use of e-cigarette, or vaping, products. No one compound or ingredient has emerged as the cause of these illnesses to date; and it may be that there is more than one cause of this outbreak. Many different substances and product sources are still under investigation. The specific chemical exposure(s) causing lung injuries associated with e-cigarette product use, or vaping, remains unknown at this time.

CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 191.

¹⁹³ Diane Carlson, Opinion, *SAFE Banking Act Shouldn’t Hurt Children*, WASH. EXAMINER (Nov. 8, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/safe-banking-act-shouldnt-harm-children> [<https://perma.cc/MQ3T-RYYV>]; Neil Haggerty, *Crapo Delivers Crushing Blow to Pot Banking*, AM. BANKER (Dec. 18, 2019), <https://www.americanbanker.com/news/crapo-delivers-crushing-blow-to-pot-banking> [<https://perma.cc/9X4F-AKXE>]; *Challenges for Cannabis and Banking Hearing*, *supra* note 158, at 44–45 (statement of Garth Van Meter, Vice President, Government Affairs Smart Approaches to Marijuana).

¹⁹⁴ OFF. OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUM. SERVS., U.S. SURGEON GENERAL’S ADVISORY: MARIJUANA USE AND THE DEVELOPING BRAIN (2019), <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance->

several reasons for such concerns. First, it has been noted that several of the victims of the mysterious THC vaping-related illnesses mentioned in this Note were teenagers. In addition, several opponents of the SAFE Banking Act including Senate Banking Committee Chairman Mike Crapo and the vice president of Smart Approaches to Marijuana, Mr. Garth Van Meter, are of the opinion that many of the marijuana edibles on the market appear to be marketed to children; the products often come in an array of bright colors and shapes.¹⁹⁵ Some have also expressed concerns about the use of high-potency products and their potential negative effects on the mental health of children and teens.¹⁹⁶ Consequently, some feel that marijuana legislation which narrowly targets the banking industry is putting the nation's youth at risk, and propose that such legislation should not be passed unless it contains provisions that limit its reach to "products that fall below a specific THC potency level and that have complied with adequate testing, labeling, and consumer safety standards."¹⁹⁷ However, such "testing" standards may not be adequate unless the United States government opens up researchers' access to marijuana for testing purposes, as previously discussed.¹⁹⁸ Accordingly, more broad marijuana legislation and legalization is needed in order to ensure the safety of America's youth from potentially dangerous products.¹⁹⁹

In a nutshell, the current lack of federal research on the health effects of marijuana products threatens medical and recreational marijuana users both young and old.²⁰⁰ Because the health of the public could be threatened by expanding the marijuana business prior to the legalization of marijuana research, opponents of the SAFE Banking Act make a compelling argument in suggesting that "we are shirking our duties" if we pass such narrowly tailored legislation in lieu of considering "the full question" of federal marijuana legalization, which would necessarily include research on the health effects of the drug.²⁰¹

misuse/advisory-on-marijuana-use-and-developing-brain/index.html [https://perma.cc/34UT-8G8A]; see also Carlson, *supra* note 193.

¹⁹⁵ Haggerty, *supra* note 193; *Challenges for Cannabis and Banking Hearing*, *supra* note 158, at 30–31 (testimony of Garth Van Meter, Vice President, Government Affairs Smart Approaches to Marijuana).

¹⁹⁶ Carlson, *supra* note 193.

¹⁹⁷ *Id.*

¹⁹⁸ Giammona & Owram, *supra* note 23.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*; Carlson, *supra* note 193; Haggerty, *supra* note 193; *Challenges for Cannabis and Banking Hearing*, *supra* note 158, at 25, 34, 231.

²⁰¹ *Challenges for Cannabis and Banking Hearing*, *supra* note 158, at 46 (statement of Garth Van Meter, Vice President, Government Affairs Smart Approaches to Marijuana). Van Meter, the Vice President of a "non-partisan, non-profit organization dedicated to a public health approach to addiction and recovery," expresses concern not only about the lack of research on the health effects of marijuana, but marijuana products that he sees as "kid friendly" and their appeal to young children. *Id.* at 44–45. Van Meter also suggests that the SAFE Banking Act will create an increase in crime, including cartel activity. *Id.* at 45–46. He asserts that the robberies of marijuana businesses are not actually motivated by cash, but that in the majority of cases, "the burglars are there to steal marijuana, not cash." *Id.* at 46. Van Meter supports his assertion with a recent story:

F. Even If Banking Industry–Targeted Legislation Makes Banking Services Available to MRBs, the Marijuana Industry Will Continue to Suffer Financial Problems Until Marijuana Is Federally Legalized

Lastly, even to the extent that piecemeal marijuana legislation like the SAFE Banking Act solves the marijuana banking problem, the marijuana industry cannot reach its full potential for growth until full federal legalization and re-scheduling of marijuana under the CSA occur. This is because even if the banking industry can accommodate state legal MRBs, those MRBs will continue to face financial disadvantages in other areas of their business. For example, tax laws will continue to put MRBs at a financial disadvantage, because Federal Tax Rule 280E requires businesses in violation of federal drug law to pay tax at a “disadvantageous” rate.²⁰² In addition, MRBs may not be able to seek protection under the bankruptcy code, because the Ninth Circuit and other courts have disallowed it.²⁰³ All in all, MRBs will remain at a financial disadvantage even if they are able to freely access banking services.

IV. Conclusion

The marijuana industry is a quickly growing industry that could soon give the American economy a much-needed boost. In 2019, the American Bankers Association reported that “according to industry analysts, the legal cannabis industry now exceeds \$10 billion and employs as many as 160,000 workers. Conservative estimates suggest that the legal cannabis market will grow to \$25 billion by 2025, while more expansive projections have the industry reaching \$75 billion by 2030. As a result, the industry is expected to create at least 300,000 jobs by 2020.”²⁰⁴ However, these economic benefits may not come to full fruition unless banks are able to serve MRBs.²⁰⁵ While proposed legislation to enable the banking industry to serve marijuana-related clients²⁰⁶ is a creative work-around to dodge a federal government not yet willing to enact the full federal legalization of marijuana including a change in scheduling designation under

[T]he marijuana is more easily accessed and is extremely valuable in its own right. A marijuana store is more akin to a jewelry store than a convenience store. A recent illustration comes from thieves who backed a pickup truck into a Michigan pot shop, stole all of the marijuana, and then left. They came back 20 minutes later to steal the ATM as an afterthought.

Id. (citing *Thieves Crash Truck Into Detroit Marijuana Dispensary - Steal Pot, ATM*, FOX 2 DETROIT (Nov. 13, 2017) <https://www.fox2detroit.com/news/thieves-crash-truck-into-detroit-marijuana-dispensary-steal-pot-atm> [<https://perma.cc/BJR7-KRS6>]). This suggests that banking is not the only issue that needs to be solved to combat crime prior to the passage of federal legislation that has the effect of legalizing marijuana-related activities.

²⁰² *Id.* at 23, 59, 94.

²⁰³ Ormond, *supra* note 6, at 25.

²⁰⁴ See AM. BANKERS ASS’N, *supra* note 14.

²⁰⁵ *Id.*

²⁰⁶ H.R. 1595, 116th Cong. (2019). Although the bill has not yet passed in the Senate and may not become law, this type of legislation may be proposed again in the future in the face of the federal government’s unwillingness to legalize marijuana and reschedule the drug under the Controlled Substances Act schedule designations.

the CSA,²⁰⁷ such an attempt is unlikely to be successful in allowing the marijuana industry to reach its full potential. Further still, such legislation may not even accomplish its goal of bringing the banking industry on board with servicing the marijuana industry.

There are too many factors involved in the marijuana banking dilemma to solve the issue by simply providing a safe harbor for banks. First, current proposed banking industry-targeted marijuana legislation has historically failed to pass,²⁰⁸ is potentially insufficiently worded,²⁰⁹ and does not provide banks with a reprieve from the cumbersome paperwork requirements currently in place for financial institutions who provide services to MRBs.²¹⁰ As a result, financial institutions may continue to shy away from servicing MRBs even if banking industry-targeted marijuana legislation is enacted.

Even if banking industry-targeted federal marijuana legislation could make bank management feel safe from federal liability in providing services to MRBs, the marijuana industry will continue to be hindered by the issue of federal illegality. The federal moratorium on marijuana research means that the health effects of marijuana will remain nebulous and poorly understood unless the legality of marijuana is opened up at the federal level to allow for proper scientific research.²¹¹ In addition, MRBs will still struggle with financial problems due to the federal illegality of marijuana. Discriminatory tax²¹² and bankruptcy rules²¹³ will continue to create financial issues for MRBs. Also, legislative acts that protect banks and financial institutions from federal liability and punishment by federal agencies for contact with MRBs do not provide a safe harbor for marijuana consumers,²¹⁴ who play an important role in the success of the marijuana industry. As long as marijuana consumers' careers²¹⁵ and property²¹⁶ remain at risk, potential customers may shy away from purchasing marijuana products.

Accordingly, while federal action will be required to bring the marijuana industry to its full potential, a narrowly tailored solution that targets only the banking industry is not the answer. Instead, the federal legalization of marijuana is required for the success of the marijuana industry, including the re-designation of marijuana to a less

²⁰⁷ Natalie Fertig, *The Great American Cannabis Experiment*, POLITICO (Oct. 14, 2019), <https://www.politico.com/agenda/story/2019/10/14/cannabis-legal-states-001031> [<https://perma.cc/8TKT-SLFH>].

²⁰⁸ Nobile, *supra* note 21; Fertig, *supra* note 207; Sarlin, *supra* note 133; *Act Passes the House*, *supra* note 134; Adams, *supra* note 135.

²⁰⁹ Stewart & Espinosa, *supra* note 20.

²¹⁰ See H.R. 1595 § 6, which would require banks to continue complying with FinCEN guidance on banking the marijuana industry.

²¹¹ Giammona & Owrap, *supra* note 23.

²¹² Chemerinsky, *supra* note 20, at 94.

²¹³ Ormond, *supra* note 6, at 25.

²¹⁴ H.R. 1595.

²¹⁵ Cary & Griffaton, *supra* note 22, at 59; Farnsworth Baker, *supra* note 22; Davis, *supra* note 22.

²¹⁶ *Gonzales v. Raich*, 545 U.S. 1, 13 (2005).

controlled schedule under the CSA or removal from the Schedule of Controlled Substances altogether.