
3-1-2024

A Safer Direction for Cannabis Banking: A Critical Analysis and Proposal to Improve the SAFER Banking Act

Noah D. Lipshie

Follow this and additional works at: <https://scholarship.law.unc.edu/ncbi>



Part of the [Law Commons](#)

Recommended Citation

Noah D. Lipshie, *A Safer Direction for Cannabis Banking: A Critical Analysis and Proposal to Improve the SAFER Banking Act*, 28 N.C. BANKING INST. 165 (2024).

Available at: <https://scholarship.law.unc.edu/ncbi/vol28/iss1/9>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Banking Institute by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

A Safer Direction for Cannabis Banking: A Critical Analysis and Proposal to Improve the SAFER Banking Act

I. INTRODUCTION

The legal cannabis industry has experienced tremendous growth in recent years as additional states have legalized marijuana for both medical and recreational use, and social acceptance of its use has increased.¹ As of 2023, medicinal marijuana use is legal in thirty-eight states, and recreational use is legal in twenty-four states plus Washington, D.C.² This rapid expansion has led to the emergence of thousands of state-licensed marijuana-related businesses (“MRBs”),³ including dispensaries,⁴ cultivators,⁵ and processors.⁶ In 2022 alone,

1. See *State Medical Cannabis Laws*, NAT. CONF. OF STATE LEGIS., <https://www.ncsl.org/health/state-medical-cannabis-laws> [https://perma.cc/QPS4-PK48] (June 22, 2023) (explaining that as of April 24, 2023, thirty-eight states, three territories, and the District of Columbia permit the medical use of cannabis products); LISA SACCO, CONG. RSCH. SERV., R44782, *THE EVOLUTION OF MARIJUANA AS A CONTROLLED SUBSTANCE AND THE FEDERAL-STATE POLICY GAP* (2022), <https://crsreports.congress.gov/product/pdf/R/R44782> [https://perma.cc/Y3XF-LQ2L] (explaining that in the past twenty-five years, cannabis legalization has expanded).

2. See Emily Laurence & Alena Hall, *Your Guide to Cannabis Legalization by State*, FORBES HEALTH, <https://www.forbes.com/health/cbd/cannabis-legalization-by-state/> [https://perma.cc/AA8K-3DQC] (Oct. 10, 2023) (illustrating the state-by-state status of cannabis legalization, noting that as of 2022, thirty-eight states have legalized medical marijuana and nineteen states, along with Washington, D.C., have legalized recreational marijuana); see also *Marijuana Laws and Ballot Measures in the United States*, BALLOTPEDIA, https://ballotpedia.org/Marijuana_laws_and_ballot_measures_in_the_United_States [https://perma.cc/US6Y-XEMT] (last visited Jan. 19, 2024) (indicating that as of November 8, 2023, medical marijuana is legal in thirty-eight states, and recreational marijuana is legal in twenty four states and Washington, D.C.).

3. See *Number of Cannabis Businesses in the U.S. as of 2017*, STATISTA (May, 2017), <https://www.statista.com/statistics/596641/us-cannabis-businesses-number/> [https://perma.cc/UX8N-ALM5] (“As of 2017, cannabis-related businesses dealing with ancillary services, technology and products had the highest number of medical cannabis businesses in the U.S. Within that category of business there were between 13 thousand and 18 thousand businesses.”).

4. See *Marijuana Dispensaries: Are They the Same Thing as Marijuana Stores?*, LIVWELL (Feb. 6, 2023), <https://livwell.com/blog/marijuana-stores-vs-dispensaries> [https://perma.cc/R9GW-Q9RS] (explaining that “cannabis” refers to all products derived from the Cannabis sativa plant, while “marijuana” refers to parts of or products from the plant Cannabis sativa that contain substantial amounts of tetrahydrocannabinol (“THC”)).

legal cannabis sales topped \$27 billion and will likely hit \$57 billion by 2026.⁷

Notwithstanding these permissive state statutes, a federal law, the Controlled Substances Act (“CSA”), prohibits cannabis sales and use.⁸ This has created immense challenges for the industry, especially regarding access to banking and financial services.⁹ Because marijuana is still illegal at the Federal level, national banks, as well as other financial institutions, have been reluctant to work with MRBs for fear of

5. See *Cultivation*, CAL. DEP’T OF CANNABIS CONTROL, <https://cannabis.ca.gov/licensees/cultivation/> [<https://perma.cc/3KHJ-YVMY>] (last visited Jan. 8, 2023) (explaining that a cultivator grows the cannabis plants that are harvested to be sold); Adam Uzialko, *Cannabis Industry Growth Potential for 2024*, BUSINESS NEWS DAILY (Jan. 11, 2024), <https://www.businessnewsdaily.com/15812-cannabis-industry-business-growth.html> [<https://perma.cc/2GU8-96QK>]

6. See *Processors FAQ*, MD. CANNABIS ADMIN., https://mmcc.maryland.gov/Pages/processors_faq.aspx [<https://perma.cc/RZ36-5GEV>] (last visited Jan. 8, 2024) (explaining that a cannabis processor is a person licensed by the state liquor control board to process medical marijuana into useable medical marijuana and medical marijuana-infused products; the term “processor” applies the same for non-medicinal cannabis use); see also Sian Ferguson, *Hemp vs. Marijuana: What’s the Difference?*, HEALTHLINE, <https://www.healthline.com/health/hemp-vs-marijuana#uses> [<https://perma.cc/P7WY-PA8E>] (Feb. 13, 2023) (explaining that hemp plants and marijuana plants are both the same species and that, legally, hemp is defined as a cannabis plant that contains 0.3 percent or less THC, while marijuana is a cannabis plant that contains more than 0.3 percent THC); see also *Cannabis (Marijuana) and Cannabinoids: What You Need To Know*, NAT’L CTR. FOR COMPLEMENTARY AND INTEGRATIVE HEALTH <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know> [<https://perma.cc/Z2MW-CTFE>] (Nov. 2019) (“The word ‘cannabis’ refers to all products derived from the plant *Cannabis sativa*. The cannabis plant contains about 540 chemical substances. The word ‘marijuana’ refers to parts of or products from the plant *Cannabis sativa* that contain substantial amounts of tetrahydrocannabinol (THC).”).

7. Iris Dorbian, *Global Cannabis Sales to Skyrocket to \$57 Billion in 2026, Says Top Market Research Firm*, FORBES (Sept. 13, 2022), <https://www.forbes.com/sites/irisdorbian/2022/09/13/global-cannabis-sales-to-skyrocket-to-57-billion-in-2026-says-new-report/?sh=7037200c7b07> [<https://perma.cc/KP5A-QUUX>]

8. See Controlled Substances Act, 21 U.S.C. § 841(a) (“Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally— (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”).

9. See MCGLINCHY, CLIENT ALERT: MARIJUANA & BANKING: WHAT’S THE HOLD UP? PART 2 – COMPLIANCE CHALLENGES (May 24, 2023), <https://www.mcglinchey.com/insights/marijuana-banking-whats-the-hold-up-part-2-compliance-challenges/> [<https://perma.cc/4T59-XHDX>] (describing the challenges banks face due to the CSA; *Controlling Drugs or Other Substances through Formal Scheduling*, DRUG ENF’T AGENCY, <https://www.dea.gov/drug-information/csa> [<https://perma.cc/2MXF-SXXXJ>] (last visited Jan. 8, 2024) (“The CSA places all substances which were in some manner regulated under existing Federal law into one of five schedules. This placement is based upon the substance’s medical use, potential for abuse, and safety or dependence liability.”).

violating Federal anti-money laundering laws or facing criminal prosecution.¹⁰ Consequently, many MRBs must operate cash-only, creating public safety risks and inefficiencies.¹¹ By one estimate, up to seventy percent of cannabis companies lack access to banking services,¹² creating a significant disadvantage among cannabis industry businesses when compared to less heavily regulated industries.¹³

Since MRBs are foreclosed from gaining access to traditional forms of debt financing, many must use equity to finance their businesses.¹⁴ For example, cannabis-related businesses benefit from an increasing amount of established venture capital organizations, which have started the process of investing in the cannabis sector.¹⁵ MRBs are also benefiting from equity financing through angel networks.¹⁶ These

10. See MCGLINCHY, CLIENT ALERT: MARIJUANA & BANKING: WHAT'S THE HOLD UP? PART 1 – CONFLICTING LEGAL LANDSCAPES (Mar. 27, 2023), <https://www.mcglinchey.com/insights/marijuana-banking-whats-the-hold-up-pt-1-conflicting-legal-landscapes/> [<https://perma.cc/5ZLU-P4CC>] (explaining that, since marijuana remains illegal at the federal level, national banks, credit card companies, and other financial institutions have been reluctant to work with MRBs).

11. See Christopher Jeffrey et al., *Risks in Cannabis, where Cash and Compliance Rule*, BAKERTILLY (May 25, 2023), <https://www.bakertilly.com/insights/risks-cannabis-cash-compliance-rule> [<https://perma.cc/X7GB-ES4R>] (“Doing so much business in cash exposes cannabis companies to additional risks such as misappropriation of funds, fraud, theft, safety and security, and others. Several of these risks can be mitigated by having strong cash-handling controls.”).

12. See Anh Hatzopoulos, *The Cost of Cash for Unbanked Cannabis Businesses*, FORBES (July 13, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/07/13/the-cost-of-cash-for-unbanked-cannabis-businesses/?sh=17faf084f4dd> [<https://perma.cc/6J9B-AABZ>] (detailing how, likely due to a lack of banking options, these businesses resort to cash-run operations).

13. See Herb Weisbaum, *Cash Costs Americans \$200 Billion a Year*, CNBC (Oct. 11, 2013), <https://www.cnbc.com/2013/10/10/cash-costs-americans-20-billion-a-year.html> [<https://perma.cc/C7V6-USXH>] (“A new study by Tufts University, *The Cost of Cash in the United States, Puts the Price Tag at About \$200 Billion a Year*. This figure includes \$55 billion in higher costs to businesses, \$43 billion for U.S. households and \$101 billion in missed tax revenue because of off-the books transactions. For the average American family, the cost of cash is about \$1,739 a year. The authors characterize their estimates as conservative.”).

14. See Julie Weed, *Legal Weed Entrepreneurs Finding New Funding Options*, FORBES (Sept. 9, 2017), <https://www.forbes.com/sites/julieweed/2017/09/09/funding-options-for-cannabusiness-expanding/#7d57f9a57cf3> [<https://perma.cc/33Z4-MBA2>] (highlighting the new funding options being implemented by legal weed entrepreneurs).

15. See Jeremy Berke, *Check Out Our Exclusive List of the Top 12 Venture Capital Firms Making Deals in the Booming Marijuana Industry*, BUS. INSIDER (Jan. 2, 2019), <https://www.businessinsider.com/cannabis-industry-top-12-venture-capital-firms-2018-10> [<https://perma.cc/7UMF-RZNK>] (demonstrating venture capital firms’ interest in cannabis sector investment).

16. See Adrian A. Ohmer, Note, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. BUS. & ENTREPRENEURIAL L. REV. 97, 115–

include groups of investors that are made up of a series of “accredited angel investors.”¹⁷ Crowdfunding serves as an additional option for equity financing that MRBs explore when they are in search of lawful investment capital.¹⁸

While these financing alternatives have provided a temporary solution, they are not the preferred financing method because they are not as “inherently stable as banks.”¹⁹ If provided access to traditional financial services, MRBs’ finances will eventually experience fewer roadblocks, and their ability to expand may increase.²⁰ However, not only MRBs will benefit from this update.²¹ The banking industry will also be able to cash in on a multibillion-dollar industry.²²

To resolve this untenable situation and level the playing field between cannabis-industry businesses and non-cannabis-industry businesses, Congress has considered various legislative proposals to provide a safe harbor for financial institutions that wish to serve state-

16 (2013) (“Another source of financing for businesses in the cannabis industry is angel investors.”).

17. *See id.* at 115 (defining an angel investor as a private individual who invests debt or equity in a private business based on their investment profiles and who does not seek an active role in the daily business operation); *see also Who We Are*, ARCVIEW, <https://arcviewgroup.com/about-2/> [<https://perma.cc/L7ZP-9AJA>] (last visited Jan. 8, 2023) (restricting membership to high net-worth accredited investors).

18. Katherine P. Franck, *Cannabis Reform: High on the Banking Agenda*, 24 N.C. BANKING INST. 163, 176 (2020).

19. *Id.* at 178; *see* Catherine Giese, *Starting a Weed Business: What Are Your Financing Options?*, FUNDERA <https://www.fundera.com/blog/weed-business-financing-options> [<https://perma.cc/B9PW-33XK>] (last updated Feb. 12, 2019) (stating the three main ways to obtain equity financing).

20. *See* Aris Folley & Taylor Giorno, *Senators Push to Pass Cannabis Banking Bill after Marijuana Rescheduling*, THE HILL (Sept. 14, 2023), <https://thehill.com/business/4202941-senators-push-to-pass-cannabis-banking-bill-after-marijuana-rescheduling/> [<https://perma.cc/T5HP-RNFY>] (“Proponents of the bill say the SAFE Banking Act would help legally operating businesses avoid the headaches and safety risks of dealing only in cash without affecting the legal status of cannabis beyond states where it’s legal.”).

21. *See generally* Norman M. Vigil, Recent Development, *The States Act: A Response to the Rescission of the Cole Memo*, 38 REV. BANKING & FIN. L. 196, 207 (2018) (explaining how cannabis legalization would alleviate some adverse consequences that currently exist among several distinct industries).

22. *See* Franck, *supra* note 18, at 163 (“Within these state borders, the cannabis industry is challenged in seeking banking services. Consequently, the multibillion-dollar legal cannabis industry has been denied access to the financial sector.”); Hilary V. Bricken, *Navigating the Hazy Status of Marijuana Banking*, AM. BAR ASS’N (Aug. 15, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/08/03_bricken/ [<https://perma.cc/8RLM-YCXZ>] (highlighting the “financial chaos across the state-legalized cannabis industry”).

legal MRBs.²³ Most notably, the Secure and Fair Enforcement (“SAFE”) Banking Act was introduced in 2019 and has since been reintroduced in every Congress.²⁴ The 2019 version had 206 co-sponsors in the House,²⁵ and thirty-four co-sponsors in the Senate.²⁶ The 2022 version passed the House with strong bipartisan support²⁷ but ultimately stalled in the Senate.²⁸ In April 2023, Congress once again took up the SAFE Banking Act.²⁹ After stalling for a third time in September 2023, the Senate Banking Committee has developed another version of the SAFE Banking Act, now referred to as the “Secure And Fair Enforcement Regulation Banking Act” or the SAFER Banking Act (“SAFER”).³⁰ As of January 8, 2024, the Senate committee is set to revise the bill.³¹

While the SAFER Banking Act proposes unprecedented protections for banks working with MRBs, significant gaps and limitations exist.³² The SAFER Banking Act falls short of fully accomplishing its goals of increasing financial transparency, improving

23. See Nathan Reif, *SAFE Banking Act: Origins, History, Impact*, INVESTOPEdia, <https://www.investopedia.com/safe-banking-act-4587773> [https://perma.cc/F296-KCLV] (Sept. 30, 2021) (describing the Secure and Fair Enforcement (“SAFE”) Banking Act, which “was first introduced to Congress in May of 2017” and “has been reintroduced several times, the latest in 2021.”).

24. See Terri Luttrell, *An Update on the SAFE Banking Act in Congress: Is a Cannabis-Banking Safe Harbor on Track?*, ABRIGO (Aug. 29, 2023), <https://www.abrigo.com/blog/safe-banking-act-returns-congress-safe-harbor-for-cannabis-banking-on-the-horizon/> [https://perma.cc/J434-P96Z] (“The 2023 version of the SAFE Banking Act was introduced in the House of Representatives (HR2891) and the Senate (S1323) in May 2023. Previous bills have had bipartisan support, but this is the first time both chambers of Congress have discussed the SAFE Banking Act simultaneously.”).

25. H.R. Res. 1595, 116th Cong. (2019).

26. S. 1200, 116th Cong. (2019).

27. H.R. Res. 1996, 117th Cong. (2021).

28. Luttrell, *supra* note 24.

29. *Id.*

30. Secure And Fair Enforcement Regulation Banking Act, S. 2860, 118th Cong. § 10(a)(1) (2023).

31. Agustin Rodriguez et al., *Senate Banking Committee to Advance SAFER Banking Act*, TROUTMAN PEPPER (Sept. 26, 2023) <https://www.regulatoryoversight.com/2023/09/senate-banking-committee-to-advance-safer-banking-act/> [https://perma.cc/N59S-66TX].

32. See SAFE Banking Act of 2023, H.R. Res. 2891, 118th Cong. (2023) (detailing the bill, which contains gaps later addressed by this Note); CAT PACKER ET AL., NOT A SAFE BET: EQUITABLE ACCESS TO CANNABIS BANKING, AN ANALYSIS OF THE SAFE BANKING ACT 5 (2022) (“Of particular significance, the SAFE Banking Act would not require financial institutions to provide services to the cannabis industry and cannabis’s federally illegal status would remain unchanged. Instead, SAFE would maintain financial institutions’ discretion to decide whether to serve a particular client or industry.”).

public safety, and expanding access to banking for state-licensed MRBs.³³ By highlighting the SAFER Banking Act's deficiencies and proposing targeted amendments, this Note aims to spark legislative changes that could positively impact the rapidly growing cannabis industry.³⁴ Only by providing lawful cannabis businesses with full and equal access to financial services can public safety, transparency, and banking equity be realized.³⁵

This Note proceeds in five Parts.³⁶ Part II provides background on the history of cannabis banking legislation and the market conditions leading to the SAFER Banking Act.³⁷ Part III summarizes and critiques the SAFER Banking Act's key provisions.³⁸ Part IV offers recommendations to strengthen the SAFER Banking Act to achieve equitable banking access for legitimate cannabis businesses.³⁹ Finally, Part V concludes that, despite efforts to increase financial transparency and public safety, the SAFER Banking Act, in its current form, fails to integrate state-compliant MRBs into the banking and monetary system fully.⁴⁰ With legal cannabis sales rapidly approaching \$57 billion annually,⁴¹ patchwork fixes cannot suffice for an industry of this size and economic importance. However, as Part V indicates, with proper bipartisan support, the challenges of the SAFER Banking Act can be remedied through targeted amendments that focus on regulatory clarity and incentivize financial institutions to provide banking services to MRBs.⁴²

33. See PACKER ET AL., *supra* note 32, at 6 (“However, despite claims that the SAFE Banking Act would improve issues related to access and equity, SAFE would maintain financial institutions’ discretion to decide whether to serve a particular client or industry Furthermore, documented patterns of discriminatory practices in the financial services industry indicate that if Congress does not take proactive measures to promote and prioritize equity, Black and Brown communities seeking financial services to participate in the legal cannabis industry are likely to experience continued inequities.”).

34. See *infra* Part V.

35. See *infra* Part V.

36. See *infra* Part I.

37. See *infra* Part II.

38. See *infra* Part III.

39. See *infra* Part IV.

40. See *infra* Part V.

41. See Dorbian, *supra* note 7 (predicting global cannabis sales in 2026).

42. See *infra* Part V.

II. HISTORICAL BACKGROUND OF CANNABIS BANKING LAW AND THE IMPETUS FOR THE SAFER BANKING ACT

The lengthy path to cannabis banking reform has been defined by conflicting state and federal laws.⁴³ While states began legalizing medical marijuana in the 1990s, the Federal prohibition under the CSA meant banks refused to work with dispensaries and cultivators.⁴⁴ This led to an all-cash model, presenting public safety risks.⁴⁵ Businesses that are known to keep large amounts of cash on hand face an increased risk of theft.⁴⁶ Due to the limited access to standard banking services for most regulated merchants in the cannabis sector, transactions at the point of sale are exclusively conducted using cash.⁴⁷ While some dispensaries allow customers to use debit cards at checkout, these businesses are likely utilizing cashless ATM payments, which violates most payment processors' policies.⁴⁸ Due to a rise in burglaries, a marijuana advocacy group published a guide to help marijuana shops bolster their security in preparation for potential robberies.⁴⁹ To better understand how these significant issues developed, it is helpful to

43. See Kellogg et al., *A Cannabis Conflict of Law: Federal vs. State Law*, AM. BAR ASS'N (Mar. 21, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-april/a-cannabis-conflict-of-law-Federal-vs-state-law/ [<https://perma.cc/KB9C-MZ5J>] (describing the history of conflicting laws related to this complex issue).

44. CAL. HEALTH & SAFETY § 11362.5(a) (West 1996); see *The History of Cannabis Banking*, TERPENES & TESTING MAG. (Apr. 2, 2021), <https://terpenesandtesting.com/the-history-of-cannabis-banking/> [<https://perma.cc/EFC2-VTGZ>] (detailing the history of cannabis banking in the 1990's).

45. See *id.* (“Those that chose cash were susceptible to robbery and accounting fiascos. As business grew, finding a place to store the cash became an ever-pressing problem.”).

46. See *The Risks of Cannabis Cash Payments*, AEROPAY (Jan. 26, 2023), <https://www.aeropay.com/guides/the-risks-of-cannabis-cash-payments> [<https://perma.cc/L4LQ-EYV9>] (describing theft as being one of the risks of cash payments).

47. *Id.*

48. See Rachel Ludwig, *Why Marijuana Dispensaries Near You Can't Take Credit Cards*, AEROPAY (Apr. 18, 2022), <https://www.aeropay.com/blog/why-marijuana-dispensaries-near-you-cant-take-credit-cards> [<https://perma.cc/GQ22-UMLG>] (“Recently, the largest payment networks, such as VISA, have started to take notice of ‘cashless ATM’ charges, and may soon take serious disciplinary measures against cannabis retailers that continue violating their internal policies resulting in illegal activity and high risk.”).

49. See Kyle Jaeger, *Marijuana Group Releases ‘Robbery Preparedness Guide’ for Dispensaries Amid Spike in Thefts*, MARIJUANA MOMENT (Dec. 23, 2021), <https://www.marijuanamoment.net/marijuana-group-releases-robbery-preparedness-guide-for-dispensaries-amid-spike-in-thefts/> [<https://perma.cc/NG4R-N3HQ>] (mentioning the robbery guide as it relates to MRBs).

review a chronological history of cannabis banking law and Federal cannabis policy in general.

A. *General History of Cannabis Policy (1840s-1900s)*

During the second half of the 19th century, cannabis was legal and used medically in the United States.⁵⁰ However, around 1860, worries arose regarding the potential harmful effects of cannabis, which led to the first federal committee being formed to research the drug.⁵¹ By the 1890s, many doctors viewed cannabis as a drug requiring regulation.⁵²

At the start of the 20th century in the U.S., recreational use of cannabis began along with efforts to regulate its consumption.⁵³ In 1914, the Harrison Narcotics Tax Act was enacted, which criminalized drug use.⁵⁴ By 1915, California had passed the first state law prohibiting cannabis possession.⁵⁵ In the 1930s, the U.S. Federal Bureau of Narcotics at the time warned about increasing cannabis misuse, and by 1937, 23 states had made possession illegal.⁵⁶ Also, in 1937, the Marijuana Tax Act imposed a tax on cannabis.⁵⁷ In 1942, marijuana was

50. *About Cannabis Policy*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <https://alcoholpolicy.niaaa.nih.gov/about/about-cannabis-policy> [https://perma.cc/C4H5-FCJB] (last visited Jan. 8, 2024); see Kyle Jaeger, *Marijuana Group Releases 'Robbery Preparedness Guide' for Dispensaries Amid Spike in Thefts*, MARIJUANA MOMENT (Dec. 23, 2021), <https://www.marijuanamoment.net/marijuana-group-releases-robbery-preparedness-guide-for-dispensaries-amid-spike-in-thefts/> [https://perma.cc/NG4R-N3HQ] (“[The Guide] encourages [MRBs] to take steps like implementing clear policies on locking up shop, managing and storing inventory, having visible security cameras, installing alarm systems, frequently changing the time of day that cash is transferred from the store, cooperating with robbers to get them to leave as soon as possible and contacting law enforcement after a theft.”).

51. See NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 50.

52. *Id.*

53. *Id.*

54. See Harrison Narcotics Tax Act, ch. 1, 38 Stat. 786 (1914) (“An Act To provide for the registration of, with collectors of internal revenue, and to impose a special tax on all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.”).

55. NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 50.

56. *Id.*

57. See *Did You Know Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/about/history/did-you-know/marijuana> [https://perma.cc/PS4R-MMR7] (Dec. 20, 2019) (“Federal Bureau of Narcotics Commissioner Harry Anslinger became a powerful anti-marijuana voice. His campaign

removed from the official U.S. Pharmacopeia list of approved medicines.⁵⁸ In 1956, the addition of cannabis to the Federal Narcotics Control Act resulted in strict federal penalties for possession.⁵⁹ Later, in the 1970 Controlled Substances Act, the federal government classified marijuana as a Schedule I substance with a high potential for abuse,⁶⁰ and stated that there is “no currently accepted medical use in treatment” and “a lack of accepted safety for use . . . under medical supervision.”⁶¹

After the CSA was passed, efforts at both the federal and state levels emerged to decriminalize cannabis possession.⁶² President Richard Nixon appointed the National Commission on Marijuana and Drug Abuse, better known as the “Shafer Commission,”⁶³ to review marijuana laws in 1972.⁶⁴ The Commission determined and recommended that cannabis should be decriminalized.⁶⁵ Nevertheless, despite some states taking steps to liberalize their cannabis laws, President Nixon chose not to follow that recommendation.⁶⁶ Since then, cannabis has remained illegal at the Federal level.⁶⁷

against Cannabis led to the passage of the Marihuana Tax Act of 1937, under which the importation, cultivation, possession and/or distribution of marijuana were regulated.”).

58. See Jason Sims, *The State of Medical Cannabis in Oklahoma*, OKLA. OSTEOPATHIC ASS’N., <https://www.okosteio.org/assets/120VAC/Presentations/Friday/1100%20-%20Prelude%20to%20Medical%20Cannabis.pdf> [https://perma.cc/Y2TJ-GQS8] (last visited Jan. 8, 2024) (“Cannabis was dropped from the United States Pharmacopoeia in 1942.”); *Pharmacopoeia*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/pharmacopoeia> [https://perma.cc/9CAZ-RJXH] (last visited Jan. 8, 2024) (“[A] book describing drugs, chemicals, and medicinal preparations. [*E*]specially: one issued by an officially recognized authority and serving as a standard.”).

59. NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 50; Federal Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (codified as amended at 21 U.S.C. §§ 174-198b (2018)).

60. Controlled Substances Act, 21 U.S.C. § 812(b)(1)(A) (1970).

61. *Id.* § 812(b)(1)(B)-(C).

62. 21 U.S.C. § 841(a); NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *supra* note 50.

63. See Jean-Gabriel Fernandez, *In 1972, Nixon Appointees Already Stated the Obvious: Marijuana Should Never Have Been Criminalized*, SHEPHERD EXPRESS (Apr. 1, 2022), <https://shepherdexpress.com/cannabis/cannabis/in-1972-nixon-appointees-already-stated-the-obvious-marijuan/> [https://perma.cc/AHE6-UR9Z] (explaining that the Commission is referred to as the “Shafer Commission”).

64. See *id.* (“In fact, this is something that the Shafer Commission specifically called out in 1972: ‘The Commission recommends that the legislatures distinguish marihuana from opiates The consequence of inappropriate definition is that the public continues to associate marihuana with narcotics such as heroin.’”).

65. *Id.*

66. See *id.* (“President Nixon declined to act on that recommendation, although some States moved to liberalize their laws pertaining to cannabis.”).

67. *Id.*

B. *Early History of Cannabis Banking (1990-2014)*

The legal cannabis industry has historically faced immense challenges in accessing banking and financial services.⁶⁸ While medical marijuana was first legalized in select states in the 1990s, the sale, possession, and distribution of cannabis has remained illegal at the Federal level under the CSA.⁶⁹

Unsurprisingly, in the early days of medical marijuana legalization, “cannabis banking” did not exist.⁷⁰ This is due to the fact that under the CSA, the possession, distribution, and sale of marijuana continue to be illegal.⁷¹ Consequently, any financial transactions linked to state-level legal cannabis activities might still be viewed as “money laundering,” putting banks at substantial legal, operational, and regulatory risk.⁷² More specifically, according to the Banking Secrecy Act (“BSA”), any movement or deposit of funds derived from the sale of cannabis could be classified as “money laundering.”⁷³ As a result, financial institutions were highly wary of breaking established money laundering laws in working with businesses viewed as illegal drug traffickers under federal law.⁷⁴

68. See *supra* Part I; See TERPENES & TESTING MAG., *supra* note 44 (“Just like any other business, [MRBs] require access to banking and payment processing services. Unfortunately, decades of Prohibition put the cannabis industry’s financial services options far behind fast-paced industry growth, but we have come far since those early days of legalization.”).

69. 21 U.S.C. § 812(b)(1); See TERPENES & TESTING MAG., *supra* note 44 (noting that states began legalizing cannabis for medicinal purposes in the 1990s).

70. See TERPENES & TESTING MAG., *supra* note 44 (describing this time period as the “wild west” due to the absence of banking infrastructure).

71. See *id.* (describing that banks were hesitant to work with MRBs due to the CSA implications).

72. MCGLINCHY, *supra* note 9.

73. Steve Schain, *Why the SAFE Banking Act Still Stinks: Third Try Falls Short*, LEGAL INTELLIGENCER (June 22, 2023), <https://www.law.com/thelegalintelligencer/2023/06/22/why-the-safe-banking-act-still-stinks-third-try-falls-short/> [<https://perma.cc/9PW5-S4YF>].

74. See Danielle Hunt et al., Miller Nash Graham & Dunn LLP, *The STATES Act—A Solution to the Cannabis Banking Problem on the Horizon*, BANK L. MONITOR (June 8, 2018), <https://www.banklawmonitor.com/2018/06/thestates-act-a-solution-to-the-cannabis-banking-problem-on-the-horizon> [<https://perma.cc/G2QW-JWMX>] (“As you can guess, most financial institutions have been wary to deal with individuals or businesses with ties to the recreational cannabis industry due to this lack of clear federal guidance.”); Foreign Transactions Act of 1970, 31 USC § 5311 (“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.”).

Providing banking services to dispensaries or cultivators was seen as no different than servicing drug cartels or street dealers.⁷⁵ Unsurprisingly, banks overwhelmingly refused any association with the sprouting medical cannabis industry during this period.⁷⁶ The problem continues; cannabis businesses are limited to selecting from a few hundred independent and community banks.⁷⁷ Frequently, these banks are smaller and less resourced.⁷⁸ Due to their limited size, many of these banks lack features like online banking, global access, wire transfers, investment choices, financial stability, and other services typically provided by larger institutions.⁷⁹ The Federal stance created immense logistical hurdles for the first medical dispensaries in states.⁸⁰ As discussed, with few banks willing to handle funds from marijuana sales, the entire industry was forced to make do with limited banking options.⁸¹

75. See James Rufus Koren, *Why Some Pot Businesses Hide Their Cash — And Others Truck It Straight to a Federal Vault*, L.A. TIMES (July 7, 2017), <https://www.latimes.com/business/la-fi-cannabis-banking-20170707-story.html> [<https://perma.cc/3XAA-RPTJ>] (“Though the transaction is legal in California, under Federal law that bill is not much different from the contents of a drug cartel’s safe — cash that most banks won’t touch.”).

76. See TERPENES & TESTING MAG., *supra* note 44 (“Despite the achievements of Seefried and other pioneers, a myth persisted that banks could suffer grave consequences for working with the industry. Of course, that’s patently false. Federal bank examiners, including those from the FDIC itself, have explicitly stated time and again that banks working with state-legal cannabis businesses should abide by a standard used across other high-risk industries: prioritize anti-money laundering (AML) monitoring.”).

77. Gene Marks, *Cannabis Firms Are Cut Off from the US Financial System, but Relief Is in Sight*, THE GUARDIAN (Oct. 8, 2023), <https://www.theguardian.com/business/2023/oct/08/cannabis-companies-us-financial-system-banking-safer-act> [<https://perma.cc/LG6U-MJCA>].

78. Kyle Jaeger, *New Federal Data Shows Record Number Of Banks Working With Marijuana Businesses As Senate Schedules Vote On Reform Bill*, MARIJUANA MOMENT (Sept. 18, 2023), <https://www.marijuanamoment.net/new-federal-data-shows-record-number-of-banks-working-with-marijuana-businesses-as-senate-schedules-vote-on-reform-bill/> [<https://perma.cc/CA77-G967>]; *see id.* (“When it comes to the cannabis industry, federally chartered banks like Wells Fargo, PNC Bank, JP Morgan Chase, TD Bank and Key Bank are not playing ball.”).

79. Marks, *supra* note 77; *see* Hannah M. Dunaway, Note, “*Breaking the Bank*” *Mergers: How Bank Consolidation is Hurting Communities*, 27 N.C. BANKING INST. 108 (2023) (“Community banks, on the other hand, lack the financing and resources to create and maintain innovative technology. As the world becomes increasingly digitized, customers move to the large banks that give twenty-four-seven access to banking, leaving behind smaller banks that are unable to keep up.”).

80. Marks, *supra* note 77; *See* TERPENES & TESTING MAG., *supra* note 44 (explaining how Federal prohibition has created challenges for the industry).

81. *See* TERPENES & TESTING MAG., *supra* note 44 (“And yet, the medical cannabis industry was generating revenue These states generated millions with no banking

This challenging status quo persisted even as more states began recognizing the medicinal value of marijuana and legalizing medical use in the late 1990s and early 2000s.⁸² The growing state-legal cannabis industry was bringing in millions of dollars in sales annually, yet federal prohibition kept banks away and cash prevalent.⁸³ With little hope for banking reform, the challenges of operating all-cash businesses became an accepted norm by necessity.⁸⁴ However, the public safety risks and attempts by the executive branch to create change began mounting steadily.⁸⁵

In August 2013, there was a shift in federal marijuana enforcement policy with the Cole Memo signed by U.S. Deputy Attorney General James M. Cole (“Cole Memo”).⁸⁶ While reiterating that marijuana is a federally illegal and “dangerous drug” under the CSA, the Memo offered some assurance to the cannabis industry by signaling restraint in enforcement of the prohibition.⁸⁷ Specifically, the

solutions. This left cannabis businesses with two options: work entirely in cash or hide cannabis operations from the bank.”).

82. *See id.* (“This continued as the industry grew. By 2014, there were 24 states with a legal medical cannabis program and 5 states, led by Colorado, with adult use cannabis programs. It was that same year that Sundie Seefried, now-former CEO and president of Partner Colorado Credit Union, developed one of the first cannabis banking programs in the nation.”).

83. *See id.* (“Since a robust black market formed during cannabis prohibition (and persists to this day), AML monitoring ensured that licensed cannabis businesses only bank money earned through the scope of their licensed operations.”).

84. *See* Hatzopoulos, *supra* note 12 (“Given their limited options, an estimated 70% of cannabis businesses resort to cash-run operations.”).

85. *See* David Pierson, *Shunned by Banks, Legitimate Pot Sellers Must Deal in Currency, Posing Safety and Logistical Problems*, L.A. TIMES (Nov. 28, 2014), <https://www.latimes.com/business/la-fi-marijuana-banking-20141128-story.html> [<https://perma.cc/6ADM-PP7G>] (“As the marijuana industry expands into a multibillion-dollar business, the need for proper banking services continues to intensify.”); *see also* MCGLINCHY, *supra* note 9 (explaining how 38 states now allow medical marijuana use and how numerous government agencies are pushing for the descheduling of marijuana).

86. Memorandum from James M. Cole, U.S. Deputy Att’y Gen. to U.S. Att’ys, U.S. Dep’t of Just., Guidance Regarding Marijuana Related Financial Crimes (Aug. 29, 2013).

87. *See id.* at 1 (announcing that the DOJ’s marijuana enforcement goals would be focused around 8 public-safety related goals, not including potential banking-related charges); *see also* *What Does the Cole Memo Mean for Marijuana?*, TALKS ON LAW, <https://www.talksonlaw.com/blog/what-does-the-cole-memo-mean-now-for-marijuana> [<https://perma.cc/RT7U-45R9>] (describing the ways in which the Cole memo provided some comfort to the cannabis industry by offering some restraint in terms of enforcement of the prohibition).

memo provided guidance to federal law enforcement regarding marijuana-related offenses in states that had legalized the drug.⁸⁸

C. *Early Stages of Cannabis Banking Infrastructure Development (2014-2024)*

The banking infrastructure continued to develop as the burgeoning industry grew.⁸⁹ This can be attributed, in part, to the Cole Memo and the Financial Crimes Enforcement Network (“FinCEN”), releasing guidance that ameliorated anti-money laundering law as it pertained to financial institutions working with MRBs.⁹⁰ By 2014, twenty-four states had legal medical marijuana programs in place, and five states, starting with Colorado, had legalized cannabis for adult recreational use.⁹¹ As a result of the growing acceptance of legal cannabis, the industry began to see the development of the nation’s initial cannabis banking projects.⁹²

In February 2014, FinCEN released a directive to elucidate the requirements of the Bank Secrecy Act (“BSA”) for banks intending to serve MRBs. This 2014 Guidance aimed to explain the ways in which financial institutions could provide services to MRBs in a manner that aligns with their obligations under the BSA.⁹³ This was particularly relevant considering the efforts by various states to legalize certain

88. See TALKS ON LAW, *supra* note 87 (“[T]he Cole Memo advises federal prosecutors to refrain from marijuana prosecutions in states that have legalized cannabis with eight exceptions: Preventing the distribution of marijuana to minors; Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; Preventing violence and the use of firearms in the cultivation and distribution of marijuana.”).

89. TERPENES & TESTING MAG., *supra* note 44.

90. See PACKER ET AL., *supra* note 32, at 9 (“Since the FinCEN guidance was released, available data has revealed an increasing number of financial institutions providing services to the cannabis industry.”).

91. See TERPENES & TESTING MAG., *supra* note 44.

92. *Id.*

93. BEN MARZOUK, ET AL., EVERSHEDES SUTHERLAND, CLIENT ALERT: FINCEN CLARIFIES SAR FILING AND DUE DILIGENCE REQUIREMENTS FOR FINANCIAL INSTITUTIONS PROVIDING SERVICES TO HEMP-RELATED BUSINESSES (July 6, 2020), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/233694/FinCEN-clarifies-SAR-filing-and-due-diligence-requirements-for-financial-institutions-providing-services-to-hemp-related-businesses#_ftn5 [<https://perma.cc/93BV-D84Y>].

activities related to marijuana, which created a discrepancy between state and federal laws in the U.S. regarding marijuana regulation.⁹⁴

In its guidance, FinCEN clarified that financial institutions could indeed serve MRBs consistent with their BSA requirement to file a suspicious activity report (“SAR”) on financial transactions involving marijuana-related transactions.⁹⁵ Officials said they expected the guidance to “enhance the availability of financial services for, and the financial transparency of, MRBs.”⁹⁶ The 2014 FinCEN guidance notes that “because Federal law prohibits the distribution and sale of marijuana, financial transactions involving an MRB would generally involve funds derived from illegal activity.”⁹⁷ As a result, a financial institution is required to file a SAR on transactions involving an MRB, even if it is appropriately licensed under state law.⁹⁸

More specifically, FinCEN clarified that banks can provide services to MRBs while still complying with the BSA if they: (a) Get information about the MRB and “related parties” from licensing authorities, including application and license documentation; (b) Learn about the MRB’s “regular business activity,” like their products and customers; (c) Check public sources for “negative information” about the business and related parties; (d) Watch for “suspicious activity” and “red flags” outlined in the guidance; and (e) Regularly update “customer due diligence” information based on the risk.⁹⁹

The FinCEN guidance also included “red flags” to indicate to authorities cases where MRBs have violated the BSA.¹⁰⁰ Examples of these red flags include an MRB appearing to use a license as a pretext to launder “criminal activity derived funds” or an MRB concealing or disguising cannabis involvement, among others.¹⁰¹

94. *Id.*

95. FIN. CRIMES ENF’T NETWORK, U.S. DEP’T OF THE TREASURY, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [<https://perma.cc/3GQE-8KXM>] (“This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations.”).

96. *Id.*

97. DEP’T. OF THE TREASURY, *supra* note 95.

98. *Id.*

99. DEP’T. OF THE TREASURY, *supra* note 95.

100. *Id.*

101. *Id.*

The 2014 Guidance established three separate categories for marijuana-related SARs, namely, “Marijuana Limited” SARs, “Marijuana Priority” SARs, and “Marijuana Termination” SARs, one of which needs to be created and filed whenever a bank is providing services to an MRB.¹⁰² A “Marijuana Limited” SAR should be used if the financial institution “reasonably believes,” based on its “customer due diligence,” that the transaction “does not implicate one of the Cole Memo enforcement priorities or a violation of state law.”¹⁰³ Continuing activity report requirements would apply after filing the initial SAR and may include information about deposits, withdrawals, and transfers.¹⁰⁴

On the other hand, if a financial institution, through its customer due diligence, reasonably believes that a transaction is connected to one of the Cole Memo enforcement priorities, aligns with one of the identified “red flags,” or breaches state law, a “Marijuana Priority” SAR should be filed.¹⁰⁵ Lastly, suppose a financial institution must end its business relationship with a MRB to uphold a robust anti-money laundering compliance program. In that case, it should file a ‘Marijuana Termination’ Suspicious Activity Report (SAR).¹⁰⁶ However, while the FinCEN guidance provided some direction, most banks still avoided opening accounts with members of the cannabis industry.¹⁰⁷

D. Holes in Marijuana Infrastructure and Impetus for the SAFER Banking Act

While the 2014 FinCEN guidance provides additional clarity and protections for financial institutions considering working with MRBs, significant obstacles persist.¹⁰⁸ The guidance’s onerous SAR filing requirements and compliance burdens discourage banks from taking on cannabis industry clients.¹⁰⁹ As a result, many state-licensed

102. MARZOUK ET AL., *supra* note 93.

103. MCGLINCHAY, *supra* note 9.

104. *Id.*

105. *Id.*

106. *Id.*; DEP’T. OF THE TREASURY, *supra* note 95.

107. Kevin Cirilli & Kate Davidson., *Banks Still Wary about Pot Businesses*, POLITICOPRO (Jan. 29, 2014), <https://subscriber.politicopro.com/article/2014/01/banks-still-wary-about-pot-businesses-030255> [<https://perma.cc/363A-5STW>].

108. *See* Schain, *supra* note 73 (describing the challenges that the industry has encountered historically, which the proposed SAFE fails to address).

109. *Id.* (detailing the regulatory burden placed on MRBs).

MRBs have continued operating on a cash-only basis.¹¹⁰ This cash-dependent model has led to significant public safety risks for businesses and communities, has hindered industry growth, and has called for a more comprehensive legislative solution.¹¹¹ The cash-handling challenges and lack of access to electronic banking services have reinforced the need for a broader federal law to eliminate the barriers keeping banks and MRBs apart.¹¹²

As noted, even if providing financial services to an MRB that is not violating state law or any Cole Memo¹¹³ priority, a bank must still create a marijuana-limited SAR denoting the subject's information.¹¹⁴ This means the bank must go through the arduous process of filing a SAR solely because the bank is engaged in business with an MRB, even if there is no other suspicious activity present.¹¹⁵ Furthermore, when a financial institution reasonably believes an MRB has violated the law, they must file a marijuana priority SAR that includes the MRB and MRB's contact information, list the violated enforcement priorities, and

110. *Id.*

111. *Id.*

112. Jeffrey et al., *supra* note 11 (“Doing so much business in cash exposes cannabis companies to additional risks such as misappropriation of funds, fraud, theft, safety and security, and others.”).

113. See TALKS ON LAW, *supra* note 87 (describing that, while the Cole Memo was technically repealed in 2018 by Attorney General Jeff Sessions, it still holds legal weight because Attorney General, William Barr, later provided some additional comfort and deference to the precedent established by the Cole Memo).

114. See Office of the Comptroller of the Currency, U.S. Dep't of the Treasury, *Suspicious Activity Reports (SAR)*, <https://www.occ.treas.gov/topics/supervision-and-examination/bank-operations/financial-crime/suspicious-activity-reports/index-suspicious-activity-reports.html> [<https://perma.cc/7XB6-Y263>] (“A financial institution is required to file a suspicious activity report no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a suspicious activity report.”); Schain, *supra* note 73 ([I]f reasonably believing that a marijuana-related business violates state law or Cole Memorandum priority, a bank must file marijuana priority SAR providing: subject and related parties information and addresses; enforcement priorities believed to have been implicated).

115. See *To File (a Suspicious Activity Report) or Not to File, That is the Question*, FORTNER BAYENS, PC, <https://fbl.cpa/banking-library/regulatory-compliance/to-file-a-suspicious-activity-report-or-not-to-file-that-is-the-question> [<https://perma.cc/2YYF-2LJA>] (“The decision to file [or not to file a SAR] is an important and onerous one.”) (last visited Jan. 8, 2023); see also Jeff Hale, *Senate Takes Long-Awaited Step Toward Cannabis Banking Reform*, MG MAGAZINE (Sept. 27, 2023), <https://mgmagazine.com/cannabis-news/senate-takes-long-awaited-step-toward-cannabis-banking-reform/> [<https://perma.cc/2JWC-QKPV>] (“Because cannabis remains federally categorized among the most dangerous illegal drugs, banks that decide to work with the industry will face onerous regulatory provisions.”).

information regarding “suspicious activity financial transactions.”¹¹⁶ Finally, if facilitating effective anti-money laundering compliance necessitates a relationship with an MRB, a financial institution should create a marijuana termination SAR, informing any other related banks that illicit activity may have occurred.¹¹⁷ More specifically, the termination SAR should be filed when a bank has elected to formally end a relationship with an MRB to ensure proper anti-money laundering compliance.¹¹⁸

These increased compliance costs likely disincentivize banks from conducting business with MRBs.¹¹⁹ Moreover, as the FDIC insures the majority of national banks, and the federal government continues to categorize cannabis as a Schedule I substance, banks are reluctant to engage with MRBs due to concerns about jeopardizing their FDIC insurance.¹²⁰ Section 8(b) of the FDI Act provides the FDIC with the power to terminate deposit insurance if an institution has violated any federal laws related to transactions with illegal businesses or trades that violate federal money laundering statutes, which includes CSA violations.¹²¹ While there are no known instances of a bank losing its FDIC certification for transacting with a state-licensed MRB, the potential risk of such exposure remains a critical factor for any bank insured by the federal government.¹²²

116. See Memorandum from Cole, *supra* note 86 (describing that, in the case in which a financial institution provides services to a non-financial customer that provides goods or services to a marijuana-related business, the financial institution may file SARs based on existing regulations and guidance without distinguishing between “Marijuana Limited” and “Marijuana Priority.”).

117. *Id.*

118. See Terence Gilroy & Tom Firestone, *SAR Filing and Ancillary Businesses*, BAKER MCKENZIE: GLOBAL CANNABIS COMPLIANCE BLOG (Sept. 1, 2020), <https://globalcannabiscompliance.bakermckenzie.com/2020/09/01/sar-filing-and-ancillary-businesses/> [<https://perma.cc/Z3TY-HAFM>] (describing when a SAR should be filed).

119. John Hudak & Aaron Klein, *Banks Don’t Want to Work with Marijuana Companies. It’s Time for That to Change*, BROOKINGS INST. (Mar. 28, 2019), <https://www.brookings.edu/articles/banks-dont-want-to-work-with-marijuana-companies-its-time-for-that-to-change/> [<https://perma.cc/QQZ3-C3LW>] (explaining how compliance costs can be a deterrent).

120. See *Cannabis Banking Options for Legal Marijuana*, WÜRK, <https://info.enjoywurk.com/cannabis-resource-center/cannabis-options-when-a-bank-says-no> [<https://perma.cc/RHW3-NANM>] (last visited Jan. 8, 2023) (“Since the national government still classifies cannabis as a schedule one drug, many national banks will not do business with companies in the industry out of fear of losing their FDIC insurance.”).

121. Federal Deposit Insurance Act § 8(b), 12 U.S.C. § 1818(b).

122. Tenzin GGT & Richard Pollak, *Part II: Confronting the Banking Dilemma for State-Licensed Marijuana Businesses in the United States*, SECURED FIN. NETWORK,

1. Operational Difficulties

There are significant operational difficulties related to cannabis banking.¹²³ Merely eight percent of the country's 9,603 financial institutions offer accounts to MRBs, and those that do often charge service fees of up to \$10,000 monthly per account to counterbalance the burdensome compliance expenses.¹²⁴

Like banks, credit card companies view working with MRBs as too risky due to the potential consequences associated with its Schedule I designation.¹²⁵ MRBs operating on a cash-only basis face major security and safety challenges stemming from the difficulty of accessing financial and armored car services, as the marijuana industry relies heavily on cash transactions.¹²⁶

MRBs, their employees, consumers, and other related parties face the risk of robbery.¹²⁷ Additionally, the absence of access to financial services places extra burdens on the MRB related to disbursement, accounting, and record-keeping, leading to a significant loss in productivity.¹²⁸ With large amounts of cash on premises, MRBs can become targets for theft, putting employees' safety at risk.¹²⁹

<https://www.sfnet.com/home/industry-data-publications/the-secured-lender/magazine/tsl-article-detail/part-ii-confronting-the-banking-dilemma-for-state-licensed-marijuana-businesses-in-the-united-states> [<https://perma.cc/CHL2-M8ES>] (“Although there has been no reported case where a bank has actually lost its FDIC status as a result of doing business with a state-licensed marijuana business, the threat of exposure to such a risk will always be an important consideration for any federally insured bank.”).

123. Schain, *supra* note 73.

124. *Id.*

125. Frances Vinall, *Don't Let People Buy Pot with Debit Cards, Mastercard Tells Banks*, WASH. POST (July 27, 2023), <https://www.washingtonpost.com/business/2023/07/27/mastercard-debit-card-marijuana/> [<https://perma.cc/L2QV-9DQM>] (explaining that Mastercard said in an emailed statement “the Federal government considers cannabis sales illegal, so these purchases are not allowed on our systems As we were made aware of this matter, we quickly investigated it,” the company said. “In accordance with our policies, we instructed the financial institutions that offer payments services to cannabis merchants and connects them to Mastercard to terminate the activity.”).

126. *Legal Marijuana Sellers face Quandary: No Armored Cars*, DENVER POST (Apr. 29, 2016), <https://www.denverpost.com/2013/08/29/legal-marijuana-sellers-face-quandary-no-armored-cars/> [<https://perma.cc/L4EH-8Z89>].

127. *Uptick in Cannabis Business Theft Underscores Need for Banking Access*, BURNS & WILCOX (May 3, 2023), <https://www.burnsandwilcox.com/insights/uptick-in-cannabis-business-theft-underscores-need-for-banking-access/> [<https://perma.cc/25FL-3LX7>] (“[O]perat[ing] primarily on a cash basis [makes cannabis businesses] more vulnerable to smash-and-grab robberies and other crimes[.]”).

128. Schain, *supra* note 73.

129. *Id.*

Employees also face physical violence and robbery threats when transporting cash deposits or making cash deliveries and pickups with vendors in the process of purchasing products or completing other transactions.¹³⁰ Furthermore, customers paying cash for cannabis may be followed and robbed.¹³¹ Vendors providing services to MRBs also carry money that criminals may seize.¹³² The lack of electronic payment options creates prime conditions for predators seeking large caches of untraceable currency.¹³³

Additionally, MRBs are forced to use only cash for business costs because they lack access to financial services and must conduct transactions in cash.¹³⁴ This situation transfers the risks of criminal activity, administrative burdens, and productivity losses onto them.¹³⁵ For example, MRBs must pay employees' wages, taxes, and benefits in cash.¹³⁶ Employees may even struggle to deposit paychecks into personal bank accounts since their personal banks may refuse cannabis-derived funds.¹³⁷ Because of this, MRBs resort to paying employees in

130. See Sean Foley, *Protecting Lone Workers in the Cannabis Industry*, MARIJUANA VENTURE (Nov. 2, 2021), <https://www.marijuanaventure.com/protecting-lone-workers-in-the-cannabis-industry/> [<https://perma.cc/W3GX-ZRHN>] (“[R]outine activities, like moving large quantities of product between stores or transporting product in personal vehicles also create opportunities for a violent offender to attempt a robbery.”).

131. See *id.* (“Due to the presence of large quantities of cash and product, lone workers in the cannabis industry are also at increased risk of violence. Workplace violence can take many forms, including verbal threats, threatening behavior and physical assault, and can be committed by strangers, customers, co-workers or personal relations.”).

132. AEROPAY, *supra* note 46.

133. Kathleen Kelleher, *Will California Get Its Way On Weed?*, UCLA: BLUE PRINT (2018), <https://blueprint.ucla.edu/feature/will-california-get-its-way-on-marijuana/> [<https://perma.cc/8T5A-HE32>] (“60 percent to 70 percent of marijuana businesses deal only in cash, a dangerous circumstance when dispensers carry duffel bags of money from one place to another, including to pay taxes.”).

134. Schain, *supra* note 73.

135. *Id.* (“[B]ecause they lack financial services and receive all monies in cash, MRBs are forced to use cash to pay

employees, landlord, taxes (local, state and federal), utilities (electricity, water), and vendors, thereby passing on the criminal vulnerability, administrative burden and productivity loss.”).

136. Heather Morton, *Banking and Cannabis: Yearning to Be Buds?* NAT’L CONF. OF STATE LEGISLATURES (Mar. 7, 2022), <https://www.ncsl.org/state-legislatures-news/details/banking-and-cannabis-yearning-to-be-buds> [<https://perma.cc/YG75-DVM3>] (“[D]ue to strict cash-only requirements, have difficulty renting or purchasing property and must pay their taxes, utility expenses, rent and employees in cash.”).

137. See *Why Cannabis Companies Are Barred from Traditional Banking*, LEADING RET. SOLS. (Aug. 19, 2022), <https://www.leadingretirement.com/blog/cannabis-banking> [<https://perma.cc/2BRT-DZNN>] (“Operating all-cash makes it difficult to ensure fair and correct payment of employees and partners, as companies can’t use payroll systems or pay

cash, who deposit the funds into their accounts.¹³⁸ Theoretically, the bank may be required to meet the SAR requirements mentioned above for these funds.¹³⁹ Employees also have more limited retirement savings options because traditional 401(k) providers hesitate to provide services to MRB employees.¹⁴⁰

Landlords who rent to MRBs face risks of accepting large cash rent payments.¹⁴¹ For example, landlords accepting cash face additional administrative burdens as it requires thorough bookkeeping, tracking and barriers to collection.¹⁴² For similar reasons, vendors who provide supplies and services to MRBs similarly endure the hassle of transacting business in cash.¹⁴³ With each payment, the limited banking access perpetuates risks and inefficiencies down the supply chain.¹⁴⁴ An inability to pay bills electronically diverts time and resources from running the core business.¹⁴⁵ In addition, theft can be particularly

through direct deposit payments or company checks. As a result, it's not uncommon for cannabis companies to be sued for unpaid wages and other worker violations.”).

138. *Guide: How Do Dispensaries Pay Their Employees?*, GREEN SPACE ACCT., <https://greenspaceaccounting.com/how-dispensaries-handle-payroll-for-their-employees/> [<https://perma.cc/W8NX-N2DC>] (last visited Jan. 8, 2023).

139. DEP'T. OF THE TREASURY, *supra* note 95 (describing when SARs are to be filed).

140. *See* LEADING RET. SOLS., *supra* note 137 (“Because banks are discouraged from handling any money related to cannabis, traditional 401(k) providers won’t get near it either, even though it is fully legal for cannabis companies to provide 401(k)s and other benefits to their employees. This diminishes most 401(k) options that these companies have.”).

141. *See* Schain, *supra* note 73 (“MRBs are forced to use cash to pay employees, landlord, taxes (local, state and federal), utilities (electricity, water), and vendors, thereby passing on the criminal vulnerability, administrative burden and productivity loss.”).

142. Mike Lefort, *Why Landlords Should Never Accept Cash Rent Payments from Tenants*, REAL EST. INVESTING AUTH. (Mar. 30, 2022), <https://www.nexuspropertymanagement.com/blog/why-landlords-should-never-accept-cash-rent-payments-tenants> [<https://perma.cc/WU8R-BGPL>] (explaining that landlords who accept cash face numerous administrative burdens that are not experienced by landlords who do not accept cash payments).

143. *See* Schain, *supra* note 73 (describing the complications vendors face); Anuj Singh, *Top 4 Reasons Why Landlords Should Not Accept Cash Payments for Rent*, REALTY TIMES (Apr. 7, 2020), <https://realtymtimes.com/agentnews/advicefromagents/item/1037515-top-4-reasons-why-landlords-should-not-accept-cash-payments-for-rent> [<https://perma.cc/FZ6X-EADM>] (“Cash payments require manual accounting data entry. This is actually not limited to just cash but applies to all offline payment methods. At some point, that information needs to enter your accounting system, whether that system is digital like Excel, Quickbooks, or some property management software.”).

144. Robert Clarke & Mojave Richmond, *Cannabis Supply Chain Woes: Bridging the Gaps*, CANNABIS BUS. TIMES (Mar. 2023), <https://www.cannabisbusinesstimes.com/article/cannabis-supply-chain-challenges-robert-clarke-mojave-richmond/> [<https://perma.cc/5NCE-3S99>] (describing risks regarding supply chain).

145. *See* Mike Kappel, *6 Reasons Why Going Paperless Benefits Your Business*, FORBES (July 11, 2018), <https://www.forbes.com/sites/mikekappel/2018/07/11/6-reasons-why->

devastating for an MRB since insurance usually covers a maximum of \$20,000 in cash losses, while MRBs often possess cash amounts ranging between \$200,000 and \$500,000.¹⁴⁶

Finally, in the rare case that an MRB has a bank account, if the MRB is administering a check to another MRB, the MRB depositing the check might have its account flagged and even shut down if the bank reasons the funds were derived from illegal activity, significantly interrupting its business operations.¹⁴⁷ The limited access to bank accounts makes it difficult for MRBs or their employees to make investments that earn interest.¹⁴⁸ This may slow the growth of MRBs, further disadvantaging them compared to non-MRBs.¹⁴⁹

Throughout this Note, I extensively reference critiques of the SAFE Banking Act, the predecessor to the SAFER Banking Act. These critiques are included because they remain pertinent; the modifications introduced in the SAFER Act have not effectively addressed the shortcomings identified in the SAFE Act. As will be elaborated in this Note, the SAFER Banking Act, like its predecessor, (1) still fails to provide MRBs with access to banking services on par with other industries; (2) does not eliminate the criminal and civil risks MRBs face under federal laws, a concern unmitigated by the SAFE Act; (3) leaves largely unresolved the compliance challenges MRBs encounter with money laundering regulations and the Bank Secrecy Act; (4) does not sufficiently address the operational difficulties MRBs face due to banking restrictions; and (5) falls short in fully integrating cannabis businesses into the banking system. This ongoing relevance of the critiques of the SAFE Act underscores the need for further legislative or regulatory measures to adequately support MRBs in these areas.

going-paperless-benefits-your-business/?sh=3caea4f945ec [https://perma.cc/4R34-K2Q6] (explaining administrative burdens presented by paper billing).

146. Schain, *supra* note 73.

147. *Id.* (“Further, following an account closure, an MRB’s owners and employees often have their personal accounts shut down and experience difficulty in obtaining home loans or credit cards.”).

148. *See* LEADING RET. SOLS., *supra* note 137 (describing the burdens MRB employees face given the nature of the industry.).

149. Schain, *supra* note 73 (describing the burdens MRBs face, which likely hinder economic growth).

2. Risk of Civil and Criminal Liability

In addition to operational challenges, banks are hesitant to work with MRBs due to the risk of liability.¹⁵⁰ As noted, the CSA lists marijuana next to heroin as a Schedule I controlled substance having “a high potential for abuse” and for which there is “no currently accepted medical use in treatment” and “a lack of accepted safety for use . . . under medical supervision.”¹⁵¹ The CSA prohibits marijuana’s manufacture, distribution, dispensation, and possession, and under the U.S. Constitution’s Supremacy Clause, state laws conflicting with federal law are generally preempted and void.¹⁵² The Supremacy Clause technically grants the CSA primacy over state cannabis law.¹⁵³ Still, a non-enforcement policy such as the Cole Memo and the FinCEN guidance allows state industries to operate under state laws.¹⁵⁴

This federal prohibition creates significant liability for MRBs.¹⁵⁵ Initially, the Controlled Substances Act (CSA) sets forth penalties for possessing, cultivating, or selling cannabis that vary based on the quantity involved. The penalties for violating federal drug laws range from 15 days to life in prison, as well as fines from \$1,000 up to \$1 million.¹⁵⁶ Additionally, distributing drugs to others is considered a

150. James Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, BUS. L. TODAY (Feb. 6, 2020), https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-february/cannabis-banking-proceed-with-caution/ [https://perma.cc/5K66-PBJA].

151. 21 U.S.C. § 812(b)(1).

152. U.S. CONST., Art. VI, cl. 2. See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (“[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.”).

153. U.S. CONST., Art. VI, cl. 2. See *Wickard*, 317 U.S. at 124 (“[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.”); CONG. RSCH. SERV., *THE EVOLUTION OF MARIJUANA AS A CONTROLLED SUBSTANCE AND THE FEDERAL-STATE POLICY GAP* 54 (2022) (“[F]ederal law supersedes state law . . . it is within the federal government’s power to enforce all of the CSA, including marijuana law, in states and territories . . . this may close the gap as it would force states to realign their marijuana laws and policies with . . . the federal government.”).

154. John Hudak, *Why Sessions is Wrong to Reverse Federal Marijuana Policy*, BROOKINGS INST. (2018), <https://www.brookings.edu/articles/why-sessions-is-wrong-to-reverse-federal-marijuana-policy/> [https://perma.cc/674T-B6TW] (“The Cole Memo effectively told federal prosecutors not to bring cannabis-related cases in states that have legalized.”).

155. Schain, *supra* note 73 (“This federal prohibition creates criminal and civil exposure for MRBs.”).

156. 21 U.S.C. § 841; Schain, *supra* note 73 (Second, because working together to distribute drugs to a third party forms

“conspiracy.” meaning that individuals involved in the sales process, like a dispensary’s landlord, could potentially face conspiracy charges.¹⁵⁷ Also, people who knowingly rent property to someone convicted of distributing illegal drugs may be seen as maintaining a drug premise and could face criminal charges and civil penalties.¹⁵⁸

III. BACKGROUND OF THE SAFER BANKING ACT

To resolve the noted challenges associated with cannabis banking, Congress has considered various legislative proposals to provide a safe harbor for financial institutions that wish to serve state-legal MRBs.¹⁵⁹ Most notably, the SAFE Banking Act was established in 2019 and has since been reintroduced in every Congress until the introduction of the SAFER Banking Act.¹⁶⁰ In April 2023, Congress reintroduced the SAFE Banking Act after two failed legislative attempts in 2019 and 2021.¹⁶¹ The SAFE Banking Act suggested novel safeguards that would have prohibited federal regulators and law enforcement from penalizing or dissuading financial institutions from offering banking services to MRBs compliant with state laws.¹⁶²

a “conspiracy” in violation of 21 U.S.C. Section 846, anyone “furthering sales” (e.g., the dispensary’s landlord) faces conspiracy exposure.”).

157. 21 U.S.C. § 846; Schain, *supra* note 73 (Third, one whom knowingly leases property for the purpose of “distributing a controlled substance” may be deemed to be “maintaining a drug premise” in violation of 21 U.S.C. Section 856 . . .”).

158. 21 U.S.C. § 856 (“[C]riminal charges include to up to 20 years’ incarceration and fines up to \$500,000 for individuals and \$2 million for an entity and civil penalty includes forfeiture of gross receipts earned from leased space.”); Schain, *supra* note 73.

159. H.R. Res. 1595, 116th Cong. (2019); S. 1200, 116th Cong. (2019). *See* Reif, *supra* note 23 (“The Secure and Fair Enforcement (SAFE) Banking Act was first introduced to Congress in May of 2017 under the sponsorship of Sen. Jeff Merkley (D-OR) and Rep. Ed Perlmutter (D-CO). It has been reintroduced several times, the latest in 2021 with sponsorship by Perlmutter in the House and Merkley and Sen. Steve Daines (R-MT) in the Senate.”).

160. Luttrell, *supra* note 24 (“The 2023 version of the SAFE Banking Act was introduced in the House of Representatives (HR2891) and the Senate (S1323) in May 2023. Previous bills have had bipartisan support, but this is the first time both chambers of Congress have discussed the SAFE Banking Act simultaneously.”); *See* Schain, *supra* note 73 (“Following failed 2019 and 2021 attempts, both the House of Representatives and Senate reintroduced the Secure and Fair Enforcement Banking Act of 2023 (SAFE Banking Act) on April 26.”).

161. Schain, *supra* note 73.

162. Stefan Sykes, *Lawmakers Reintroduce SAFE Banking Act, a Bill the Cannabis Industry Hails as a Lifeline*, CNBC (Apr. 27, 2023), <https://www.cnbc.com/2023/04/27/safe-banking-act-reintroduced-cannabis-industry-hails-bill.html> [<https://perma.cc/RD87-GBSY>].

Furthermore, it would have prohibited regulators from terminating or limiting a bank's federal deposit insurance solely because it is banking state-compliant MRBs.¹⁶³ The SAFE Banking Act also clarifies that handling revenue from legal cannabis businesses does not constitute illegal trafficking or money laundering.¹⁶⁴

The updated "SAFER" legislation from September 2023 aims to further protect MRBs by addressing issues around potential bad actors and setting boundaries in case federal regulators attempt to discourage banks from servicing MRBs.¹⁶⁵ Under this version, federal regulators must "develop uniform guidance and examination procedures – including legacy cannabis-related deposits" and "update guidance related to hemp-related businesses and service providers."¹⁶⁶

Similar to former iterations of the SAFE Banking Act, the SAFER Banking Act includes a "safe harbor" for financial institutions that plan to provide banking services to state-legal MRBs.¹⁶⁷ Nonetheless, the SAFER Banking Act incorporates more provisions favorable to MRBs, specifying that federal banking agencies are responsible for ensuring that their supervised depository institutions operate securely and reliably and maintain processes to detect fraudulent or illegal activities.¹⁶⁸ Furthermore, under the amended version, regulators would not be allowed to order a financial institution to close an account "unless there is a valid reason."¹⁶⁹ The bill also contains provisions to safeguard employees of cannabis businesses that are legal under state law when those employees try to get home loans backed by federal programs.¹⁷⁰ The latest version of the SAFER Banking Act also lays out some risk assessment guidelines.¹⁷¹ The bill prompts banks to evaluate each customer's risk individually rather than

163. Black & Galeazzi, *supra* note 150.

164. *Id.*

165. A.J. Herrington, *New Amendments to Marijuana Banking Bill Revealed*, FORBES (Oct. 2, 2023), <https://www.forbes.com/sites/ajherrington/2023/10/02/new-amendments-to-marijuana-banking-bill-revealed/?sh=36f81724409d> [https://perma.cc/W4ZX-CX7X] (detailing the specific proposed changes outlined in bill).

166. SAFER Banking Act, SENATE DEMOCRATS (OCT. 2, 2023), https://www.democrats.senate.gov/imo/media/doc/safer_section_by_section.pdf [https://perma.cc/6CU9-CZV5].

167. Herrington, *supra* note 165; S. 2860 § 2(a)(5).

168. S. 2860, 118th Cong. § 10(a)(1) (2023).

169. *Id.* at § 10(b)(1)(a).

170. *Id.* at § 5(d)(3).

171. *Id.* at § 10(a)(5).

automatically denying services to entire categories of customers without considering the actual risks of an individual customer or the bank's ability to manage that risk.¹⁷²

While these safeguards constitute progress toward expanding MRBs' financial accessibility, the current version of the SAFER Banking Act lacks adequate incentives to encourage hesitant banks to partner with MRBs productively.¹⁷³ By declining to provide banks with sufficient incentives to work with MRBs, the SAFER Banking Act does not fix the compliance challenges and reputational risks that have prevented most banks from serving the cannabis industry thus far.¹⁷⁴

A. *SAFER Banking Act's Protections*

The SAFER Banking Act aims to provide greater legal clarity and protections for financial institutions partnering with state-compliant MRBs.¹⁷⁵ In particular, the SAFER Banking Act would stop federal regulators and law enforcement from punishing or dissuading banks from working with MRBs just because of their cannabis activities.¹⁷⁶ It also prohibits regulators from solely jeopardizing a bank's federal deposit insurance because it funds MRBs.¹⁷⁷ In addition, the SAFER Banking Act clarifies that handling funds from state-compliant MRBs does not constitute trafficking proceeds from an illegal activity.¹⁷⁸

172. *Id.*

173. See PACKER ET AL., *supra* note 32, at 15 ("It is imperative that MDIs, as institutions uniquely positioned to repair communities, receive not just safe harbor but also incentives to provide financial services to [M]RBs.").

174. See *Why Cannabis Firms Are Focused on Banking and Tax Reform*, SMITH BRAIN TRUST NEWSL. (U. Md. Robert H. Smith School of Bus., College Park, Md.), May 19, 2021, <https://www.rhsmith.umd.edu/research/why-cannabis-firms-are-focused-banking-and-tax-reform> [<https://perma.cc/333L-EV6X>] (explaining the significant barrier 280E presents to financial institutions working with MRBs).

175. *Id.*

176. *Id.*

177. S. 2860, 118th Cong. § 10(a)(1) (2023); see also *The SAFE Banking Act: Financial Services for Marijuana and Hemp Businesses*, HINSHAW L. (June 5, 2023), <https://www.hinshawlaw.com/newsroom-updates-hinshaw-alert-safe-banking-act-financial-services-for-marijuana-hemp-businesses.html> [<https://perma.cc/KTG7-MPW4>] ("The legislation also provides protections for insurance companies that provide insurance to SSMBs and SSMB Service Providers.").

178. See HINSHAW L., *supra* note 177 ("Section 3 of the SAFE Banking Act provides a safe harbor for depository institutions by prohibiting Federal banking regulators from . . . Terminating or limiting deposit insurance, or taking other adverse action against a depository institution under the FDIC Act or the FCU Act solely because the depository institution has.").

While the bill does not remove all hurdles, these provisions offer safeguards designed to reassure cautious financial institutions and facilitate MRBs' access to much-needed banking services.¹⁷⁹

Additionally, the SAFER Banking Act shields banks and insurers that offer financial services to MRBs from facing any federal legal consequences or regulatory penalties (including criminal, civil or administrative forfeiture) only for providing or investing profits from those financial services.¹⁸⁰

B. *The SAFER Banking Act's Failings*

Although the SAFER Banking Act clarifies some of the ambiguities between contradictory laws and reduces penalties, it still does not grant the cannabis industry complete access to the banking services that are available to other legal industries.¹⁸¹ Despite its protections, the SAFER Banking Act fails to create an equal playing field for MRBs and non-MRBs.¹⁸² First, while the SAFER requires FinCEN to revisit their 2014 guidance regarding SARs,¹⁸³ it does not explicitly attempt to update the BSA to remove MRBs' proceeds from the "money laundering" provision that would make depository accounts from national financial institutions available and affordable to MRBs.¹⁸⁴ Additionally, instead of easing burdens, the SAFER Banking Act imposes FinCEN's strict compliance rules on banks, making it potentially unprofitable for them to service MRBs.¹⁸⁵ This restricts the

179. *See id.* ("If enacted, the SAFE Banking Act would allow depository institutions (including de novo institutions) to provide financial products and services to a State Sanctioned Marijuana Businesses (SSMB) and businesses that provide products or services to a SSMB (SSMB Service Provider).").

180. *See* S. 2860, 118th Cong. § 9(b)(1) (2023) (declaring that banks and insurers are protected when providing financial services to MRBs).

181. Schain, *supra* note 73 ("While preferable to its predecessors, the SAFE Banking Act fails to provide legal marijuana growers, processors, transporters or sellers (marijuana-related businesses or MRBs) with the access to banking that every other legitimate industry enjoys.").

182. *Id.*

183. *See* S. 2860 § 2(a)(5) ("Not later than the end of the 180-day 1-year period beginning on the date of enactment of the Secure And Fair Enforcement Regulation Banking Act, the Secretary shall amend the February 14, 2014, guidance titled 'BSA Expectations Regarding Marijuana-Related Businesses' (FIN-2014-G001) or issue new guidance.").

184. *Id.*

185. MCGLINCHY, CLIENT ALERT: SAFER ACT: MARIJUANA MAY SOON BECOME A BIGGER DEAL (Oct. 17, 2023), <https://www.mcglinchey.com/insights/safer-act-marijuana->

number of banks willing and able to provide financial services to the industry, forcing MRBs to bear high costs.¹⁸⁶ Furthermore, the SAFER Banking Act declines to mandate that banks service MRBs.¹⁸⁷ This means that if lenders choose to avoid working with MRBs, the government cannot force them to do otherwise.¹⁸⁸ While under the SAFER Banking Act, banks are expected to “take a risk-based approach in assessing individual customer relationships,” with banks free to exclude the cannabis industry without repercussion, the SAFER Banking Act’s goals may go unmet if lenders broadly discriminate against MRBs.¹⁸⁹

Moreover, the SAFER Banking Act does nothing to restrict financial institutions from putting forth obstacles to consumers looking to support MRBs.¹⁹⁰ For example, Mastercard recently banned the ability to utilize its debit cards for the purchase of cannabis products.¹⁹¹ These actions further force cash-only business models, perpetuating

may-soon-become-a-bigger-deal/ [https://perma.cc/8QVU-RC9T] (“Under the SAFER Banking Act, certain applicable guidelines and restrictions will remain in place – primarily surrounding due diligence and ongoing monitoring for suspicious activities, all to which activities banking and financial institutions are accustomed in the context of other highly regulated industries.”).

186. Schain, *supra* note 73 (describing the challenges MRBs face when they are not provided with access to financial institutions).

187. S. 2860 § 15(a) (“Nothing in this Act shall require a depository institution, an entity performing a financial service for or in association with a depository institution, a community development financial institution, or an insurer to provide financial services to a State-sanctioned marijuana business, service provider, or any other business.”).

188. *Id.*; see MCGLINCHY, *supra* note 185 (“But no, institutions will not be required to serve marijuana businesses.”).

189. S. 2860 § 10(a)(5); See MCGLINCHY, *supra* note 185 (explaining that technically, financial institutions are not required to work with MRBs, implying that they can still be legally excluded).

190. See e.g., Niket Nishant & Tanay Dhumal, *Mastercard Moves to Ban Cannabis Purchases on its Debit Cards*, REUTERS (July 26, 2023), <https://www.reuters.com/business/finance/mastercard-demands-termination-cannabis-purchases-its-debit-cards-2023-07-26/> [https://perma.cc/V3R2-LC7P] (issuing a directive to financial institutions, Mastercard is demanding the termination of marijuana transactions on its debit cards, a decision impacting both consumers and the cannabis industry’s revenue stream).

191. Kathryn Pomroy, *Mastercard Blocks Debit Card Purchases of Cannabis on Its Network 2023*, KIPLINGER (last updated Jan. 17, 2023), <https://www.kiplinger.com/personal-finance/mastercard-blocks-debit-card-purchases-of-cannabis-on-its-network> [https://perma.cc/E5Q6-37WJ] (“Our rules require our customers to conduct lawful activity where they are licensed to use our brands. The federal government considers cannabis sales illegal, so these purchases are not allowed on our systems.”).

MRBs' inequities, such as a heightened theft risk and lack of investment opportunities.¹⁹²

Finally, the SAFER Banking Act fails to address the IRS pitfalls that harm MRBs.¹⁹³ Specifically, under Section 280E of the tax code, MRBs are still considered essentially drug traffickers.¹⁹⁴ While some states where cannabis is legal have allowed MRBs to write off business expenses for state-level taxes, the IRS has yet to do so.¹⁹⁵ The effect of this is that MRBs cannot write off business expenses.¹⁹⁶ As a result, by one estimate, MRBs paid nearly \$1.8 billion in excess taxes in 2022.¹⁹⁷

192. See Iris Dorian, *Mastercard Weed Ban not Surprising; Visa could be Next, says Lawyer*, FORBES (Aug. 4, 2023), <https://www.forbes.com/sites/irisdorian/2023/08/04/mastercard-weed-ban-not-surprising-visa-could-be-next-says-lawyer/?sh=513d01b23019> [<https://perma.cc/66YB-ZKT2>] (“Over a week ago, the legal cannabis industry was dealt a major blow when Mastercard announced that it would no longer accept cannabis purchases on its debit cards.”); see John Lord, Testimony Before the S. Comm. on Banking, Housing, and Urban Affairs, 116th Cong., see *Challenges for Cannabis and Banking: Outside Perspectives: Hearing Before the Subcomm. on Banking, Housing, and Urban Affairs*, 116th Cong. (2019) (statement of John Lord) (“The status of cannabis and banking at the federal level has resulted in credit card companies refusing to process transactions for cannabis stores.”); see also Alex Milligan, *Pay More, Get Less: The SAFE Banking Act Overpromises and Under Delivers*, WELL NEWS (Aug. 25, 2023), <https://www.thewellnews.com/opinions/pay-more-get-less-the-safe-banking-act-overpromises-and-under-delivers/> [<https://perma.cc/NNB7-VZWH>] (explaining the shortcomings of the SAFE Banking Act from the perspective of a founder of a large telehealth-related MRB).

193. S. 2860 § 10(a)(5); see also Milligan, *supra* note 192 (“[T]he Act does not address section 280E of the IRS code, which prevents cannabis businesses from deducting business expenses from their taxes. This restriction is the biggest barrier preventing the many cannabis businesses that operate lawfully from growing and scaling.”).

194. S. 2860 § 10(a)(5); see also Jason Freeman, *Section 280E and The Taxation of Cannabis Businesses*, JDSUPRA (Aug. 20, 2021), <https://www.jdsupra.com/legalnews/section-280e-and-the-taxation-of-5068426/> [<https://perma.cc/8GE4-949L>] (“Section 280E of the Internal Revenue Code prohibits taxpayers who are engaged in the business of trafficking certain controlled substances (including, most notably, marijuana) from deducting typical business expenses associated those activities.”).

195. S. 2860 § 10(a)(5); see also Freeman, *supra* note 194 (“Section 280E of the Internal Revenue Code prohibits taxpayers who are engaged in the business of trafficking certain controlled substances (including, most notably, marijuana) from deducting typical business expenses associated those activities.”).

196. See *A Guide to Business Expense Deductions for Cannabis Companies*, POLSTON, <https://polstontax.com/business-deductions-for-cannabis-companies/> [<https://perma.cc/5B6D-ECA9>] (last visited Jan. 8, 2023) (“280E was created to prevent drug dealers from claiming these deductions for ordinary and necessary business expenses when trafficking controlled substances. Under IRC 61, all income is taxable, including income from businesses that are considered illegal by federal law.”).

197. *Marijuana Industry Overpaid \$1.8 Billion in Federal Taxes in 2022, Analysis Shows*, MJBIZDAILY (May 8, 2023), <https://mjbizdaily.com/marijuana-industry-overpaid-1-8-billion-in-federal-taxes-in-2022-analysis-shows/> [<https://perma.cc/A6R6-ZTMG>].

The Joint Committee on Taxation estimated in a 2016 letter sent to Senator Cory Gardner that repealing 280E would lower Federal receipts by up to \$5 billion (about \$15 per person in the US) over ten years.¹⁹⁸

IV. RECOMMENDATIONS TO EQUITABLY ACHIEVE BANKING REFORM VIA THE SAFER BANKING ACT

The SAFER Banking Act falls short in helping MRBs because it lacks clarity and incentives.¹⁹⁹ By incorporating the following recommendations, the SAFER Banking Act will better meet its objectives of improving equity and public safety by ensuring MRBs have access to financial services and can reduce their use of cash.²⁰⁰

A. *The SAFER Banking Act Could Raise Evidentiary Requirements and Limit Enforcement Penalties Against Financial Institutions for Servicing MRBs*

At this point, the criminal implications of working with MRBs deter lenders from being associated with MRBs.²⁰¹ To incentivize relationships between lenders and MRBs, the SAFER Banking Act should include additional provisions that relax enforcement standards against the financial institutions that service MRBs, and the federal government should only pursue egregious cases of money laundering that clearly violate the BSA.²⁰²

The SAFER Banking Act can accomplish this by clarifying that providing financial services to MRBs are not to be viewed as an “unsafe” or “unsound” practice.²⁰³ Alternatively, the SAFER Banking

198. Letter from Robert P. Harvey, Staff Member, Joint Comm. on Tax’n, United States House of Representatives, to Senator Cory Gardner (Dec. 1, 2017), <https://newtax.files.wordpress.com/2018/12/370531229-Senator-Gardner-280E-Score-12-04-2017.pdf> [<https://perma.cc/WM5A-7D23>].

199. See Milligan, *supra* note 192 (“There are many problems with the SAFE Banking Act, but they boil down to a lack of clarity, a lack of reform and a lack of incentives.”).

200. See Schain, *supra* note 73 (describing the challenges that the industry has encountered historically, which the proposed SAFE fails to address).

201. See PACKER ET AL., *supra* note 32, at 12 (“Until more comprehensive policy reforms are achieved, perceptions of risk are likely to be framed by the continued criminal prohibition of cannabis at the federal level, regardless of standalone banking reforms.”).

202. See *id.* at 16 ([O]ur recommendation is to [r]aise evidentiary requirements and limit enforcement penalties for MDIs and CDFIs for servicing legitimate cannabis businesses.”).

203. See Moises Gali-Velazquez, *Changes Needed to Protect Banking and Financial Services When Dealing with the Marijuana Industry*, LEXISNEXIS: PRAC. GUIDANCE J. (Aug.

Act could require the government to show evidence of violations of the Act by a “clear and convincing” standard before federal agencies are allowed to pursue enforcement actions.²⁰⁴ Easing these restrictions might increase banks’ comfort levels, potentially leading to a greater number of financial institutions offering services to MRBs.²⁰⁵

B. Ideally, the SAFER Banking Act Should Remove Cannabis from the CSA Altogether

There are a few critical implications and potential benefits of removing cannabis entirely from the CSA (“de-scheduling”) rather than simply rescheduling it as a Schedule III substance.²⁰⁶ First, de-scheduling would allow states to regulate cannabis without conflicting with Federal law.²⁰⁷ Simply rescheduling cannabis federally does not resolve the growing divide between state and federal cannabis laws.²⁰⁸ After rescheduling, state laws allowing people to possess cannabis for medical or recreational use would still conflict with federal law, as would the thousands of state-licensed cannabis businesses currently serving those markets.²⁰⁹ Even if rescheduled, the DEA would retain the same power it has now to crack down on these state-legal markets if it wanted to.²¹⁰

4, 2016), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/changes-needed-to-protect-banking-and-financial-services-when-dealing-with-the-marijuana-industry> [<https://perma.cc/N6F5-4P66>] (explaining that banks could receive significant civil penalties if they engage in “unsafe and unsound practices”).

204. See PACKER ET AL., *supra* note 32, at 16 (“And enforcement actions should be adjudicated for a violation of law under a clear and convincing evidence standard.”).

205. See *id.* (“And enforcement actions should be adjudicated for a violation of law under a clear and convincing evidence standard. These actions may encourage more MDIs and CDFIs to provide services to cannabis-related legitimate businesses.”).

206. See Whitt Steinker, *De-scheduling vs. Re-scheduling Marijuana: A Dramatic Difference*, BRADLEY (Mar. 28, 2023), <https://www.bradley.com/insights/publications/2023/03/descheduling-vs-rescheduling-marijuana-a-dramatic-difference> [<https://perma.cc/5SFY-QPKM>] (“The consequences between de-scheduling marijuana and re-scheduling are enormous.”).

207. See *id.* (“As a practical matter, it likely would be treated like alcohol as states would have their own marijuana laws with the potential for some federal oversight and regulation.”).

208. See *id.* (“If marijuana is re-scheduled such that it remains a controlled substance, marijuana companies may have to comply with much more stringent FDA rules, and physicians may still face the question of whether they are permitted to prescribe marijuana.”).

209. *Id.*

210. *Id.*

Furthermore, like re-scheduling, de-scheduling would resolve the 280E tax burdens.²¹¹ IRC Section 280E provides that “no deduction or credit shall be allowed” for an amount paid throughout the tax year if the trade is prohibited by federal or state law.²¹² As discussed, even though cannabis is legal in many forms, it currently is classified as a Schedule I substance by the CSA, which prevents cannabis businesses from being able to deduct all expenses, including rent, payroll, interest, depreciation, and advertising, among many other fees on their Federal income tax returns.²¹³ This creates a tax rate often higher than an average company’s, and operating under the higher tax rate is unsustainable in the long term.²¹⁴ By removing cannabis from the CSA, businesses could write off expenses like other industries, thus leveling the playing field.²¹⁵

To accomplish the outlined perks of de-scheduling, newly introduced legislation aims to de-schedule marijuana. For example, the Cannabis Administration and Opportunity Act (“CAOA”)²¹⁶ and the Marijuana Opportunity Reinvestment and Expungement Act of 2021 (“MORE”)²¹⁷ propose to remove cannabis from the CSA.²¹⁷ Both bills stalled in 2022.²¹⁸ Given these bills’ stagnation, the SAFER Banking Act could benefit from incorporating provisions related to de-scheduling.²¹⁹ However, the fact that these bills both failed indicates

211. See Whitt Steineker & Slaters C. Veazey, *To Reschedule or To Deschedule: That Is the (Marijuana) Question*, BRADLEY (Sept. 20, 2023), <https://www.buddingtrendsblog.com/2023/09/to-reschedule-or-to-deschedule-that-is-the-marijuana-question/> [<https://perma.cc/D3R6-DQNK>] (discussing implications of descheduling marijuana for tax purposes).

212. I.R.C. § 280E.

213. See Steineker & Veazey, *supra* note 211 (“One of the most significant impediments to the growth of marijuana operators, and dispensaries in particular, is 26 U.S.C 280E.”).

214. See *id.* (describing the long-term impairments created by 280E on MRBs).

215. See *id.* (explaining that by removing the 280E burden, a massive hurdle will be removed).

216. Cannabis Administration and Opportunity Act, S. 4591, 118th Cong. (2022).

217. Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022).

218. See Luttrell, *supra* note 24 (explaining that the bills stalled); Govtrack, H.R. 3617 (117th): *Marijuana Opportunity Reinvestment and Expungement Act* (2022), <https://www.govtrack.us/congress/bills/117/hr3617> [<https://perma.cc/FT3C-U4CY>] (“This bill was introduced in a previous session of Congress and was passed by the House on April 1, 2022 but was never passed by the Senate.”).

219. See Steineker & Veazey, *supra* note 211 (explaining how descheduling would remove significant burdens for MRBs; since the SAFER Banking Act was designed to benefit MRBs, removing these burdens works towards the stated goals of the SAFER Banking Act).

that de-scheduling may not be a politically feasible stance.²²⁰ This is why, as the following recommendation suggests, it may be more politically feasible to focus on rescheduling rather than de-scheduling.²²¹

C. *If removing Cannabis from the CSA is not Practical, the SAFER Banking Act should attempt to either Reschedule Cannabis to Schedule III or include a Workaround for the 280E IRS Provision.*

On August 29, 2023, Rachel Levine, the Assistant Secretary for Health at the Department of Health and Human Services, wrote a letter to Anne Milgram, Head of the Drug Enforcement Administration, advising that cannabis should be rescheduled.²²² Levine's recommendation followed an executive order from President Joe Biden in October 2022 directing the heads of the Department of Justice and Department of Health and Human Services to review marijuana's classification under federal law.²²³ It appears likely that the DEA will adopt the recommendations.²²⁴ While rescheduling cannabis as a

220. See Cristina Marcos, *Just Three GOP Lawmakers Back Marijuana Legalization Vote; Two Dems Vote 'No,'* THE HILL (Apr. 1, 2022 2:26PM), <https://thehill.com/homenews/house/3256567-just-three-gop-lawmakers-back-marijuana-legalization-vote-two-dems-vote-no/> [<https://perma.cc/9SSN-E7PM>] (demonstrating the political challenges associated with legalization).

221. *Id.*

222. Letter from Rachel Levine, Assistant Sec'y for Health, to Anne Milgram, D.E.A. Admin. (Aug. 29, 2023), <https://www.hhs.gov/sites/default/files/signed-ash-to-dea-letter-marijuana.pdf> [<https://perma.cc/53AD-6K34>] (explaining why cannabis should be rescheduled); see Riley Griffin et al., *US Health Officials Urge Moving Pot to Lower-Risk Tier*, BLOOMBERG (Aug. 30, 2023); Erin McEvoy, *Content Remains Confidential in HHS Letter About Rescheduling*, CANNABIS SCI. TECH. <https://www.cannabissciencetech.com/view/content-remains-confidential-in-hhs-letter-about-rescheduling> [<https://perma.cc/WTX5-6S6F>] (explaining that the contents of the letter have been redacted, but explains what the contents were before they were redacted).

223. Proclamation No. 10467, 87 Fed. Reg. 61441 (Oct. 6, 2022); see Kyle Jaeger, *Top Federal Health Agency Releases Highly Redacted Marijuana Scheduling Recommendation Letter To DEA*, MARIJUANA MOMENT (Oct. 25, 2023), <https://www.marijuanamoment.net/top-federal-health-agency-releases-highly-redacted-marijuana-scheduling-recommendation-letter-to-dea/> [<https://perma.cc/25M9-VTX7>] (describing the implications of the letter).

224. See *DEA Likely to Reschedule Marijuana Based on Congressional Report*, MCGLINCHY (Sept. 18, 2023), <https://www.mcglinchey.com/insights/dea-likely-to-reschedule-marijuana-based-on-congressional-report/> [<https://perma.cc/XS4K-LGPH>] (“While cannabis insiders do not know for certain what the DEA will do or when it will do

Schedule III substance would not resolve all of the cannabis industry's legal issues, it would be a positive step.²²⁵

While rescheduling to Schedule III would resolve the 280E tax issue, it would still leave significant obstacles untouched.²²⁶ Since cannabis would remain classified as a controlled substance with a Schedule III designation, cannabis could be viewed more as a “medical product,” which could prevent it from being treated as a consumer good, “limiting its addressable market.”²²⁷ Rescheduling affects the classification of the cannabis plant itself, not the intended use.²²⁸ So, moving it to Schedule III would not legalize recreational use since cannabis would still be a controlled substance under the CSA.²²⁹ Also, medical use would not automatically become legal, and it's unclear how, whether, or when doctors would get federal approval to prescribe cannabis or cannabis-derived products.²³⁰

Furthermore, rescheduling would only partially reduce regulatory burdens.²³¹ Although Schedule III drugs typically don't face such measures, the DEA would have to impose regulations unique to cannabis, like quota limits and certain security rules to adhere to the Single Convention.²³² This would be similar to the conditions the DEA established for Marinol and related drugs.²³³

it, the Report is well-researched, and it does appear the DEA is on record stating that it will follow the FDA's recommendation.”).

225. *Bernstein says Reclassifying Cannabis as Schedule III not Preferred Outcome*, SEEKING ALPHA (Aug. 31, 2023), <https://seekingalpha.com/news/4008231-bernstein-says-reclassifying-cannabis-as-schedule-iii-not-preferred-outcome> [<https://perma.cc/7JYA-6YD2>] (explaining the positive that would come from rescheduling).

226. *Id.*

227. *Id.*

228. Eric P. Berlin & Joanne Caceres, *Rescheduling Misconceptions and Responses*, DENTONS (Sept. 18, 2023), <https://www.dentons.com/en/insights/alerts/2023/september/18/rescheduling-misconceptions-and-responses> [<https://perma.cc/D9W2-S7W9>].

229. *See id.* (“If the DEA does reschedule cannabis to schedule III, cannabis will remain a controlled substance and be subject to the CSA's requirements for registration with the [DEA], manufacture and distribution. The state law programs to regulate and tax cannabis would still exist outside of the federal system.”).

230. *Id.* (describing implications of it being Schedule I).

231. *Id.* (Implying that not all burdens would be alleviated).

232. G.A. Res. 7515, Single Convention on Narcotic Drugs (Mar. 30, 1961); *see Single Convention on Narcotic Drugs 1961*, UNITED NATIONS OFF. DRUGS & CRIME, <https://syntheticdrugs.unodc.org/syntheticdrugs/en/legal/system/1961.html>

[<https://perma.cc/22DY-NWUU>] (last visited Dec. 18, 2023) (“Substances controlled under the 1961 Convention are subject to control measures that include their limitation to medical and scientific purposes and regulate their licit production, manufacture, export, import, distribution, trade, use and possession.”); *see also* Lyle A. Hilton-Lee, *The Single*

While it is likely that rescheduling will occur, it is not inevitable.²³⁴ Furthermore, even if it is rescheduled, there is yet to be a known timetable.²³⁵ In the scenario in which cannabis is neither de-scheduled nor rescheduled, the SAFER Banking Act could include a provision declaring 280E inapplicable to MRBs despite marijuana's status as a Schedule I controlled substance.²³⁶ However, if this is not a politically practical solution, the SAFER Banking Act could alternatively provide tax credits or incentives to MRBs to offset the financial burden created by 280E. The SAFER Banking Act could model these incentives on those in the Craft Beverage Modernization and Tax Reform Act ("CBMA").²³⁷ These tax credits could be structured to encourage compliance with state regulations further or improve other outcomes.²³⁸

Convention on Narcotic Drugs, FINDLAW (OCT. 20, 2023), <https://www.findlaw.com/criminal/criminal-charges/the-single-convention-on-narcotic-drugs.html> [<https://perma.cc/YP86-LDFM>] (describing the impetus for the Single Convention and detailing what it requires).

233. See Berlin & Caceres, *supra* note 228 ("While schedule III drugs traditionally do not have such measures, to move cannabis to schedule III and comply with the requirements under the Single Convention, the DEA would have to add regulations specific to cannabis, including quota requirements and certain security regulations (consistent with what they did with Marinol and Epidiolex."); *Dronabinol Capsules*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/drugs/20218-dronabinol-capsules> [<https://perma.cc/D2A4-8YEX>] (Jan. 8, 2024) ("[Marinol] prevents and treats nausea and vomiting from chemotherapy. It is prescribed when other medications have not worked. It may also be used to treat loss of appetite and weight loss in patients with chronic conditions. It belongs to a group of medications called cannabinoids.").

234. See Berlin & Caceres, *supra* note 228 (explaining that it is likely that rescheduling occurs but not that it is imminent).

235. Paula Hess, *High Times, Low Times*, NAT'L ASS'N REALTORS (Dec. 27, 2022), <https://www.nar.realtor/commercial/create/high-times-low-times> [<https://perma.cc/4P95-3YQA>] ("A simple carve-out of 280E for legal operators would create profitability.").

236. See Berlin & Caceres, *supra* note 228 (explaining that if the negative tax implications of 280E are eliminated, the authors expect positive outcomes for MRBs; although the authors focus on eliminating 280E in the context of descheduling MRBs would likely positively benefit in a similar way if the negative 280E tax implications are instead eliminated through a provision of the SAFER Banking Act).

237. Craft Beverage Modernization Act, 87 Fed. Reg. 58032 (Sept. 23, 2022) (to be codified at 27 C.F.R. pt. P).

238. See *Understanding the Craft Beverage Modernization and Reform Act*, PARK ST. (Feb. 15, 2021), <https://www.parkstreet.com/understanding-the-craft-beverage-modernization-and-reform-act/> [<https://perma.cc/J2FS-EUZZ>] (detailing the specific Federal excise tax benefits available to "brewers, winemakers, distillers, and importers of beverage alcohol.").

The CBMA provides various tax credits and incentives for brewers, winemakers, distillers, and importers of alcoholic beverages.²³⁹ Specifically, the Act permanently sets the tax rate for distilled spirits at \$2.70 per proof gallon on the first 100,000 proof gallons produced or imported annually, and \$13.34 per proof gallon on the next 22,130,000 proof gallons.²⁴⁰

Given the high costs and regulatory burden of complying with alcohol regulations at the Federal and state levels, the CBMA was designed to offset costs and burdens for small businesses.²⁴¹ While the burden faced by MRBs is more substantial than that of alcohol-related companies, the notion of using tax breaks as a mechanism to relieve the financial obligation of a highly regulated industry is applicable.²⁴² The CBMA directly gives small, legal alcohol businesses significant tax reductions, credits, and deductions to lower the costs and burden of complying with alcohol regulations at Federal and state levels.²⁴³

First, the CBMA provides qualifying businesses with reduced Federal excise taxes, in which the companies receive significantly decreased national excise tax rates on a specified amount of the product produced yearly.²⁴⁴ The CBMA also allows qualified businesses to receive compliance bonds tax credits, in which they can claim a tax credit equal to the cost of obtaining a Federal compliance bond to adhere to all regulations, which, in turn, lowers the cost of compliance.²⁴⁵ Finally, to qualify for these CBMA credits, businesses must demonstrate compliance with state-specific laws regarding licensing, record keeping, and violation disclosures.²⁴⁶ Since tax breaks are generally considered relatively palatable by conservative members

239. *See* 27 CFR § 27.252 (describing eligibility for tax relief).

240. *Id.*; *Tax Reform — Craft Beverage Modernization Act (CBMA)*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (July 5, 2023), <https://www.ttb.gov/alcohol/craft-beverage-modernization-and-tax-reform-cbmtra> [<https://perma.cc/LAG3-J7LE>] (explaining in the FAQ section, the specific quantities eligible for tax relief).

241. PARK ST., *supra* note 238 (detailing rationale for the Act).

242. *See id.* (explaining the rationale for the CBMA to provide tax relief to alcohol-related businesses, who, like MRBs face hurdles created by the Federal government that most other industries do not face).

243. *Id.*

244. *Tax Reform — Craft Beverage Modernization Act (CBMA)*, U.S. DEP'T TREAS.: ALCOHOL & TOBACCO TAX & TRADE BUREAU (Sept. 30, 2021), <https://www.ttb.gov/alcohol/craft-beverage-modernization-and-tax-reform-cbmtra> [<https://perma.cc/9LSW-KQKQ>].

245. *Id.*

246. *Id.*

of Congress, some or all of the noted tax credits could be applied to MRBs in the SAFER Banking Act with bipartisan support, resulting in a mechanism that offsets costs associated with the burdensome 280E provision.²⁴⁷

If the SAFER Banking Act included tax breaks for banks that work with MRBs, it could lead to a similar, positive outcome achieved by the CBMA.²⁴⁸ Like alcohol-related businesses, MRBs have traditionally been overlooked by banking institutions.²⁴⁹

V. CONCLUSION

The rapid growth of the cannabis industry and its increasing legitimacy at the state level call for adequate access to banking services for MRBs.²⁵⁰ However, the current Federal prohibition on cannabis and the resulting legal ambiguity has severely impeded lawful businesses from accessing banking services on par with any other legal industry.²⁵¹

Despite efforts to increase financial transparency and public safety, the SAFER Banking Act, in its current form, needs to integrate state-compliant MRBs fully into the banking and monetary system.²⁵² With legal cannabis sales rapidly approaching \$50 billion annually, patchwork fixes will not remedy an industry of this size and economic importance.²⁵³

However, windows of opportunity emerge through political will and bipartisan collaboration. The deficiencies of the SAFER Banking Act can be fixed through targeted amendments that provide proper incentives, liability limitations, and regulatory clarity.

247. See Jeff Carlson, *House Republicans Introduce Broad Package of Tax Breaks*, THOMSON REUTERS (June 13, 2023), <https://tax.thomsonreuters.com/news/house-republicans-introduce-broad-package-of-tax-breaks/> [https://perma.cc/K4RY-Q4PR] (discussing conservative lawmakers' tendency to favor tax breaks as an option to promote economic development).

248. See Milligan, *supra* note 192 (explaining a desire to realize a regulatory landscape in which banks are incentivized to work with MRBs, which is what was accomplished through the CBMA, as it pertains to beer and wine businesses).

249. See TERPENES & TESTING MAG., *supra* note 44 (detailing the historical exclusion of MRBs from traditional banking services).

250. *Id.*

251. *Id.*

252. Schain, *supra* note 73.

253. Dorbian, *supra* note 7.

Public support for medical and recreational legalization continues to rise year-over-year, signaling that it is not a question of if but when cannabis achieves total Federal legality.²⁵⁴

As discussed, certain modifications would immediately strengthen the SAFER Banking Act's ability to achieve its objectives. Increased access to financial services will propel the cannabis industry towards stability, safety, and parity with other lawful enterprises. Equal banking access for MRBs is a rational and necessary policy shift. This evidence-based reform proposed will ensure that MRBs can finally operate on a level playing field.

NOAH D. LIPSHIE*

254. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use*, PEW RSCH. CTR. (Nov. 22, 2022), <https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/> [https://perma.cc/YVB6-U7QA].

* I extend my heartfelt thanks to my editors, Sunny Khan Frothingham and Lauren Pless, for their invaluable assistance in transforming my concept for this Note into reality. My profound appreciation goes to Professor Broome for providing insightful feedback and valuable suggestions that were instrumental in refining my Note. I am deeply grateful to all the staff members who meticulously edited my Note, ensuring its excellence—your efforts are sincerely appreciated. A special acknowledgment to my incredible family for their relentless support since the beginning of my law school journey. I would also like to tip my hat to Joshua Almond, for steering the ship with both skill and a dash of flair.