

# THE NATIONAL LAW REVIEW

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## Financial Services and the Marijuana Industry: the U.S. House Mulls Regulatory Reform for Financial Institutions and Cannabis-Related Businesses

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Federal legislators continue to struggle over the growing disconnect between increasing State legalization of the cannabis industry, and the continued illegality of cannabis under federal law. This struggle represents an increasingly pressing question for financial institutions, given the burgeoning market involving cannabis-related products – including third parties who provide services and equipment to growers and distributors – and its need for safe, traditional banking services. The latest chapter in this struggle was a hearing, entitled “Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses,” held by the House Financial Services Committee’s Subcommittee on Consumer Protection and Financial Institutions on February 13. The recorded webcast is available [here](#).

We previously have [blogged](#) about the unsteady regulatory ground on which financial institutions have been operating with regard to cannabis-related businesses, an industry legalized in many states but still in violation of federal drug laws and thus exposing its financial service providers to potential Bank Secrecy Act (“BSA”) violations and federal money laundering charges. The terrain grew only more perilous at the beginning of 2018 with then-Attorney General Sessions’ decision to [rescind](#) the Cole Memo and with it the prior limited assurance that the DOJ would not make prosecution of persons working in or with state-licensed cannabis businesses a DOJ priority.

The 2018 midterm elections, however, changed the landscape yet again. This post will discuss last week’s hearing and the growing opportunities and stubborn obstacles which it highlighted.

### ***Progress Towards Safe and Reliable Banking of the Cannabis Industry?***

Signals that the issue of banking the marijuana industry would be revisited in 2019 already were apparent last fall. Rep Maxine Waters (D – CA), the new chair of the House Financial Services Committee, stated shortly after the 2018 midterm elections that “[it’s inevitable we are going to have to talk about](#)” the issue of banking the marijuana industry. In the run-up to the election, Rep. Earl Blumenauer (D – OR), in an October [memo](#) to Democratic party leaders anticipating a party takeover of the House of Representatives, laid out a comprehensive step-by-step approach to implementing federal legalization of marijuana. Blumenauer recommended that such an approach start with subcommittee hearings on marijuana policy issues, including a “hearing on barriers to the safe access of banking services and capital as well as unnecessary and unwise barriers to banking services for state legal marijuana businesses” in the first quarter of 2019, culminating with votes on portions of cannabis reform bills later in the spring. That hearing occurred last week.

As a focal point of discussion for the subcommittee hearing, Rep. Ed Perlmutter (D – CO) provided a “[discussion draft](#)” of his “Secure and Fair Enforcement Banking Act of 2019” (SAFE Banking Act). While generally equivalent to the bill he introduced in [2017](#), this new draft of the SAFE Banking Act includes two sections that have been added in an apparent effort to compensate for the DOJ’s rescission of its previous Cole Memo guidance.

The first addition, “Sec. 3: Treatment of Proceeds Under Federal Law,” specifically addresses the federal criminal money laundering statutes, 18 U.S.C. §§ 1956 and 1957 (while also applying to “all other provisions of Federal

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law”) and states that “the proceeds from a transaction conducted by a cannabis-related legitimate business shall not be considered as proceeds from an unlawful activity solely because the transaction was conducted by a cannabis-related legitimate business.” The second addition, “Sec. 7: Guidance and Examination Procedures,” directs the Federal Financial Institutions Examination Council (“FFIEC”) to “develop uniform guidance and examination procedures for depository institutions that provide financial services to cannabis-related legitimate businesses,” and requires federal banking regulators to issue guidance and examination procedures subsequent to and consistent with the FFIEC-developed uniform guidance.

Additionally, the Democratic staffers of the House Financial Services Committee published a [memorandum](#) recapping the recent history of federal guidance on banking of cannabis-related businesses. The hearing itself featured testimony from, among others, representatives of the Credit Union National Association ([CUNA](#)) and the Independent Community Bankers of America ([ICBA](#)), who testified regarding the challenges and pressures that the current clash between federal and state regulatory regimes has imposed on their industries, as well as the ways in which their member institutions are currently endeavoring to comply with the still-extant 2014 [FinCEN guidance](#) on “BSA Expectations Regarding Marijuana-Related Businesses.” This testimony emphasized, among other issues, the uncertainty regarding how far down the stream of commerce from actual distribution of marijuana an entity can be and still be considered a “cannabis-related business.” ICBA representative and bank president Gregory Deckard [opined](#) that his bank could not bank an energy provider whose customers included cannabis-related businesses “without assuming legal risk and additional compliance burdens.”

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Although not focused on in news coverage, the hearing also featured a striking comment from the senior Republican member of the subcommittee. Ranking member Rep. Blaine Luetkemeyer (R – MO), in voicing his opposition to Perlmutter’s proposed legislation in his initial remarks, expressed a general lack of confidence in the current federal AML regime, and intimated that achieving bipartisan consensus in Congress on the issue of banking the marijuana industry may require a more fundamental restructuring of the American banking regulatory system, [saying](#) that “our current anti-money laundering regime is already woefully inadequate, and until we modernize the Bank Secrecy Act and anti-money laundering regulations, it would be irresponsible to open up our financial institutions to another major challenge.”

## **An Uncertain Future**

The path forward for this issue generally, and Perlmutter’s SAFE Banking Act specifically, remains unclear. If the Democratic leadership continues along the path recommended in the Blumenauer memo, we should expect to see additional committee hearings on marijuana issues scheduled, not only in the Financial Services Committee but in others, such as Education and Labor (re: access to student loans for individuals convicted of marijuana possession), Judiciary (re: descheduling of marijuana), and Ways and Means (re: taxation of the marijuana industry). We also may see a companion SAFE Banking bill in the Senate, as there was in 2017. At that time, Sen. Jeff Merkley (D – OR) was the sponsor, and he managed to recruit several Republican co-sponsors still in the Senate – Rand Paul (KY), Cory Gardner (CO), Lisa Murkowski and Dan Sullivan (both AK). However, that bill also gained the co-sponsorship of several current or anticipated Democratic presidential candidates – Elizabeth Warren (MA), Bernie Sanders (VT), Kamala Harris (CA), and Cory Booker (NJ). Although they may view this issue as a good way to reinforce their progressive *bona fides* with the Democratic base, the Republican Senate majority may be less inclined to give anything that could be construed as a “win” to these individuals.

Should a bill manage to pass the Senate, it is anyone’s guess what the ultimate result would be. President Trump, as recently as last year, [voiced his support](#) for legislation on this issue and may be inclined to sign off in the absence of Attorney General Sessions’ influence and in light of the positive reaction he received to signing the First Step Act. Moreover, Congress just passed – and the President signed – the 2018 Farm Bill, which created a framework for the [legalization of growing and distributing hemp](#) (defined as product not including over .3 percent of THC, the chemical producing the “high” associated with marijuana consumption), under a combined state and federal licensing system to be created by the Department of Agriculture.

Likewise, Secretary of the Treasury Steven Mnuchin [suggested publically](#) last year that he supports the ability of the marijuana industry to have access to the traditional financial sector, stating that “I assure you that we don’t want bags of cash . . . We want to make sure that we can collect our necessary taxes and other things.” Further, the Department of the Treasury [has stated](#) that it is “consulting with law enforcement” about whether to maintain the 2014 guidance from FinCEN, and that the guidance [remains in effect](#) while the administration

weighs whether to revoke it.

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