DOJ Technical Assistance on H.R. 1996
The Secure and Fair Enforcement Banking Act of 2021

I. GENERAL COMMENTS

The SAFE Banking Act would extend banking services to state-legal marijuana businesses. The Act does not seek to legalize marijuana under federal law or remove it from schedule I of the Controlled Substances Act. *See* 21 U.S.C. § 812. Because marijuana would remain illegal under federal law, Congress should ensure efforts to provide access to financial services for state-legal businesses does not unintentionally erect obstacles to prosecution of other illicit activity or activities involving money laundering of proceeds of other illegal drugs or sales of marijuana that do not comply with state requirements.

For example, the SAFE Banking Act immunizes from federal prosecution certain businesses based on their classification as a "cannabis-related legitimate business" or marijuana-related "service provider" rather than based on the type of business model. That is, a a "cannabis-related legitimate business" or a cannabis-related "service provider" is immunized based on that classification rather than based on the *activities* in which the entity engages. Thus, businesses that engage in both state-legal marijuana business activities and other activities or operations, whether legal or illegal, could potentially be immune from prosecution under the Act based solely on its classification as a legitimate business. The bill could therefore be read to immunize a state-legal marijuana business that is also engaged in fraud, for example, or one whose marijuana business includes both state-legal and state-prohibited conduct. This does not appear to be the intent of the bill; one way the drafters could resolve this is by limiting immunity to the state-legal *activities* in which entities engage (again, ensuring those activities are in conformity with state law), rather than basing it on their classification as a particular business type, *i.e.*, a "cannabis-related legitimate business" or a marijuana-related "service provider."

The SAFE Banking Act also purports to exempt the proceeds of "cannabis-related legitimate businesses" from certain money laundering statutes. *See* Sec. 3. This exemption is drafted broadly and could create an immunity shield around activities of cannabis businesses that involve other illicit drugs or activities. The exemption should be limited to the proceeds of "cannabis-related legitimate businesses" *derived from* marijuana-related activities in compliance with state law. In addition, the proposed exemption could prove challenging for prosecutors to apply in practice. The bill would essentially create a possible defense to a money laundering charge—and an extra burden of proof for investigators and prosecutors, who would have to show that a targeted marijuana-related business or the activity from which the proceeds derived had not operated in accordance with applicable state laws. This could significantly complicate law enforcement investigations and prosecutions. For example, a marijuana-related business could be laundering proceeds from fentanyl sales on the side, or from marijuana sales conducted outside of the state regulatory framework. While the SAFE Banking Act does not appear intended to shield this activity, it would complicate these cash seizures cases, and marijuana cases generally, because it would impose upon the government the burden of demonstrating that the relevant marijuana activity falls outside the protections of the state regulatory framework. This would particularly complicate enforcement efforts targeting marijuana-adjacent service providers, which would include a wide swath of economic activity. We would be happy to work

with Congress on ways to ensure this exemption applies only to state-legal marijuana business and activities.

Additionally, while the bill purports to permit financial institutions to service state-legal marijuana businesses and service providers, as defined in the SAFE Banking Act, it does not address financial institutions' obligations, if any, under the Bank Secrecy Act (BSA) and existing anti-money-laundering (AML) and countering-the-financing (CFT) regulations to collect—or verify—information demonstrating that a particular business is operating in accordance with applicable state law. And although the bill addresses financial institutions' suspicious activity reporting obligations under the BSA for state-legal marijuana businesses, it does not address other financial institution BSA requirements related to these businesses, such as customer due diligence and other reporting and recordkeeping obligations. Any updates to FinCEN's 2014 guidance (required by section 6) would not have the same force of existing statutes and regulations.

Finally, the SAFE Banking Act would create forfeiture-related exemptions for depositary institutions with legal interests in loan collateral or other financial service related to state-legal marijuana businesses. *See* Sec. 4(d). It is not clear, however, how these exemptions would work in practice, because the bill does not amend the existing forfeiture laws themselves. Additionally, under existing laws, federal prosecutors could still pursue forfeiture of the proceeds of state-legal cannabis-related activities from those carrying out those activities, but depositary institutions' legal interests in these same activities would be shielded, which could raise questions of fairness given both groups' involvement in the same underlying activity. (The bill has similar provisions for Federal Reserve banks and federal home loan banks.)

II. TECHNICAL COMMENTS

Overarching Concerns

- We have concerns with using the term "legitimate" when describing the cannabis-related businesses that are the subject of the bill. Using the word "legitimate" does not take account of the fact that the bill does not legalize marijuana under federal law. As a result, we recommend striking "legitimate" from the bill's text. If a replacement adjective is needed, "state-sanctioned" or "locally sanctioned" is preferable to "legitimate."

- The use of the term "cannabis" throughout the bill could present enforcement and interpretation issues, particularly following the enactment of the Agricultural Improvement Act (AIA) in late 2018 whereby Congress excluded *cannabis Sativa L* with less than 0.3 percent TCH from the definition of "marijuana" under the Controlled Substances Act. Both "marijuana" and "hemp" as defined by the AIA remain derivatives of the same plant. Recommend not using the term, "cannabis" in this bill.

- We are concerned with the definition of "cannabis-related legitimate businesses" in section 14(4) of the bill. As written, the section appears to provide protections for

cannabis businesses that are sanctioned at the county or municipal level, but not by the state.

- In addition, under section 14(4), the bill appears to confer legitimacy over a cannabis business's entire activities if any one of its activities is licensed. For example, if a cannabis business receives a state license to cultivate marijuana but not distribute it, the bill appears to provide banking protection for revenue derived from distribution as well as cultivation, even though the business is not authorized to distribute.

Section 3, Protections for Ancillary Businesses

As drafted, section 3 appears to confuse "unlawful activity"— the *scienter* requirement under 18 U.S.C. § 1956—with "specified unlawful activity"— the nature of the actual funds involved in the transaction. The drafters could insert "specified" before the phrase "unlawful activity" to address this.

Section 3 specifically references 18 U.S.C. §§ 1956 and 1957 but then goes on to include "and all other provisions of Federal law," making its application overly broad and rendering redundant the reference to the money laundering statutes that precedes it. Moreover, it would appear to create tension between Sections 3 and 4 of the bill. For example, 18 U.S.C. § 1960(b)(1)(C), the portion of the money transmitting statute that applies where the business activity "otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity," would be one "other" provision of law swept into the ambit of Section 3 via this phrase. Thus, under the SAFE Banking Act, a money transmitting business would not violate section § 1960(b)(1)(C) for handling funds from qualifying state-legal marijuana businesses and service providers. However, that same money transmitting business is presumably not a "depository institution," and therefore would not be entitled to the exemption from liability under "any Federal law or regulation" simply for providing its services to a marijuana-related business, as contemplated by Section 4. Thus, money transmitting businesses could still be liable for the federal narcotics charges described above, even if exempted from money laundering liability under Section 3.

<u>Impact on Enforcing Anti-Money Laundering Provisions of 18 U.S.C. §§ 1956 and 1957; Sections 3 and 14 of the SAFE Banking Act</u>

Section 3 and 14 ("Definitions") read together result in interpretive uncertainties. The definition of "cannabis-related legitimate business" is ambiguous. For example, this Section says nothing about how states will determine compliance with state law or what happens when state laws conflict – e.g., some states have different restrictions on movement of marijuana within or out of the state, or different registration and compliance regimes. Nor does it explain how to deal with fraudulent declarations of alleged compliance with state laws (many states do not have the bureaucratic capability to ensure full compliance yet, and DEA has law enforcement intelligence demonstrating that criminal organizations are exploiting the marijuana industry in states where the industry is legalized).

The Department requests additional clarification regarding what is meant by, "cannabis-related legitimate businesses." (For example, do these business have to certify compliance with state law, or the laws in states where they are operating?) The Department also recommends explicit language indicating that nothing in this legislation will affect the ability of federal law enforcement agencies to investigate money laundering crimes involving proceeds of illegal activity other than marijuana sales in conformity with state law, nor will it affect the ability of agencies (like FinCEN and the IRS) to engage in regulatory enforcement through their reporting requirement regimes.

Section 4, Protections Under Federal Law

Subsection 4(d) uses broad language to prevent the forfeiture of interests in assets (collateral) held by certain financial institutions that would otherwise be subject to forfeiture under federal law. This Subsection does not prevent the seizure and forfeiture of the "cannabis-related legitimate business's" interest, only the bank's interest in that same property. This is an untenable position under forfeiture law, making the financial institution an innocent owner for related activity that is still criminal under federal law for the "cannabis-related legitimate business." The result is that "cannabis-related legitimate businesses" could raise due process or equal protection claims resulting from this disparate treatment under the law.

Section 4 also does not address liquidation scenarios should the loan default and the financial institution chooses to transport marijuana (as the collateral to be liquidated and sold) across state lines, which remains in contravention of federal (and state) laws.

Section 6, Requirements for Filing Suspicious Activity Reports

Section 6 would amend 31 U.S.C. § 5318(g) to include requirements for filing suspicious activity reports (SARs) for cannabis-related legitimate businesses. The National Defense Authorization Act for FY 2021 (NDAA) recently amended this statute; therefore, current section 5318(g) contains subparts (1) through (11). This proposal should therefore seek to insert "at the end" a new subsection (12), rather than (5).

Section 10, GAO Study on Effectiveness of Certain Reports on Finding Certain Persons

Section 10 would require a Government Accountability Office (GAO) study "on the effectiveness" of certain SARs filed pursuant to proposed new section 5318(g), set forth in Section 6. The GAO is not in the best position to determine the "effectiveness" of SARs on law enforcement efforts to identify criminal activity. Additionally, existing statutory risk assessment and illicit finance strategy requirements already address certain elements of this reporting requirement. For example, Section 6201 of the NDAA requires the Attorney General to submit to the Secretary of the Treasury an annual report that contains statistics, metrics, and other information on the use of data derived from financial institution reporting under the BSA; Section 6203 requires FinCEN to periodically disclose to financial institutions information on SARs that proved useful to law enforcement agencies; and Section 6215 requires the Comptroller General to conduct an analysis and submit to Congress a report on financial services de-risking.

Section 13, Requirements for Deposit Account Termination Requests and Orders

Section 13(a)(1) would prohibit federal banking agencies from formally or informally requesting or ordering a depositary institution to terminate customer accounts, or from restricting or discouraging these institutions from banking relationships with customers, unless the agency has a "valid reason" and this reason is not based only on "reputation risk." It is not clear from the bill what would constitute a "valid reason," beyond the national security criteria in section 13(a)(2). The drafters could provide greater definition of these terms.

Section 13(c)(2)(B) would prohibit a financial institution from providing notice to a customer of the institution's justification for ordering the closure of a customer account if the notice may interfere with "an authorized criminal investigation." The meaning of "authorized" is unclear and could be unnecessarily restrictive; it could be stricken. Moreover, this provision would permit a federal banking agency to determine whether the notice of account closure contemplated by this provision would jeopardize a criminal investigation. *See* § 13(c)(2)(B) ("If an appropriate Federal banking agency determines that the notice required under paragraph (1) may interfere with an authorized criminal investigation . . . ."). Federal banking agencies are not best situated to determine the effect on a criminal investigation, if any, of notice to a customer. The drafters could rephrase this provision to permit law enforcement to make this determination, to: "If an appropriate federal law enforcement agency informs the appropriate federal banking agency that the notice required under paragraph (1) . . . ."

Finally, the reporting requirement in Section 13(d) may call for law-enforcement-sensitive information, or information that implicates national security concerns. The drafters could include in this subsection a provision exempting from the reporting requirement law-enforcement- or national-security-sensitive information.

Section 14, Definitions

Proposed definition (6), "federal banking regulator," should be amended to reflect that certain of the named entities are components or bureaus of the Department of the Treasury (Treasury). Specifically, FinCEN and the Office of the Comptroller of the Currency are bureaus within Treasury, and the Office of Foreign Assets Control is a component of Treasury's Office of Terrorism and Financial Intelligence. *See* https://home.treasury.gov/about/general-information/organizational-chart, https://home.treasury.gov/about/bureaus.