

Necessary Oxygen: Banking, Payment Systems, and the Legalized Cannabis Industry

Without access to the financial system, particularly bank accounts, financing, and the payment system, few businesses can survive. Those that do are likely to be cash-based, and operate in “grey markets” light on regulation and taxation, but often heavy on crime.¹ Thus far, this has largely been the fate of cannabis-related businesses, even in states in which marijuana usage is legal.² For example, the Colorado state-chartered Fourth Corner Credit Union (FCCU), set up to “service the unique financial needs of the cannabis and hemp industries and their supporters”³ in 2014, only received conditional approval for a “master account” – the absence of which would be a “death sentence” for the institution – at the Federal Reserve in 2018. However, at the end of that year, FCCU was purportedly still “no closer to opening date.”⁴

FCCU’s challenges in accessing the banking system are not unique. Although a majority of states have now legalized at least some uses of marijuana, it remains illegal under federal law. Consequently, both state and national banks, in addition to credit unions, have thus far largely refused to service this industry because of the extreme regulatory uncertainty and risk. However, the tide seems to be changing, at least in Congress. The U.S. House of Representatives passed the SAFE Banking Act (SAFE), aiming to provide access to the banking system for “marijuana-related businesses in states with some form of legalized marijuana and strict regulatory structures.”⁵ It seems likely that the U.S. Senate will soon follow suit. Proponents of SAFE stated that “No federal regulator should block Americans’ lawful access to the financial system. This principle holds true, whether you are talking about firearms or cannabis.”⁶

This article argues that while the SAFE Banking Act (or similar legislation) is a start, it might ultimately prove insufficient to provide sufficient regulatory certainty and reduced risk to banks in dealing with the cannabis industry ecosystem. This is because, as a practical matter, banking regulation and supervision can hinder the growth of lawful businesses. Commentators note that “the Federal Reserve’s control over access to its payment systems gives it significant regulatory and supervisory control to which courts will defer.” Indeed, the Federal Reserve’s footprint in the payments system is set to increase as its recently announced plans to develop FedNow, “a new round-the-clock real-time payment and settlement service, called the FedNowSM Service, to support faster payments in the United States,”⁷ attest. Banks’ regulatory relationships also include additional financial regulators such as the FDIC and the OCC.

The banking industry and banking regulators’ ability to cripple a legal industry is not unique to the marijuana context. However, this article uses the experience of the legalized marijuana industry as a case study to explore the potential for regulatory risk and uncertainty in the banking system to stymie lawful businesses. It argues that banking institutions and their regulators must exercise ethical restraint and ensure fair access to the banking system even for unpopular, but lawful businesses. To this end, it proposes legal and ethical principles for banks and their regulators designed to support this objective whether in the legalized marijuana industry and elsewhere.

¹ See Peter Conti-Brown, The Policy Barriers to Marijuana Banking, <https://publicpolicy.wharton.upenn.edu/issue-brief/v6n2.php>.

² Id.

³ Id. (quoting Chris Morran, “Pot-Centric Colorado Credit Union Sues Federal Reserve Bank for Denying Account”).

⁴ <https://www.cutimes.com/2018/10/05/pot-credit-union-no-closer-to-opening-date/>.

⁵ <https://dennyheck.house.gov/media-center/press-releases/joint-release-safe-banking-act-passes-us-house-of-representatives-with>.

⁶ <https://dennyheck.house.gov/media-center/press-releases/joint-release-safe-banking-act-passes-us-house-of-representatives-with>.

⁷ <https://www.federalreserve.gov/newsevents/pressreleases/other20190805a.htm>.