

## Taking it to the Bank: The Need for a Federal Legislative Safe Harbor for Financial Institutions Offering Services to State-Legal Marijuana-Related Businesses

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# **TAKING IT TO THE BANK: THE NEED FOR A FEDERAL LEGISLATIVE SAFE HARBOR FOR FINANCIAL INSTITUTIONS OFFERING SERVICES TO STATE-LEGAL MARIJUANA- RELATED BUSINESSES**

ANDREW BLOOMFIELD

## INTRODUCTION

Imagine that you are a small business owner. Rather than opening a new coffee shop, craft brewery, or chic clothing store, you decide to enter one of the fastest-growing industries in the country: marijuana (also referred to herein as “cannabis”). Your state, Washington, has recently legalized recreational use of marijuana, and your new marijuana-related business (MRB), Plantworks, has joined thousands of other licensed producers to supply the new growing market.

You and your business partner lease 2,500 square feet of industrial workspace in Seattle’s North End and produce several pounds of high-quality “craft” cannabis for distribution to local dispensaries. Of course, you have taken precautions to protect your new MRB, installing security cameras, alarms, and razor wire on top of the chain-link fence around your building. However, those precautions prove to be toothless as burglars smash through the front door and steal approximately \$52,000 worth of your product. The result is devastating for your business.

This was Regina Lisanckie’s experience in January 2018.<sup>1</sup> Unfortunately, Regina discovered she was not alone, as numerous other MRBs in and around the Seattle area all suffered similar

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<sup>1</sup> See Eric Scigliano, *The Great Seattle Pot Heist*, ROLLING STONE (Aug. 23, 2019), <https://www.politico.com/magazine/story/2019/08/23/marijuana-legal-seattle-robberies-heist-227628>.

burglaries.<sup>2</sup> A pattern emerged. Each of the MRBs was a smaller operation with less secure facilities, located in remote and inconspicuous industrial strips.<sup>3</sup> The burglars came in the early morning hours, and either cut electricity to the cameras and alarms or smashed through walls to avoid them.<sup>4</sup>

The experiences of these MRBs in Washington were not new or unique. Since 2010, MRBs in Colorado have been installing alarms and surveillance systems, and securing cash in floor-bolted safes, in an effort to limit losses from burglaries and robberies.<sup>5</sup> In a six-month stretch from late 2013 to 2014, Colorado MRBs experienced numerous robberies that varied in method, ranging from threatening employees with bear mace, to breaking down walls with an ax and taking a saw to the store's safe, to an old-fashioned stick-up at gunpoint.<sup>6</sup> Some criminals have resorted to significantly more violent means of robbing MRB owners.<sup>7</sup> And the risks have not abated. In September 2019, the Denver Police Department announced that it detected an increase in burglaries at MRBs and recommended a bevy of proactive security measures.<sup>8</sup> These thefts

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<sup>2</sup> See *id.*

<sup>3</sup> See *id.* For comparison, a Canadian medical marijuana producer, Tilray, one of the world's largest legal marijuana growers, uses a 70,000 square foot facility surrounded by barbed-wire fences and guarded by a professional security team of former Mounties, along with seventy high-resolution cameras and a vault sophisticated enough to be used in a bank. See Anna King, *Safety First: Are Security Requirements For Legal Pot Grows Enough?*, NW NEWS NETWORK (Aug. 6, 2014), <https://www.nwnewsnetwork.org/post/safety-first-are-security-requirements-legal-pot-grows-enough>.

<sup>4</sup> See Scigliano, *supra* note 1.

<sup>5</sup> See *High Crimes: Robber Gangs Terrorize Colorado Pot Shops*, NBC NEWS (Feb. 5, 2014), <https://www.nbcnews.com/storyline/legal-pot/high-crimes-robber-gangs-terrorize-colorado-pot-shops-n20111>.

<sup>6</sup> See *id.*

<sup>7</sup> See James Koren, *Why Some Pot Businesses Hide Their Cash – and Others Truck it Straight to a Federal Vault*, LA TIMES (July 7, 2017), <https://www.latimes.com/business/la-fi-cannabis-banking-20170707-story.html> (“In one infamous case from 2012, an Orange County dispensary owner was kidnapped, tortured and had his penis cut off by assailants who thought that the businessman was burying cash in the desert outside Palm Springs.”).

<sup>8</sup> See *Denver Marijuana Informational Bulletin Notice from the Denver Police Department*, DENVER POLICE DEPARTMENT (Sept. 12, 2019), <https://mailchi.mp/denvergov/dpdnoticesept2019>. The measures recommended include, but are not limited to, installing motion sensors, leaving lights on after hours, locking up cannabis products in a safe, and requiring employees to maintain confidentiality regarding information like camera locations and harvest dates for the cannabis crop. See *id.*

can result in massive financial loss to MRBs,<sup>9</sup> which are often uninsured and thus must pay for their losses out-of-pocket.<sup>10</sup>

As former Denver District Attorney Mitch Morrissey noted, “[y]ou hit a 7-Eleven, you’ll get [twenty] bucks. You hit a dispensary, you’ll get \$300,000 on a good day.”<sup>11</sup>

The reason that MRBs have been, and remain, such a tempting target for criminals is that they are largely unable to use banking services due to federal anti-money laundering laws.<sup>12</sup> These laws apply to these businesses because marijuana is a controlled substance under federal law.<sup>13</sup> As a result, because many MRBs cannot open bank accounts, they are forced to operate as cash-only businesses and hold large amounts of currency on their premises, creating tempting targets for criminals looking for big scores. This state of affairs raises concerns about public safety and financial transparency in MRB operations.<sup>14</sup> Since there is no paper-trail created by banking records, there is greater potential for MRBs to improperly report their proceeds.<sup>15</sup>

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<sup>9</sup> See e.g., Deedee Sun, *After a String of Robberies, Pot Shops Call for State’s Help*, KIRO 7 NEWS (Apr. 5, 2018), <https://www.kiro7.com/news/local/after-a-string-of-robberies-pot-shops-call-for-states-help/727885863/> (A Washington MRB, Have a Heart, after having three of its locations robbed more than ten times, suffered losses of \$250,000.).

<sup>10</sup> See Cannabis Insurance Working Group, *Regulatory Guide Understanding the Market for Cannabis Insurance*, NAIC (May 24, 2019), [https://naic-cms.org/sites/default/files/inline-files/cmte\\_c\\_cannabis\\_wg\\_exposure\\_understanding\\_cannabis\\_market\\_place\\_0.pdf](https://naic-cms.org/sites/default/files/inline-files/cmte_c_cannabis_wg_exposure_understanding_cannabis_market_place_0.pdf) (“However, even with the increased market activity, many insurers are not willing to write cannabis insurance products due to the cannabis industry’s inability to bank, the federal illegality, and the unknown risks associated with insuring cannabis businesses.”).

<sup>11</sup> NBC NEWS, *supra* note 5.

<sup>12</sup> See generally 18 U.S.C. §§ 1956-57 (2012). The Money Laundering Control Act forbids financial institutions from engaging in financial transactions involving proceeds from “specified unlawful activities,” which includes proceeds derived from the manufacturing, distribution, or dispensing of marijuana. *Id.* Therefore, financial institutions providing their services to MRBs would be liable for illegal money laundering under the Act.

<sup>13</sup> See generally 21 U.S.C. §§ 802, 812, 841 (2012) (The Controlled Substances Act forbids the manufacturing, distribution, or dispensing of marijuana).

<sup>14</sup> See Tom Angell, *Senators Vote to Block Marijuana Banking Amendment*, FORBES (June 21, 2018), <https://www.forbes.com/sites/tomangell/2018/06/21/senators-vote-to-block-marijuana-banking-amendment/#6b552593ff3e> (containing quotes from Senators, Treasury Secretary Mnuchin, and marijuana lobbyist groups addressing their concerns that the lack of transparency in MRB operations due to lack of banking options could allow bad actors to divert MRB proceeds to organized crime, or allow MRB owners to evade taxes).

<sup>15</sup> See Robert Rowe, *Compliance and the Cannabis Conundrum*, ABA BANKING JOURNAL (Sept. 11, 2018), <https://bankingjournal.aba.com/2018/09/compliance-and-the-cannabis-conundrum/>; see also Scigliano, *supra* note 1 (Washington, which allows its local banks to service legal MRBs, mandates that its banks require sales data from its cannabis clients, in order to ensure that “deposits match reported sales and receipts from illicit sales don’t get laundered.”).

Currently, those banks that do work with state-legal MRBs operate according to guidelines issued in February 2014 by the Financial Crimes Enforcement Network (“FinCEN”).<sup>16</sup> Under these guidelines, financial institutions that do business with MRBs are required to file suspicious activity reports (SARs)<sup>17</sup> with FinCEN for each MRB they work with.<sup>18</sup> However, those guidelines do not curtail the ability or discretion of federal prosecutors or financial regulators to go after financial institutions that do business with MRBs.<sup>19</sup> This creates an uncertain environment for financial institutions and the marijuana industry as a whole, as “on the one hand, you have a financial regulator allowing the banking of an MRB, but on the other hand you could face federal prosecution by the DOJ.”<sup>20</sup> Due to federal law enforcement’s continued unfettered discretion, there has been general reluctance on the part of financial institutions to work with MRBs in light of the ongoing federal prohibition of marijuana.<sup>21</sup>

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<sup>16</sup> See generally *BSA Expectations Regarding Marijuana-Related Businesses*, FINCEN (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>. FinCEN is a bureau of the Department of the Treasury responsible for preventing “illicit use” of the financial system and “combat[ing]” money laundering under the legislative framework known as the Bank Secrecy Act (BSA). *What We Do*, FINCEN, <https://www.fincen.gov/what-we-do> (last visited Oct. 26, 2019).

<sup>17</sup> SARs are documents that financial institutions file with FinCEN whenever they suspect that clients or employees are engaging in money laundering or fraud. Filing a SAR is required when such activity is confirmed. The BSA initially established SARs as a tool for financial institutions in 1970, becoming standard in 1996. See *What is a Suspicious Activity Report?*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report> (last visited Jan. 7, 2020).

<sup>18</sup> See FINCEN, *supra* note 16.

<sup>19</sup> The 2014 guidance issued by FinCEN makes no mention of affecting prosecutorial discretion, but the Department of Justice issued concurrent guidance, referencing the 2014 FinCEN guidelines, which stated that the memoranda being issued on the subject of marijuana-related financial crimes “does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law.” James Cole, *Memorandum for All United States Attorneys – Guidance Regarding Marijuana Related Financial Crimes*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE DEPUTY ATTORNEY GENERAL (February 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20%282%29.pdf>.

<sup>20</sup> *Marijuana Banking Issue Brief*, NAFCU 1, 9, <https://www.nafcu.org/system/files/files/NAFCU-Marijuana-Banking-Issue-Brief-Aug19.pdf>.

<sup>21</sup> See generally Tom Angell, *More Banks Working With Marijuana Businesses, Despite Federal Moves*, FORBES (June 14, 2018), <https://www.forbes.com/sites/toman-gell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#4c7df3bb1b1b> (discussing that because of the ongoing federal prohibition of

This Note advocates that the United States Congress reconsider and pass the Secure And Fair Enforcement Banking Act (“SAFE Act” or “Act”), which was previously approved by the House of Representatives in September 2019.<sup>22</sup> Due to the unmitigated risk of prosecution that financial institutions currently face as a result of conflicting state and federal laws regarding marijuana, and the resulting need for MRBs to riskily operate on an all-cash basis, Congress must pass legislation offering banks safe harbor from prosecution. Under the SAFE Act, financial institutions doing business with state-legal MRBs, or related ancillary businesses, would be shielded from adverse legal action by federal financial regulators and prosecutors solely for doing business with MRBs.<sup>23</sup>

Part I of this Note discusses the growth of the cannabis industry in the United States generally, the framework of federal financial regulations under the Bank Secrecy Act that discourage financial institutions from offering their banking services to state-legal MRBs, and the public safety and transparency concerns for MRBs that have occurred as a result of the conflict between state and federal marijuana laws. Part II of this Note discusses the series of Department of Justice memoranda, running from the Obama to the Trump administrations, which established the current SAR reporting regime, and how this regime has been insufficient to incentivize financial institutions to do business with state-legal MRBs. Finally, Part III of this Note describes the provisions of the SAFE Act and explains why it is the best solution to address the concerns described.

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marijuana, banks that accept cannabis clients risk violation of U.S. money laundering laws, causing reluctance on the part of financial service providers to work with MRBs).

<sup>22</sup> See Sean Williams, *The SAFE Banking Act Passes the House in a Landslide—Here’s What Happens Next*, THE MOTLEY FOOL (Sept. 28, 2019), <https://www.fool.com/investing/2019/09/28/the-safe-banking-act-passes-the-house-in-a-landsli.aspx>; see also Secure And Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (2019).

<sup>23</sup> See generally Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at §§ 2-4, 6.

## I. STATE-LEGAL CANNABIS: INDUSTRY GROWTH, LAWS, AND CONCERN

The legal cannabis market in the United States began in California in 1996 and has continued to grow. Thirty-three states have now legalized the recreational and/or medical use of marijuana. As a result of increased demand for the product, MRBs continue to emerge nationwide. However, current federal laws and financial regulations have prevented, and continue to discourage, financial institutions from servicing MRBs. The inability of MRBs to conduct business with financial institutions means they must operate on an all-cash basis, which has created safety and transparency issues.

### A. Growth of the Cannabis Industry in the United States

Modern state-legal cannabis markets in the United States began when California legalized medicinal marijuana in 1996.<sup>24</sup> Since then, more than half of the states have legalized marijuana for medicinal purposes.<sup>25</sup> Eleven states and the District of Columbia have legalized recreational use of marijuana for adults, and in 2018 there were twenty-one other states that considered bills that would have legalized recreational marijuana.<sup>26</sup>

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<sup>24</sup> See Cal. Health & Safety Code § 11362.5 (West 1996); see also *California Proposition 215, the Medical Marijuana Initiative (1996)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_215\\_the\\_Medical\\_Marijuana\\_Initiative\\_\(1996\)](https://ballotpedia.org/California_Proposition_215_the_Medical_Marijuana_Initiative_(1996)) (last visited January 7, 2020).

<sup>25</sup> See *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 16, 2019), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. See also e.g., Md. Code Ann., Health §§ 13-3301-16 (2015) (medical marijuana regulations for the state of Maryland); 18 V.S.A. §§ 4471-74 (medical marijuana regulations for the state of Vermont).

<sup>26</sup> See *Marijuana Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>. States that have legalized recreational use of marijuana include California, Alaska, Washington, Oregon, Colorado, Nevada, Illinois, Michigan, Vermont, Massachusetts, and Maine. See *id.*

Current attitudes about marijuana are rapidly shifting in favor of legalization. A recent Gallup survey conducted in October 2019 found that sixty-six percent of Americans currently support legalization of marijuana, a notable increase from the thirty-six percent of Americans who supported legalization in 2005.<sup>27</sup> Even a majority of Republicans, the political party most commonly associated with marijuana prohibition, responded positively to supporting legalization.<sup>28</sup> Furthermore, “given generational differences in support for legalizing marijuana use, it is likely the percentage who endorse making marijuana use legal will continue to expand in the years ahead.”<sup>29</sup>

Legalization and the concomitant shifting attitudes towards adult marijuana use have created large and lucrative state-legal cannabis markets. The cannabis markets in Washington and Colorado are apt examples. Since Washington’s decision to legalize marijuana sales in 2014, its annual sales of marijuana have grown “rapidly, from \$259 million in 2015 to \$1.3 billion in 2017.”<sup>30</sup> Similarly in Colorado, “[s]ales rose from \$683 million in 2014 to \$1.5 billion in 2017.”<sup>31</sup> Overall, “[i]n terms of sales, the U.S. cannabis industry generated nearly \$9 billion in 2017.”<sup>32</sup> The New York City Comptroller’s Office estimated in 2018 that if New York State were to legalize recreational use and sales of marijuana, there

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<sup>27</sup> See Jeffrey Jones, *U.S. Support for Legal Marijuana Steady in Past Year*, Gallup (Oct. 23, 2019), <https://news.gallup.com/poll/267698/support-legal-marijuana-steady-past-year.aspx> (“Americans’ support for legalizing marijuana has held steady at [sixty-six percent] over the past year, after rising [thirty] percentage points between 2005 and 2018.”).

<sup>28</sup> See *id.* (“Twenty-five points separate Democratic (76%) and Republican (51%) support for making marijuana legal, with independents (68%) near the national average.”).

<sup>29</sup> *Id.*

<sup>30</sup> Scott Stringer, *Estimated Tax Revenues from Marijuana Legalization in New York*, NEW YORK CITY COMPTROLLER 1, 3 (May 2018), [https://comptroller.nyc.gov/wp-content/uploads/documents/Legal\\_Marijuana\\_051418.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Legal_Marijuana_051418.pdf) (performing a comprehensive study of estimated tax revenues from marijuana legalization in New York state, using financial data gleaned from publicly available sources from Washington and Colorado as a baseline).

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Wade A. Thomson and E.K. McWilliams, *Cannabis Cash: Tips for Financial Institutions*, AMERICAN BAR ASSOCIATION (Feb. 6, 2019), <https://www.americanbar.org/groups/litigation/committees/criminal/articles/2019/winter2019-cannabis-cash-tips-for-financial-institutions/>.

would be a “roughly \$3.1 billion” market for legal cannabis, with “\$1.1 billion . . . attributable to New York City.”<sup>33</sup> If marijuana were legalized for recreational use and sale in all fifty states, the industry “is projected to be worth upwards of \$28 billion.”<sup>34</sup>

In assessing this rapidly growing billion-dollar industry, banks currently understand MRBs to be those that deal directly with the cannabis plant, such as growers and retailers,<sup>35</sup> although the term “marijuana-related business” is not defined in FinCEN’s 2014 guidelines.<sup>36</sup> These direct MRBs can be further subdivided into marijuana growers, processors, and retailers.<sup>37</sup> Growers farm the cannabis; processors trim and prepare the dried flowers, or extract chemical compounds to make oils and other derivative products; and retailers sell the final products at physical stores known as dispensaries.<sup>38</sup> There are also a number of ancillary businesses, including lawyers, accountants, security services, testing labs, and equipment suppliers that derive revenue from those direct MRBs.<sup>39</sup>

Growth in the number and size of MRBs has been remarkable. By the end of December 2018, the number of active marijuana licenses for MRBs in the U.S. totaled 17,350, an eighty-two percent jump from the beginning of January 2018, with a majority of businesses held by growers, processors, and retailers.<sup>40</sup> It is estimated

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<sup>33</sup> Stringer, *supra* note 30, at 5. The size of the New York State market was “estimated by reference to the markets in Colorado and Washington, adjusted for population size, and the prevalence of marijuana use.” *Id.* at 4.

<sup>34</sup> NAFCU, *supra* note 20.

<sup>35</sup> See Rowe, *supra* note 15 (“The general consensus seems to be that it applies to those businesses that deal directly with the plant in some way, such as growing or retailing. However, it’s a challenge that continues to haunt banks and there have been discussions and requests for Congress to address this issue.”).

<sup>36</sup> See Rowe, *supra* note 15; see also FinCEN, *supra* note 16 (term “marijuana-related businesses” not defined in memo).

<sup>37</sup> See Todd Campbell, *The Marijuana Industry: Everything You Need to Know*, MOTLEY FOOL (Aug. 2, 2019), <https://www.fool.com/investing/marijuana-industry-investing-what-need-to-know.aspx>.

<sup>38</sup> See *id.*

<sup>39</sup> See *Cannabis Business Directory*, GANJAPRENEUR, <https://www.ganjapreneur.com/businesses> (last visited Jan. 8, 2020) (listing various businesses, organized categorically, that provide services to other businesses working in the cannabis industry).

<sup>40</sup> See Ed Keating, *The Explosive Marijuana License Growth in the United States During 2018*, CANNABIZ MEDIA (Dec. 13, 2018), <https://cannabiz.media/the-explosive-marijuana-license-growth-in-the-united-states-during-2018/>. Growers and processors are referred to in different terms, as “cultivator[s]” and “manufacturer[s]” respectively; growers held 8,781 licenses, processors held 2,899 licenses, and retailers held 4,042 licenses, while a

that the U.S. cannabis industry employed between 175,000 and 215,000 full-time workers in 2019,<sup>41</sup> outpacing employment in other hot industries such as web development.<sup>42</sup>

As the cannabis industry at-large has grown, so too has a new niche industry for providing security services to MRBs.<sup>43</sup> Because MRBs must deal in cash, unlike businesses in a majority of other industries, they are forced to put a premium on comprehensive security systems to protect their liquid proceeds.<sup>44</sup> Dozens of security firms have sprung up around the country to assist MRBs in figuring out their needs, with some being full-service and others specializing in specific areas, such as video surveillance.<sup>45</sup> The cost of these security systems “can typically run into the tens of thousands of dollars or more, depending on how secure a company wants to be,” with “[o]ngoing costs, such as monitoring services and guards, add[ing] to the bill.”<sup>46</sup> The options chosen typically depend on the size of the MRB’s operation, which can range from growing operations with 50,000-square-foot indoor facilities to small, four-room retailers.<sup>47</sup> MRBs must also take into account business licensing requirements mandating specific security measures,<sup>48</sup> which vary by state but can feature common requirements.<sup>49</sup> Although there is no way to know ahead of time how much a comprehensive security system will cost, one industry

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number of distributors, delivery services, testing labs and other small businesses held licenses as well. *Id.*

<sup>41</sup> See Maggie Cowee, *US Cannabis Employment to Jump 34% in 2019 Thanks to California, Growth in New Markets*, MARIJUANA BUSINESS DAILY (June 19, 2019), <https://mjbiz-daily.com/us-cannabis-employees-increase-34-percent-2019/>.

<sup>42</sup> *See id.*

<sup>43</sup> See John Schroyer, *Industry Snapshot: Security Services*, MARIJUANA BUSINESS MAGAZINE (Feb. 2017), <https://mjbizmagazine.com/industry-snapshot-security-services/> (discussing how the “value” of marijuana, and “everything involved in growing, processing, transporting and selling it,” has “given rise to a thriving industry niche focused on helping cannabis businesses protect their assets and employees.”).

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> See Mark Powlowski, *The Complete Guide to Cannabis Security*, MEDLIN (July 9, 2019), <https://medlininc.com/the-complete-guide-to-cannabis-security/> (describing common requirements, including a functional alarm system, secure storage system integrated into the alarm systems, security personnel, and video surveillance systems meeting certain quality specifications); see e.g., Pa. Code § 1161.31 (2019) (providing security requirements for medical marijuana dispensaries in Pennsylvania).

expert estimated that a “typical cultivation operation should budget around \$80,000 to \$100,000 for security, while a retailer should probably set aside \$30,000 to \$40,000.”<sup>50</sup>

The number of product offerings and brand-building opportunities has increased as well. Legal dispensaries now sell a wide variety of cannabis products, ranging from the traditional flower buds, to processed goods like oils, and edible goods such as candies and gummies.<sup>51</sup> The number of cannabis brands has skyrocketed, with over 2,000 offered in 2018 as compared to the 166 brands operating in 2014.<sup>52</sup> Investors are starting to recognize the opportunities available, with more than \$10 billion invested in the cannabis industry in 2018, twice what was invested in the previous three years combined.<sup>53</sup> However, due to federal laws and financial regulations, a significant majority of the proceeds generated by MRBs cannot be banked.

### *B. Federal Laws Prohibiting Banking for Cannabis Businesses*

Under federal law, both state-chartered and federally-chartered financial institutions are not only potentially criminally liable for offering their services to MRBs, but they must also affirmatively ensure through adequate due diligence and reporting that they do not do so.<sup>54</sup>

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<sup>50</sup> Schroyer, *supra* note 43.

<sup>51</sup> See Aaron Smith, *The U.S. Legal Marijuana Industry is Booming*, CNN (Jan. 31, 2018), <https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/index.html>. “[A] mere 48% of pot products sold in 2018 in Colorado, Washington, Nevada, and California was dried flower. The remainder was comprised of vape pens (19%), edibles (11%), and other derivatives (22%). This is an excellent trend for the weed industry considering that derivative products have no oversupply or pricing concerns to worry about, making them a considerably higher-margin offering than dried cannabis flower.” Sean Williams, *U.S. Cannabis Sales to More Than Quintuple by 2025, New Report Finds*, THE MOTLEY FOOL (Sept. 29, 2019), <https://www.fool.com/investing/2019/09/29/us-cannabis-sales-to-more-than-quintuple-by-2025-n.aspx>.

<sup>52</sup> See Williams, *supra* note 51 (“Colorado, Washington, Nevada, and California had a combined 2,650 marijuana brands being offered in 2018. That’s nearly double the amount from 2017, and a massive multiple from the 166 brands consumers had to choose from in 2014.”).

<sup>53</sup> See Gillian Flaccus, *Legal Marijuana Industry Toasts Banner Year*, ASSOCIATED PRESS (Dec. 27, 2018), <https://apnews.com/0bd3cdbae26c4f99be359d6fe32f0d49>.

<sup>54</sup> See Julie Hill, *Banks, Marijuana, and Federalism*, 65 CASE WESTERN RESERVE L. REV. 597, 610 (2015) (“Federal law, however, expects financial institutions to do more than

The Money Laundering Control Act<sup>55</sup> imposes criminal liability on “individuals and entities” for money laundering, which under the statute includes “conducting a financial transaction involving the proceeds of a known ‘specified unlawful activity.’”<sup>56</sup> As the federal Controlled Substances Act (CSA)<sup>57</sup> continues to prohibit the manufacturing, distribution, or dispensing of marijuana,<sup>58</sup> an MRB commits a “specified unlawful activity” under the money laundering statute when it dispenses a federally controlled substance.<sup>59</sup> Therefore, financial institutions that engage with MRBs by providing banking services may be criminally liable for money laundering, because the proceeds involved stem from a specified unlawful activity.<sup>60</sup>

A financial institution can be liable on a variety of fronts. For instance, if it enables the use of electronic payments via credit card for an MRB, it could be illegally “aiding and abetting the distribution of marijuana” because it is facilitating financial exchanges involving federally illegal cannabis sales.<sup>61</sup> If the institution “knowingly” accepts deposits that derive from proceeds of marijuana sales, it may be illegally “acting as an accessory after the fact” because it is knowingly housing, and thus arguably concealing, proceeds from a federally illegal transaction.<sup>62</sup> Penalties can involve

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merely avoid assisting those who manufacture, distribute, or dispense marijuana. Financial institutions must discover illegal activity, report it to federal officials, and prevent wrongdoers from accessing the banking system.”).

<sup>55</sup> 18 U.S.C. §§ 1956-57 (2012).

<sup>56</sup> Hill, *supra* note 54, at 610-11; 18 U.S.C. § 1956(a)(1).

<sup>57</sup> Controlled Substances Act, 21 U.S.C. §§ 801-904 (2012).

<sup>58</sup> *See id.* at §§ 841(a)(1), 802(6), 812. Under § 841(a)(1) it is unlawful “to manufacture, distribute, or dispense. . . a controlled substance.” Under § 802(6), “controlled substance” is defined as a substance “included in Schedule I.” Under § 812, cannabis is classified as a Schedule I substance.

<sup>59</sup> *See* 18 U.S.C. §§ 1956(c)(7), 1957(f)(3), 1961(1). (Under § 1956(c)(7), the term “specified unlawful activity” includes “any act or activity constituting an offense listed in section 1961(1).” Section 1961(1) includes “dealing in a controlled substance” as an offense.) *See also* Hill, *supra* note 54, at 611.

<sup>60</sup> *See* Hill, *supra* note 54, at 617 (“In sum, a financial institution that knowingly processes transactions for marijuana-related businesses commits the crime of money laundering.”). *See also* Adrian Snead and Logan Hill, *Accounts That Go Up In Smoke: To Bank or Not to Bank, the Marijuana Industry*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/banking/2020/202001/fa\\_3/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/banking/2020/202001/fa_3/) (Jan. 30, 2020), (noting that since the introduction of FinCEN’s guidelines in 2014, federal financial regulators have not yet prosecuted any financial institution that has chosen to work with a state-legal MRB).

<sup>61</sup> Hill, *supra* note 54, at 608; *see* 18 U.S.C. § 2(a) (2012).

<sup>62</sup> Hill, *supra* note 54, at 608; *see* 18 U.S.C. § 3 (2012).

either “substantial fines [or] imprisonment,”<sup>63</sup> and the Department of Justice (DOJ) has unhindered discretion to “investigate and prosecute anyone violating the money laundering laws.”<sup>64</sup>

Additionally, under the Bank Secrecy Act (BSA),<sup>65</sup> financial institutions are required to enact comprehensive due diligence programs to seek out and prevent money laundering.<sup>66</sup> First, the BSA requires each financial institution to implement a “customer identification program” to confirm the identities of those seeking to open an account with the institution.<sup>67</sup> Once a customer’s identity is verified, financial institutions must “undertake sufficient due diligence on each customer to adequately assess the risk associated with that customer.”<sup>68</sup> Using the information gained from this due diligence, the BSA requires financial institutions to identify and report illegal or suspicious activities to FinCEN.<sup>69</sup> Because the 2014 FinCEN guidelines explicitly state that “financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity,”<sup>70</sup> banks are required to file suspicious activity reports “on [any] activity involving a[n] [MRB].”<sup>71</sup> Financial institutions that fail to comply with

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<sup>63</sup> Hill, *supra* note 54, at 611; *see* 18 U.S.C. § 1956(a); *see also* 18 U.S.C. § 1957(b).

<sup>64</sup> Hill, *supra* note 54, at 616-17; *see also* Cole, *supra* note 19 (“[N]othing [in the guidance] precludes investigation or prosecution . . . in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”).

<sup>65</sup> Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of the U.S.C.).

<sup>66</sup> *See* Hill, *supra* note 54, at 612; *see also* 31 U.S.C. § 5318(h).

<sup>67</sup> Hill, *supra* note 54, at 612; *see* 31 U.S.C. § 5318(l).

<sup>68</sup> Hill, *supra* note 54, at 612. Although the BSA does not specifically require this due diligence, it is “imposed” on banks by federal financial regulators “as part of the supervisory process.” Mark E. Plotkin & B.J. Sanford, *The Customer’s View of “Know Your Customer” — Section 326 of the USA Patriot Act*, 1 BLOOMBERG CORP. L. J. 670, 677 (2006).

<sup>69</sup> *See* Hill, *supra* note 54, at 613; *see also* Fed. Fin. Inst. Examination Council, *Bank Secrecy Act/Anti-Money Laundering Examination Manual*, 5 (2014), [https://bsaaml.ffeic.gov/docs/manual/BSA\\_AML\\_Man\\_2014\\_v2\\_CDDBO.pdf](https://bsaaml.ffeic.gov/docs/manual/BSA_AML_Man_2014_v2_CDDBO.pdf) (“FinCEN, a bureau of the U.S. Treasury, is the delegated administrator of the BSA. In this capacity, FinCEN issues regulations and interpretive guidance, provides outreach to regulated industries, supports the examination functions performed by federal banking agencies, and pursues civil enforcement actions when warranted.”).

<sup>70</sup> FINCEN, *supra* note 16.

<sup>71</sup> *Id.*; *see also* Hill, *supra* note 54, at 613-14.

the BSA's provisions may be subject to substantial monetary penalties by FinCEN,<sup>72</sup> or criminal prosecution by federal officials.<sup>73</sup>

National banks that run afoul of the BSA also risk losing their federally insured status from the Federal Deposit Insurance Corporation (FDIC). Under the Banking Act of 1933,<sup>74</sup> all national banks operating in interstate commerce are required to obtain FDIC insurance.<sup>75</sup> A majority of states have since applied this requirement to their state-chartered banks.<sup>76</sup> In order to preserve their federally insured status, banks must comply with federal financial regulations.<sup>77</sup> A federally insured financial institution that fails to do so may have its deposit insurance withdrawn, "effectively forcing the closure of any institution that is required to have federal insurance,"<sup>78</sup> which applies to virtually the entire

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<sup>72</sup> See Hill, *supra* note 54, at 615; see also 31 U.S.C. § 5321(a)(2) (2004) (stating that "[t]he Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement"); 31 C.F.R. § 1010.810(d) (2014) (stating that "[a]uthority for the imposition of civil penalties for violations of this chapter lies with the Director of FinCEN.").

<sup>73</sup> See Hill, *supra* note 54, at 615; see also 31 U.S.C. § 5322(a) (2001) (providing criminal penalties of up to \$250,000 fines and/or imprisonment up to five years for willful violations of the BSA).

<sup>74</sup> Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.).

<sup>75</sup> See Hill, *supra* note 54, at 617; 12 U.S.C. § 222 ("Every national bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located, become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this chapter and shall thereupon be an insured bank under the Federal Deposit Insurance Act").

<sup>76</sup> See Hill, *supra* note 54, at 617-18; see also Chana Joffe-Walt, *Do Banks Need the FDIC?*, NPR (Apr. 7, 2009), [https://www.npr.org/sections/money/2009/04/do\\_banks\\_need\\_the\\_fdic.html](https://www.npr.org/sections/money/2009/04/do_banks_need_the_fdic.html) (containing a statement from an FDIC spokesperson that "[m]ost states require FDIC insurance for their banks. It was more common back in the early- to mid-'80s to have non-FDIC insured banks. That changed when most of those private insurance funds or state-sponsored funds went bankrupt and left customers without access to their deposits for extremely long periods of time . . . The result is that today most, if not all, states require federal insurance. There may be some rare exceptions or grandfather provisions to that statement, but most, if not all, banks and S&Ls must be federally insured. States are the ones who decide whether or not to require FDIC insurance.").

<sup>77</sup> See Hill, *supra* note 54, at 618; see also *Weir v U.S.*, 92 F.2d 634, 637 (7th Cir. 1937) (stating that if a bank "chooses to become an insured bank and thus to obtain and enjoy the benefits of deposit insurance furnished by the government through its agency created by Congress, it thereby submits itself to the penalties for violation of the law creating the benefits.").

<sup>78</sup> Hill, *supra* note 54, at 618-19; see 12 U.S.C. § 1818(a)(2) (providing that the FDIC's Board of Directors may unilaterally terminate a bank's status as an insured depository institution if it determines that the "depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the [FDIC] in connection with the approval of any application or other

U.S. banking industry. Additionally, “insured financial institution employees who violate money laundering laws or the [BSA] face regulatory suspension or prohibition from the banking industry.”<sup>79</sup> Thus, the regime of federal deposit insurance “provide[s] federal regulators an additional avenue for enforcing already applicable federal laws.”<sup>80</sup>

### *C. Safety and Transparency Concerns Involving MRBs*

Banks’ reluctance to work with MRBs because of these federal laws and regulations has created public safety and transparency issues for MRB operators because they are forced to operate on an all-cash basis.

#### *i. Safety Concerns Involving MRBs*

Because of conflicting state and federal laws regarding marijuana, MRBs predominately operate as cash-only businesses and store their proceeds in vaults kept on their premises, since banks are unwilling to provide basic services for fear of adverse regulatory action.<sup>81</sup> This practice makes MRBs susceptible to security threats, such as robberies and burglaries.<sup>82</sup>

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request by the insured depository institution, or written agreement entered into between the insured depository institution and the [FDIC]”).

<sup>79</sup> Hill, *supra* note 54, at 619; see 12 U.S.C. § 1818(e)(2) (providing that the “appropriate Federal banking agency” may unilaterally remove an “institution-affiliated party” from office for violation of the BSA and anti-money laundering laws).

<sup>80</sup> Hill, *supra* note 54, at 619.

<sup>81</sup> See Florence Shu-Acquaye, *The Unintended Consequence to Legalizing Marijuana Use: The Banking Conundrum*, 64 CLEV. STATE L. REV. 315, 317 (2016). “Nearly all of the nation’s banks either refuse or are reluctant to take money from marijuana sales or to offer basic checking or credit card services to the industry out of the fear that they will be shut down by federal authorities, for whom marijuana remains an illegal narcotic. Consequently, banks are unwilling to do business with growers, processors, retail shops, medical dispensaries, employees, or contractors involved in the marijuana industry.” *Id.*

<sup>82</sup> See *id.* at 317, 328 n.26.

Although precise statistics for property crimes against MRBs are difficult to find<sup>83</sup> because cannabis-legal states do not comprehensively track them, or track them at all,<sup>84</sup> persistent anecdotal evidence paints a grim and dangerous picture for MRB owners and operators. For example, in Denver, Colorado, “cannabis businesses make up less than [one percent] of all local businesses but have accounted for [ten percent] of all reported business burglaries from 2012-2016.”<sup>85</sup> “Burglaries and theft comprise almost eighty percent of Denver’s cannabis industry-related crime[.]” and according to the Denver Police Department, “[o]n average, more than 100 burglaries occur at cannabis businesses each year.”<sup>86</sup>

Denver is one of the only municipalities tracking crimes determined to have a connection with the cannabis industry.<sup>87</sup> Its data shows that from 2012 to 2017, there were over 700 incidents involving a robbery or burglary of an MRB in Denver.<sup>88</sup> In California’s “Emerald Triangle,” a “10,000-square-mile area” encompassing three counties, which grew about sixty percent of the country’s marijuana, saw a “steady” rise in violent crimes, specifically robberies and gun violence.<sup>89</sup> In 2018, a Seattle police detective testified in a sworn statement that in 2017 alone there were sixty-five reported burglaries to” MRBs.<sup>90</sup>

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<sup>83</sup> See Alex Halperin, *The Cannabis Security Industry Helps Marijuana Businesses Fight Crime*, LA WKLY (Apr. 3, 2017), <https://www.laweekly.com/the-cannabis-security-industry-helps-marijuana-businesses-fight-crime/> (“[E]xact statistics for crime against dispensaries are rare[.]”).

<sup>84</sup> See Scigliano, *supra* note 1 (“For all the state’s talk of transparency, local law enforcement and the [Washington Liquor and Cannabis Board] . . . don’t track cumulative data on marijuana thefts.”).

<sup>85</sup> *The Public Benefits of Banking Cannabis Businesses*, AM. BANKERS ASS’N (ABA), at 3, (July 2019), <https://www.aba.com/-/media/documents/white-paper/cannabis-white-paper.pdf?rev=4869167cac644d4aaf0a72eb3b9c8c7a>.

<sup>86</sup> *Id.*

<sup>87</sup> See City and County of Denver, *Crime Marijuana*, DENVER: THE MILE HIGH CITY, <https://www.denvergov.org/opendata/dataset/city-and-county-of-denver-crime-marijuana> (last updated Jan. 31, 2021).

<sup>88</sup> See JACK K. REED, COLO. DIV. OF CRIM. JUSTICE, DEPT’ OF PUB. SAFETY, IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO SENATE BILL 13-283, 32 (October 2018).

<sup>89</sup> Rene Chun, *Ending Weed Prohibition Hasn’t Stopped Drug Crimes*, THE ATLANTIC (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/california-marijuana-crime/576391/>.

<sup>90</sup> Scigliano, *supra* note 1.

In a hearing held by the Senate Committee on Banking, Housing, and Urban Affairs on July 23, 2019,<sup>91</sup> a representative for the Credit Union National Association (CUNA) estimated that one in every two marijuana dispensaries were robbed or burglarized, “with the average thief walking away with anywhere from \$20,000 to \$50,000 in a single theft.”<sup>92</sup> In that same hearing, a representative from the American Bankers Association estimated that “roughly one in five cannabis business[es] [are] burglarized.”<sup>93</sup> Attorneys general and state treasurers in many states have taken notice of this public safety issue, sending letters to congressional leaders in May and April of 2019 discussing the problem.<sup>94</sup>

Part of the reason other municipalities have been unable or unwilling to track such statistics is likely due to gross understaffing of the relevant state agencies. For example, the Washington State Liquor and Cannabis Board (WSLCB), the regulatory body responsible for oversight of the marijuana industry in Washington State, “has a team of just [eighteen], including six enforcement officers, to monitor more than 1,000 cannabis growers.”<sup>95</sup> Cannabis producers in Washington feel, justifiably, that “the inspectors assigned to them are overwhelmed” and in “over their heads.”<sup>96</sup> As a result, although MRBs in Washington are required to immediately report instances of theft to the WSLCB, that data is not compiled in any meaningful way “that might help law enforcement and policy makers assess and address such crimes.”<sup>97</sup> This is problematic for smaller MRBs that cannot afford twenty-four-hour security

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<sup>91</sup> *Challenges for Cannabis and Banking: Outside Perspectives*, U.S. SENATE COMMITTEE ON BANKING, HOUSING, & URB. AFF. (July 23, 2019, 10:00 AM), <https://www.banking.senate.gov/hearings/challenges-for-cannabis-and-banking-outside-perspectives>.

<sup>92</sup> *One in Two Cannabis Dispensaries is Robbed or Burglarized? Perhaps Not...*, REGTECH CONSULTING LLC (July 23, 2019), <https://regtechconsulting.net/cannabis-marijuana/one-in-two-cannabis-dispensaries-is-robbed-or-burglarized-perhaps-not/>.

<sup>93</sup> *Id.*

<sup>94</sup> See ABA, *supra* note 85, at 3. “In May 2019, a bipartisan group of [thirty-eight] state attorneys general sent a letter to ten congressional leaders recognizing that cannabis business’ preclusion from the banking system and reliance on cash ‘contributes to a public safety threat as cash-intensive businesses are often targets for criminal activity.’ *Id.* Similarly, in April 2019, a bipartisan group of [seventeen] state treasurers sent their own letter to congressional leaders, noting that “[p]rocessing, storing, and moving large amounts of cash puts business owners, their employees, and their customers at risk of violent crime.” *Id.*

<sup>95</sup> Scigliano, *supra* note 1.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

measures or large reinforced facilities, and instead must use “frame and stucco warehouses” that are unable to withstand the efforts of professional criminals.<sup>98</sup> Sophisticated security systems for dispensaries carry a heavy price tag,<sup>99</sup> especially if states mandate particular security requirements,<sup>100</sup> which most small-scale MRBs are unlikely to be able to afford.

## ii. Transparency Concerns Involving MRBs

Lack of access to banking services has also generated concerns about the operational transparency of state-legal MRBs. Because the legal cannabis industry in the United States is relatively new, there is concern that criminals may use otherwise legitimate MRBs “as a shell to hide other illegal activities.”<sup>101</sup> No banking means there are no banking records for MRB earnings, “making it simpler to divert funds to improper use.”<sup>102</sup> “For instance, a marijuana wholesaler could conceivably make sales to unlicensed (or even black-market) entities and maintain no record of the transaction” because it is conducted in cash.<sup>103</sup> In some cases, MRBs are resorting to criminal activity to get banking access, setting up

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<sup>98</sup> *See id.*

<sup>99</sup> *See* Halperin, *supra* note 83. “Widespread requirements for sophisticated security programs and a lack of large providers has created a business opportunity. Security services aren’t cheap . . . startup security costs for a dispensary might be tens of thousands of dollars.” *Id.*

<sup>100</sup> *See id.* “In Pennsylvania, which legalized medical marijuana use . . . the state currently requires dispensaries to maintain 24/7 video surveillance and store all of it for four years. For such a system, just the storage space and server could cost \$200,000.” *See e.g.*, Pa. Code § 1161.31 (2019).

<sup>101</sup> *See* Deborah Dickinson, *Bank on Marijuana: A Legitimate Industry Warranting Banking Access*, 2 SAVANNAH L. REV. 459, 520 (2015) (“The marijuana industry is slowly emerging as a growing legitimate industry, though a heavily regulated one, to weed out criminals from non-criminals. Because it is an emerging industry, there is the potential for abuse, including [by] drug dealers and organized crime.”); *see also e.g.*, Kristina Davis, *Plea Deal Reached in Med Pot Case*, THE SAN DIEGO UNION-TRIBUNE (Oct. 15, 2013, 5:28 PM), <https://www.sandiegouniontribune.com/sdut-plea-guilty-medical-marijuana-federal-chang-2013oct15-story.html> (former owner of two medical marijuana dispensaries in San Diego pled guilty to money laundering, “admitting to knowingly depositing \$100,000 in proceeds from marijuana sales into the bank account of his elderly mother in an attempt to hide the source.”)

<sup>102</sup> Rowe, *supra* note 15.

<sup>103</sup> Geoff Lawrence, *Marijuana Industry Financial Services: Obstacles and Solutions*, REASON FOUNDATION (Sept. 2019), <https://reason.org/wp-content/uploads/marijuana-industry-financial-services.pdf>.

shell companies and depositing their proceeds into that company's accounts without disclosing to the financial institution that those funds are tied to marijuana transactions.<sup>104</sup> Access to banking services, and the paper trail it would create, would help “draw out the[se] underground elements attracted to the legitimate marijuana industry in its early stages.”<sup>105</sup>

Additionally, being forced to operate on an all-cash basis makes tax payments for MRBs more difficult, and may encourage tax evasion.<sup>106</sup> Some states make it onerous for MRBs to pay taxes with cash,<sup>107</sup> and “without reliable banking services” it is more difficult for MRBs to engage in accurate record keeping.<sup>108</sup> For example, Oregon MRB owners must trek every month to the state capital, Salem, “no matter the distance they must travel,” and make their tax payments in cash at a single “guarded, bulletproof site.”<sup>109</sup>

This state of affairs can result in errors in tax payments, or even outright tax evasion by otherwise legitimate MRBs.<sup>110</sup> “The city of Sacramento estimated that cannabis dispensaries amass \$9 million per year in underpaid taxes due to poor recordkeeping or filing

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<sup>104</sup> See Kristina Davis, *Focus: Licensed Marijuana Businesses Operate in the Shadows Without Access to Banks*, THE SAN DIEGO UNION-TRIBUNE (Feb. 18, 2017), <https://www.sandiegouniontribune.com/business/sd-me-pot-banking-20170210-story.html>.

<sup>105</sup> Dickinson, *supra* note 101, at 521.

<sup>106</sup> See ABA, *supra* note 85. “New York University (NYU) researchers concluded that due to extensive noncompliance across the cash business sector, ‘honest’ business owners who would otherwise comply with tax laws often cave under the pressure and evade taxes in order to remain competitive with their tax-evading competitors.” *Id.*

<sup>107</sup> See *Why Marijuana Retailers Can't Use Banks*, THE ECONOMIST (Jan. 22, 2018), <https://www.economist.com/the-economist-explains/2018/01/22/why-marijuana-retailers-cant-use-banks>.

<sup>108</sup> Dickinson, *supra* note 101, at 516.

<sup>109</sup> THE ECONOMIST, *supra* note 107; see also Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch*, FORBES (Sept. 6, 2018, 10:07 AM), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#1d3419df3c68>. “One Nevada medical marijuana dispensary owner recently sent me a picture that illustrates the problem. It showed \$2 million in \$20 bills. Ironically, this particular \$2 million was being prepared for hand-delivery to the Internal Revenue Service to pay taxes that the business cannot pay via bank.” *Id.*

<sup>110</sup> See THE ECONOMIST, *supra* note 107 (“Operating only one such ‘cash-transaction unit’ [in Oregon] saves the revenue department money, but it also reduces the number of sellers who declare sales.”). See Dickinson, *supra* note 101, at 516; Lawrence, *supra* note 103, at 33 (“Cash-intensive businesses have both the incentive and ability to conceal revenues in order to reduce their tax liabilities. The federal Internal Revenue Service has specifically targeted cash-only businesses as subjects of its field audits for this reason.”); ABA, *supra* note 85, at 4 (“Although compliance rates are difficult to estimate, researchers at Stanford University suggest that cash-based businesses underreport their income by at least [fifty percent].”).

inaccurate financial statements with local tax collectors.”<sup>111</sup> Even the IRS has faced challenges handling tax payments from MRBs, needing to hire an outside agency for \$1.7 million to handle processing the cash payments.<sup>112</sup>

In sum, as stated by Senator Jeff Merkley of Oregon in June 2018, MRBs being forced to operate on an all-cash basis is “a big problem because it’s great for organized crime, it’s great for money laundering, it’s great for theft and larceny, it’s great for cheating on taxes, it’s great for cheating on your payroll. We’re really facilitating crime by not enabling the banking industry to provide basic services.”<sup>113</sup>

## II. THE CURRENT BANKING ENVIRONMENT FOR MRBs AND ITS INADEQUACIES

Although the federal anti-money laundering laws and the BSA remain in effect with regard to proceeds derived from cannabis transactions, there are financial institutions that currently engage with MRBs in line with the 2014 FinCEN guidelines.<sup>114</sup> However, changes in Department of Justice policy related to the SAR filing regime have led to uncertainty for financial institutions interested in the cannabis industry. This uncertainty has resulted in an operating environment that is inadequate to incentivize a majority of financial institutions to work with MRBs.

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<sup>111</sup> ABA, *supra* note 85, at 4.

<sup>112</sup> Lawrence, *supra* note 103, at 33.

<sup>113</sup> See Angell, *supra* note 14.

<sup>114</sup> See *Frequently Requested FOIA-Processed Records*, FINCEN, <https://www.fincen.gov/frequently-requested-foia-processed-records> (last visited February 13, 2021) (webpage operated by FinCEN providing “marijuana banking update[s]” that show the number of financial institutions currently providing banking services to MRBs).

### A. MRB Banking Now and the Current SAR Regime

As of September 30, 2019, FinCEN recorded that there were 723 financial institutions currently providing banking services to MRBs.<sup>115</sup> Of those, 563 were banks, and the remainder were credit unions.<sup>116</sup> The number of financial institutions working with MRBs has steadily increased since FinCEN issued its 2014 guidance, with over 100,000 SARs filed as of June 30, 2019.<sup>117</sup> However, an estimated seventy percent of MRBs continue to have no relationship with a financial institution,<sup>118</sup> and the 723 financial institutions currently working with the cannabis industry represent only 8.4% of all such institutions in the United States.<sup>119</sup>

Many financial institutions are hesitant to work with MRBs because Former United States Attorney General Jeff Sessions rescinded multiple Obama-era Department of Justice memoranda,<sup>120</sup> known as the “Cole memos.” Those memos strongly recommended that federal prosecutors not use their investigative resources to prosecute marijuana-related crimes. The initial Cole memo (the “2013 Cole Memo”), published on August 29, 2013, by former United States Deputy Attorney General James Cole, was meant to provide “guidance to federal prosecutors concerning marijuana enforcement under the [CSA]” in light of state legalization efforts.<sup>121</sup> Cole reiterated that Congress has deemed marijuana a

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<sup>115</sup> See *Marijuana Banking Update Depository Institutions (by type) Providing Banking Services to Marijuana Related Businesses (SARs filed through 30 September 2019)*, FINCEN (Sept. 2019), [https://www.fincen.gov/sites/default/files/shared/289465%204thQ%20FY2019%20Marijuana%20Banking%20Update\\_Public.pdf](https://www.fincen.gov/sites/default/files/shared/289465%204thQ%20FY2019%20Marijuana%20Banking%20Update_Public.pdf).

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> Stuart Leavenworth, *When Does Too Much Cash Become a Health Risk? When You Own a Marijuana Shop*, MCCLATCHY DC BUREAU (Feb. 7, 2018, 5:36 PM), <https://www.mcclatchydc.com/news/nation-world/national/article198941964.html>.

<sup>119</sup> Sean Williams, *Here's How Many Banks Provide Financial Services to the U.S. Marijuana Industry*, THE MOTLEY FOOL (Dec. 8, 2019, 11:41 AM), <https://www.fool.com/investing/2019/12/08/heres-how-many-banks-provide-financial-services-to.aspx> (stating that the FDIC lists 8,610 insured financial institutions as of September 30, 2019).

<sup>120</sup> See Memorandum for All United States Attorneys – Marijuana Enforcement, Op. Deputy Att’y Gen. (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>121</sup> See Memorandum for All United States Attorneys – Guidance Regarding Marijuana Enforcement, Op. Deputy Att’y Gen. (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

“dangerous drug” that provides a “significant source of revenue” to criminal actors, but also stated that the DOJ was committed to using its resources “in the most effective, consistent, and rational way.”<sup>122</sup>

With these considerations in mind, Cole identified eight specific “enforcement priorities that are particularly important to the federal government,” and stated that those priorities would guide the DOJ’s “enforcement of the CSA against marijuana-related conduct.”<sup>123</sup> The priorities included:

- (1) Preventing the distribution of marijuana to minors;
- (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- (3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- (6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- (8) Preventing marijuana possession or use on federal property.<sup>124</sup>

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<sup>122</sup> *See id.* at 1.

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 1-2.

Absent implication of one of these priorities, and so long as state and local governments implemented “strong and effective regulatory and enforcement systems,” “state and local law enforcement and regulatory bodies” were to remain “the primary means of addressing marijuana-related activity.”<sup>125</sup> Although Cole explicitly stated that the memo did not “alter in any way the Department’s authority to enforce federal law,”<sup>126</sup> its language seemingly provided reassurance to actual or potential actors in the cannabis industry that federal prosecutors would not be breaking down their doors to enforce the CSA, so long as their activities did not implicate any of the enumerated federal priorities.

On February 14, 2014, Cole released a second memorandum (the “2014 Cole memo”), which offered specific guidance regarding marijuana-related financial crimes.<sup>127</sup> In it, Cole stated that the money laundering statutes and the BSA “remain in effect with respect to marijuana-related conduct,” and that financial institutions could still be prosecuted for engaging in transactions involving proceeds derived from marijuana.<sup>128</sup> However, Cole also reiterated the federal enforcement priorities enumerated in the 2013 Cole memo and stated that decisions to prosecute under federal financial regulations should be dictated by the same priorities.<sup>129</sup>

Cole mandated that financial institutions involved in the cannabis industry institute “appropriate risk-based” anti-money laundering safeguards and procedures, and conduct “customer due diligence” to identify any MRB that may potentially implicate the federal enforcement priorities.<sup>130</sup> He ended by stating that FinCEN would be releasing concurrent guidance for financial institutions interested in doing business with MRBs, that it was

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<sup>125</sup> *See id.* at 2-3.

<sup>126</sup> *See id.* at 4.

<sup>127</sup> *See* Memorandum for All United States Attorneys – Guidance Regarding Marijuana Related Financial Crimes, Op. Deputy Att’y Gen. (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf>.

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *See id.* at 1-2.

<sup>130</sup> *Id.* at 3.

“essential” that institutions adhere to those guidelines, and that the DOJ continued to retain prosecutorial discretion under federal law.<sup>131</sup>

The 2014 FinCEN memo was issued as promised on the same date as the Cole memo and stated that it would clarify how financial institutions could offer their services to MRBs “consistent with their BSA obligations.”<sup>132</sup> Specifically, FinCEN detailed what it expected from financial institutions in terms of “customer due diligence” to assess whether an MRB implicated one of the enumerated federal priorities:

In assessing the risk of providing services to a marijuana related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.<sup>133</sup>

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<sup>131</sup> *See id.* at 2-3.

<sup>132</sup> FINCEN, *supra* note 16.

<sup>133</sup> *Id.* at 2-3.

FinCEN also stated that any institution that does business with an MRB must file a SAR on that MRB because its funds, under federal law, are “derived from illegal activity.”<sup>134</sup> The SARs would be used to further the BSA’s objective of facilitating “law enforcement’s access to information pertinent to a priority.”<sup>135</sup> Under the regime set up by FinCEN, there would be three categories of SAR filings: “Marijuana Limited,” “Marijuana Priority,” and “Marijuana Termination.”<sup>136</sup> The first, “Marijuana Limited,” would be used where the financial institution “reasonably believes, based on its customer due diligence,” that the MRB’s business does not implicate one of the federal enforcement priorities.<sup>137</sup> If one of the priorities is implicated, then a “Marijuana Priority” SAR should be filed.<sup>138</sup> And if the financial institution terminates its relationship with an MRB, “in order to maintain an effective anti-money laundering compliance program,” then it would file a “Marijuana Termination” SAR.<sup>139</sup>

FinCEN ended by listing various “red flags” and their accompanying indicia that may “indicate that an MRB is engaged in activity” implicating one of the priorities, but stated that the list was not “exhaustive.”<sup>140</sup> The red flags included, among other things:

- A customer appears to use the state-licensed MRB as a front to launder money from other criminal activity;
- The MRB cannot provide evidence of its licensed status and compliance with state laws;
- The MRB cannot demonstrate the legitimacy of a source of outside investment;
- The MRB owner has previously been subjected to

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<sup>134</sup> See *id.* Filing a SAR is typically required only when a financial institution confirms that any of its clients, including non-MRBs, or employees, are engaging in money laundering or fraud. See *What is a Suspicious Activity Report?*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/what-is-a-suspicious-activity-report> (last visited Jan. 7, 2020). Because proceeds earned by MRBs inherently originate from federally illegal transactions under the CSA, any funds they deposit with a bank would be derived from illegal activity.

<sup>135</sup> FINCEN, *supra* note 16.

<sup>136</sup> See *id.*

<sup>137</sup> *Id.*

<sup>138</sup> See *id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

investigation by law enforcement for marijuana-related activity;

- The MRB frequently transacts with out-of-state persons or entities;
- The owner lives outside the state in which the MRB is located;
- The MRB purports to be a non-profit but, in fact, participates in commercial activities.

As a result of these memoranda, financial institutions could now ostensibly provide their services to MRBs in cannabis-legal states without overwhelming fear of legal reprisal, so long as they adhered to the FinCEN guidelines.

This was the state of affairs until January 4, 2018, when former United States Attorney General Jeff Sessions issued a memorandum (the “Sessions memo”) rescinding both the 2013 and 2014 Cole memos.<sup>141</sup> In the memo, Sessions stated that “well-established principles that govern all federal prosecutions” should dictate the expenditure of DOJ resources, and that, given these principles, the 2013 and 2014 Cole memos’ “guidance specific to marijuana enforcement [was] unnecessary” and thus rescinded.<sup>142</sup> In an accompanying press release from the DOJ, Sessions stated that the Cole memos had “undermine[d] the rule of law and the ability” of federal law enforcement “to carry out” its mission of enforcing the laws of the United States.<sup>143</sup>

Notably, Sessions did not rescind the 2014 FinCEN memo, thus seemingly preserving its authority. FinCEN has continued to state in its Marijuana Banking Updates that “[t]he SAR reporting structure laid out in the 2014 guidance remains in place.”<sup>144</sup> As a

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<sup>141</sup> See Memorandum for All United States Attorneys – Marijuana Enforcement, Op. Deputy Att’y Gen. (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>142</sup> *Id.*

<sup>143</sup> Dep’t of Just. Off. of Pub. Aff., Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

<sup>144</sup> FinCEN, *supra* note 16.

result, FinCEN's guidance to financial institutions wishing to get involved in legal cannabis remains effective, although it is being reviewed by the Treasury Department for consistency with the DOJ's new position.<sup>145</sup>

*B. Inadequacies of the SAR Regime in Facilitating Cannabis Banking*

Although an increasing number of financial institutions are providing services to MRBs even after Sessions rescinded the Cole memos,<sup>146</sup> the current SAR regime administered by FinCEN has been insufficient to adequately incentivize a majority of financial institutions to offer services to MRBs. This is due not only to definition-based issues in the system but also to the salient fact that the DOJ and federal banking regulators still have unfettered discretion to prosecute financial institutions that do participate and offer services to MRBs.

One foundational issue with the SAR regime is that the term "marijuana-related business" is not defined in FinCEN's 2014 guidance.<sup>147</sup> Therefore, there is no precise definition for financial institutions to refer to in deciding whether a potential customer's transactions are subject to SAR reporting. Banks currently operate based on an understanding that the guidance applies only to those MRBs that deal directly with the cannabis plant, such as growers and retailers, but it is a tenuous understanding at best.<sup>148</sup>

This challenge of identifying exactly which customers are MRBs for SAR purposes is of key importance to financial institutions because FinCEN's guidance places the burden of due diligence on them. While banks do not have to ensure that other business clients operate in accordance with state law, when dealing with

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<sup>145</sup> See Thomson & McWilliams, *supra* note 32.

<sup>146</sup> See *id.*

<sup>147</sup> See FINCEN, *supra* note 16 (term "marijuana-related businesses" not defined in memo); see also Rowe, *supra* note 15.

<sup>148</sup> See Rowe, *supra* note 15. "The general consensus seems to be that it applies to those businesses that deal directly with the plant in some way, such as growing or retailing. However, it's a challenge that continues to haunt banks and there have been discussions and requests for Congress to address this issue." *Id.*

MRBs, banks must report every transaction and activity, and affirm that such activity is consistent with state law.<sup>149</sup> The financial institution is expected to serve as a continuous watchdog so long as it provides services to the MRB, imposing an obligation on banks akin to a state regulatory authority.<sup>150</sup> Thus, if there is no precise definition of an MRB, it will be difficult for banks to know which businesses qualify as such and thus which ones will require continuous reporting. And if the bank's interpretation differs from the federal government's interpretation, it could face legal repercussions by making what amounts to a mistaken judgment call.

This problem also has downstream effects, as MRBs do not operate in a vacuum. Not only must banks evaluate the viability of working with cannabis growers and retailers, but they must also consider whether certain "second-tier" businesses and individuals, such as landlords, suppliers, and employees of MRBs, are subject to reporting.<sup>151</sup> If the business or individual derives income from marijuana-related activities, then their relationship with the bank would seemingly be subject to reporting; however, FinCEN and federal banking agencies have offered no guidance in this area.<sup>152</sup> This kind of line-drawing is important, as a bank operating in a marijuana-legal state could have a significant number of its customers considered to be MRBs if they need only be one-step removed from the plant.<sup>153</sup> Even if the bank operates in a state that has not legalized marijuana, the likelihood that one of its customers may be a supplier, owner, or employee of an out-of-state MRB, or an investor in marijuana-related securities, is growing as more

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<sup>149</sup> *See id.* "For example, when a bank has a customer that is a tavern or restaurant which serves alcohol, the bank is not expected to determine whether the business is serving minors . . . [w]hen it comes to marijuana-related businesses, though, the FinCEN guidance implies that it is the bank that is responsible for ensuring marijuana is not distributed to minors, a subtle but highly critical distinction that places a new level of burden on banks." *Id.*

<sup>150</sup> *See id.* "For example, when a bank has a customer that is a tavern or restaurant which serves alcohol, the bank is not expected to determine whether the business is serving minors. Clearly, state laws prohibit serving alcohol to minors, but the bank can rely on state liquor control authorities to ensure those standards are followed." *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.* "For example, one banker suggested that a bank that operates in a state that has legalized marijuana for both medicinal and adult use could have up to ninety percent of its customers affected by this one-step removed calculation." *Id.*

states move toward marijuana legalization and cannabis companies begin trading on United States securities exchanges.<sup>154</sup>

Thus, lack of an operational definition chills banks' willingness to work with individuals and entities across all levels of the state-legal marijuana industry.<sup>155</sup> Banks bear not only enormous risk in doing business with potential MRBs but also the entire burden of due diligence, without adequate guidance as to what is considered an MRB.

This problem is compounded by the separate issue that DOJ and federal financial regulators continue to have unencumbered discretion to prosecute any financial institution offering its services to an MRB.<sup>156</sup> When a financial institution offers its services to an MRB and processes its transactions, that institution is technically laundering money in violation of federal anti-money laundering laws.<sup>157</sup> With the recent changes to DOJ policy instituted by former AG Sessions, banks now have even less certainty as to whether federal prosecutors will go after them for becoming involved with state-legal MRBs.<sup>158</sup> While so far there have been no such prosecutions, the fear of being the "first test case" is likely strong enough to exclude many financial institutions from participating because the heavy burdens and risks of involvement in the marijuana industry currently outweigh the potential benefits.<sup>159</sup>

Banks are in the business of assessing risk, which is virtually impossible to do in the current environment because the situation is so fluid.<sup>160</sup> With the rescission of the Cole memos, there is no unifying DOJ policy when it comes to prosecuting financial institutions for their involvement with MRBs. Individual prosecutors

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<sup>154</sup> *See id.*

<sup>155</sup> *See Id.*

<sup>156</sup> *See* Memorandum for All United States Attorneys – Guidance Regarding Marijuana Related Financial Crimes, Op. Deputy Att'y Gen. (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf>.

<sup>157</sup> *See id.*; *see also* FINCEN, *supra* note 16; *see also* Rowe, *supra* note 15; *see also* Campbell, *supra* note 37.

<sup>158</sup> *See* Rowe, *supra* note 15.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.* "Banks confront a serious risk when they bank a marijuana business. Granted, banks are in the business of assessing, controlling, and mitigating risks. However, to control risks, banks have to be able to understand and identify them. Currently, that's extremely difficult when it comes to the cannabis industry." *Id.*

once again have complete discretion, but this could just as easily change again with the next presidential administration. As a result, banks have no way to gauge the likelihood of federal prosecution now or in the future, and thus no way to assess the risks of involvement in the industry other than knowing the heavy compliance burdens and potentially high penalties for doing so. With no legislative framework to dictate the DOJ's or federal financial regulators' actions, banks must operate under the assumption that the risks and costs of involvement in the cannabis industry are high, which will continue to deter most from doing so.<sup>161</sup>

### III. THE SAFE AND FAIR ENFORCEMENT BANKING ACT

The SAFE Act, previously passed by the U.S. House of Representatives on September 26, 2019,<sup>162</sup> provides a direct solution to these problems. Although the Act does not alter marijuana's federally illegal status under the CSA, it is designed to increase access to financial institutions for MRBs and their associated service providers through a "Safe Harbor," which shields participating financial institutions from prosecution by federal financial regulators and the DOJ.<sup>163</sup> The Act specifically states that its purpose "is to increase public safety by ensuring access to financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses."<sup>164</sup> By providing increased access to banking, the Act would greatly reduce the number of MRBs operating as all-cash businesses, and thus alleviate the safety and transparency concerns associated with such operations.

First, the Act does the important task of defining exactly what an MRB is, though the Act uses the terminology "cannabis-related

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<sup>161</sup> See *id.*

<sup>162</sup> Secure and Fair Enforcement Banking Act of 2019, *supra* note 22.

<sup>163</sup> See Independent Community Bankers of America (ICBA), *FAQs – Secure and Fair Enforcement (SAFE) Banking Act*, INDEP. COMMUNITY BANKERS OF AM. (Oct. 9, 2019), <https://www.icba.org/docs/default-source/icba/advocacy-documents/summaries/safefaq19-10-09.pdf>; see also Secure and Fair Enforcement Banking Act of 2019, *supra* note 22 at § 2 (section is entitled "Safe harbor for depository institutions").

<sup>164</sup> Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. § 1(b).

legitimate business” (“CRLB”).<sup>165</sup> According to Section 14(4) of the Act, a CRLB is any “manufacturer, producer or any person” that “participates in any business or organized activity that involves handling cannabis or cannabis products,” “pursuant to a law established by a State or a political subdivision of a State.”<sup>166</sup> Basically any business or individual involved in the cultivation, transportation, or retailing of marijuana, which does so consistently with state law, is a CRLB and within the Act’s provisions.<sup>167</sup> The Act also defines those ancillary businesses, referred to as “service providers,” associated with CRLBs that are also protected by the Act. Section 14(13) of the Act defines a service provider as “a business, organization, or other person that sells goods or services to a [CRLB]; or provides any business service . . . or other ancillary service, relating to cannabis.”<sup>168</sup> This definition includes individuals or businesses selling or offering any kind of good or service to a CRLB, without actually handling the cannabis, including property managers and lawyers.<sup>169</sup>

Under Section 2, federal banking regulators may not terminate or limit a financial institution’s deposit insurance, or “prohibit, penalize, or otherwise discourage” a bank, for providing its services to a CRLB solely because the client is a CRLB.<sup>170</sup> The prohibition applies whether the bank is doing business with a CRLB, one of its employees, or one of its service providers.<sup>171</sup> Federal banking regulators are defined to include FinCEN, the Department of the Treasury, and various other federal regulatory authorities.<sup>172</sup> The Secretary of the Treasury retains the discretion to designate other agencies and departments as federal banking regulators, as long as it regulates banking or financial services.<sup>173</sup>

Under Section 3 of the Act, proceeds generated by ancillary

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<sup>165</sup> See *id.* at § 2(a)(1) (indicating the term “CLRB” will be used in place of “MRB”).

<sup>166</sup> *Id.* at § 14(4).

<sup>167</sup> See ICBA, *supra* note 163, at 4-5.

<sup>168</sup> Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong., § 14(13) (2019).

<sup>169</sup> See ICBA, *supra* note 163, at 2.

<sup>170</sup> Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 2(a); see also ICBA, *supra* note 163, at 2.

<sup>171</sup> See ICBA, *supra* note 163, at 2.

<sup>172</sup> See Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 14(6).

<sup>173</sup> See *id.*; see also ICBA, *supra* note 163, at 2-3.

businesses from transactions with CRLBs, or their service providers, are not to be considered proceeds “from an unlawful activity” under any provision of federal law solely because they originate from a CRLB or associated service provider.<sup>174</sup> This allows those funds to be spent or invested freely without violation of federal anti-money laundering laws.<sup>175</sup> Under Section 4 of the Act, banks and insurers, and their employees, officers, and directors, “may not be held liable pursuant to any Federal law or regulation” solely for providing financial services to CRLBs or investing income derived from providing such services.<sup>176</sup> This provision applies to individuals within financial institutions and shields them from any individual criminal or civil liability solely for providing banking services to CRLBs.<sup>177</sup>

These provisions provide powerful protection for financial institutions seeking to do business with MRBs and associated ancillary businesses. Section 2 ensures that federal banking regulators cannot penalize financial institutions *solely* for doing business with an MRB, as long as that MRB continues to operate legally under applicable state laws. Section 3 classifies proceeds generated by MRBs and service providers as not unlawful, and thus allows financial institutions to process transactions involving funds from MRBs without fear of being liable for participating in money laundering. Finally, Section 4 ensures individual protection, both criminally and civilly, from prosecution by any federal government agency or department, including the DOJ, for the employees, directors, and officers of financial institutions doing business with MRBs.

A key point of the legislation is that an MRB is only a valid CRLB under the Act if it complies with the cannabis laws of the state in which it is located.<sup>178</sup> If it does not, then it may not be considered a CRLB and the Act’s safe harbor provisions cease to apply to the financial institution providing the MRB with financial services.<sup>179</sup> As a result, under the Act, banks will continue to bear

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<sup>174</sup> Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 3.

<sup>175</sup> See ICBA, *supra* note 163, at 4.

<sup>176</sup> Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 4(a).

<sup>177</sup> See ICBA, *supra* note 163, at 3.

<sup>178</sup> See *id.*, at 1.

<sup>179</sup> See *id.*, at 1-2.

the burden of due diligence on potential MRB clients to ensure that they comply with applicable state laws.<sup>180</sup> Otherwise, the bank may face penalties from federal banking regulators for working with an unlawful MRB.<sup>181</sup>

The continued requirement that banks perform this due diligence is a rational balance between the new powerful protections granted and reasonable concerns regarding potential abuses of the financial system. Federal anti-money laundering laws are meant to prevent criminal organizations from using the financial system to their pecuniary benefit.<sup>182</sup> Proceeds from illegal sales of federally controlled substances continue to make up a substantial portion of the funds being illicitly “washed” through the financial system.<sup>183</sup> Unlike other regulated substances like alcohol or cigarettes, marijuana itself is a federally illegal substance with both national and state-based black markets worth billions of dollars.<sup>184</sup> Thus, criminal organizations may still financially benefit from illicit marijuana sales whose proceeds are funneled through the American financial system. By requiring banks to ensure that the MRBs they work with are compliant with applicable state laws, or risk regulatory action, the Act will ensure that marijuana proceeds flowing through our banks originate from legal sources.

Although this due diligence burden may be onerous for some banks, the estimated rate of growth of the cannabis market, and

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<sup>180</sup> *See id.*

<sup>181</sup> *See* Frank Tice and Jack Meadows, *Temper Your Expectations on Cannabis Banking Reform: foreseeable pitfalls of the SAFE Banking Act*, PORTER WRIGHT MORRIS & ARTHUR LLP (Oct. 28, 2019), <https://www.lexology.com/library/detail.aspx?g=849ecc60-c158-4c80-8c6c-40d045a20764>.

<sup>182</sup> *See* Michael Held, *The First Line of Defense and Financial Crime*, FED. RESERVE BANK OF NEW YORK (Apr. 2, 2019), <https://www.newyork-fed.org/newsevents/speeches/2019/hel190402> (discussing how the U.S. financial system is “used to facilitate many types of crime,” and that the anti-money laundering laws are utilized to combat drug traffickers from abusing the system).

<sup>183</sup> *Id.* (“According to the United Nations Office on Drugs and Crime, the amount of money laundered globally in one year could be as much as \$2 trillion.”).

<sup>184</sup> *See* Will Yakowicz, *Illegal Pot Sales Topped \$46.4 Billion in 2016, and That’s Good News for Marijuana Entrepreneurs*, INC. (Jan. 17, 2017), <https://www.inc.com/will-yakowicz/marijuana-sales-2016-50-billion.html> (discussing a report which stated that “black market marijuana sales made up [eighty-seven] percent of all pot sales across North America in 2016,” amounting to “\$46.4 billion in sales.”); *see also* Sean Williams, *California’s Cannabis Black Market Is Insanely Larger Than Its Legal Market*, THE MOTLEY FOOL (Sept. 14, 2019), <https://www.fool.com/investing/2019/09/14/californias-cannabis-black-market-is-insanely-larg.aspx> (discussing the “\$8.7 billion in black market [marijuana] sales [in California] projected for 2019.”).

the Act's elimination of a significant portion of the risks involved, should spur growth in the number of financial institutions working with MRBs. In the run-up to the House's passing the Act, several of the nation's largest financial institutions, as well as groups like the American Bankers Association, engaged in significant lobbying efforts to promote the Act.<sup>185</sup> Banks seeking to become involved in the cannabis industry have already contacted financial institutions currently providing services to MRBs, with large multi-national firms showing keen interest.<sup>186</sup> Because these larger institutions have more resources at their disposal, and more sophisticated legal counsel, the Act's due diligence requirements will likely be less onerous for them to comply with.

The primary reason these institutions have not become involved in the industry as of yet is the continued risk of federal regulatory action; but, if the Act becomes law, these larger and more conservative institutions will have sufficient legal cover to justify entry into the cannabis market.<sup>187</sup> With the cannabis market estimated to grow to over \$40 billion by 2024,<sup>188</sup> larger financial institutions will want to be in on the ground floor to offer investment opportunities to MRBs that may eventually trade on U.S. stock exchanges.<sup>189</sup> Although some smaller financial institutions may not be able to shoulder the Act's due diligence burdens, the entrance of larger institutions into the market will likely yield a net positive in the rate of participation by banks in the cannabis industry. Also, smaller institutions can limit the amount of MRBs they work with, curating select clientele so as to limit their burdens and maximize profit.

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<sup>185</sup> See Jeremy Borden & Nushin Rashidian, *Which Big Banks Are Thinking About the SAFE Banking Act?*, CANNABISWIRE (Apr. 24, 2019), <https://cannabiswire.com/2019/04/24/which-big-banks-are-thinking-about-the-safe-banking-act/> (including institutions such as Wells Fargo, Citigroup, Paypal, Prudential, Nationwide, and HSBC North America).

<sup>186</sup> See Nick Thomas, *Big Banking Shows More Interest in Serving Cannabis Clients After Recent SAFE Act Passage by US House*, MARIJUANA BUS. DAILY (Oct. 14, 2019), <https://mjbizdaily.com/big-banking-interest-serve-cannabis-clients-safe-banking-act-passage-u-s-house/>.

<sup>187</sup> See *id.*

<sup>188</sup> Don Jergler, *High Hopes, Higher Hurdles for Pro-Cannabis SAFE Banking Act*, INS. J. (Oct. 3, 2019), <https://www.insurancejournal.com/news/national/2019/10/03/544395.htm> (“[T]he industry is expected to grow exponentially – recent estimates have the cannabis market in North America reaching \$47.3 billion by 2024.”).

<sup>189</sup> See Thomas, *supra* note 186; see also Jergler, *supra* note 188.

In addition to the safe harbor provisions, the Act also mandates that FinCEN issue new guidelines regarding SAR filings. Under Section 6, financial institutions filing SARs on transactions involving CRLBs must do so in compliance with guidance issued by FinCEN.<sup>190</sup> The Secretary of the Treasury must ensure that the guidance issued “is consistent with the purpose and intent” of the Act and does not “*significantly inhibit*” banks’ ability to provide financial services to CRLBs and associated service providers.<sup>191</sup> The Act does not address FinCEN’s existing guidelines and whether they are significantly inhibitive.<sup>192</sup> However, the restrictive language in Section 6 that any guidance issued should not be “significantly inhibit[ive]” should lead to guidelines that make regulatory compliance less onerous for financial institutions wanting to participate in the industry, which is currently perceived as one of the biggest barriers to entry.<sup>193</sup>

The combined effect of each of these sections of the Act will substantially alleviate the safety and transparency concerns that MRBs and governments respectively face in the current banking environment for the cannabis market. If MRBs are able to store their cash proceeds at banks and utilize non-cash options for payment, then they will become less tempting targets for criminals who would no longer be able to count on MRBs keeping large amounts of cash on-premises. This will reduce crime rates for MRBs and result in an overall improvement in public safety. Additionally, increased banking access for MRBs will make their operations more transparent and facilitate easier taxation. Banking records will make MRBs easier to audit, result in more accurate tax payments by MRBs, and reduce the amount of cash that state tax departments and the IRS have to handle. These increased tax

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<sup>190</sup> See Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 6.

<sup>191</sup> See *id.* (emphasis added).

<sup>192</sup> See Tice & Meadows, *supra* note 181.

<sup>193</sup> See Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 6; See Thomas, *supra* note 186 (“I don’t think (the U.S. House vote) changes that much,” Dave Rodman, founder of Denver-based cannabis specialists The Rodman Law Group told Marijuana Business Daily. “The reason for that is very onerous compliance (under FinCEN).”).

payments can then be directed to numerous public works, such as education and community programs, which Colorado currently does.<sup>194</sup> In sum, the SAFE Act will directly improve communities by fundamentally changing the current banking environment for MRBs across the country.<sup>195</sup>

## CONCLUSION

MRBs' lack of access to basic banking services, which forces them to operate as all-cash businesses, will continue to cause public safety and transparency problems for those states with legalized cannabis markets. Federal legislation, in the form of the SAFE Act, will ensure that financial institutions across the country can confidently offer their services to state-legal MRBs, without relying on the discretion of federal banking regulators and prosecutors, and thus alleviate the public safety and transparency issues posed by MRBs operating on an all-cash basis.

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<sup>194</sup> See *Marijuana Tax Revenue and Education*, COLO. DEPT OF EDUC., <https://www.cde.state.co.us/communications/2019marijuanarevenue> (Jun. 12, 2019) (showing marijuana tax revenues earmarked for the Colorado Department of Education since 2015, including \$90.3 million in fiscal year 2017-2018, as well as the specific programs contributed to).

<sup>195</sup> One other positive aspect of the SAFE Act that should be mentioned is in Section 9 of the Act, entitled "GAO study on diversity and inclusion." Secure and Fair Enforcement Banking Act of 2019, *supra* note 22, at § 9. Section 9 mandates that the Comptroller General "carry out a study on the barriers to marketplace entry, including in the licensing process, and the access to financial services for potential and existing minority-owned and women-owned cannabis-related legitimate businesses." *Id.* at § 9(a). Afterwards, the Comptroller General must issue a report to Congress with "regulatory or legislative recommendations for removing barriers to marketplace entry . . . for potential and existing minority-owned and women-owned cannabis-related legitimate businesses." *Id.* at § 9(b)(2). This Section should help to address justifiable concerns in minority communities that, despite bearing a heavy share of the costs of the War on Drugs, they have not been given equal opportunity to participate in the new booming marijuana industry. See *Marijuana Reform in New York: Diversity and Inclusion in the Marijuana Industry*, DRUG POLY ALLIANCE (Sept. 2017), [http://smart-ny.com/wp-content/uploads/2017/06/StartSMART\\_DPA\\_NY\\_Marijuana\\_Reform\\_Diversity\\_Inclusion\\_09.14.2017.pdf](http://smart-ny.com/wp-content/uploads/2017/06/StartSMART_DPA_NY_Marijuana_Reform_Diversity_Inclusion_09.14.2017.pdf); Kristen Clarke, *Cannabis Industry Shouldn't Expand Until We Fix Marijuana's Racial Inequities, Injustices*, USA TODAY (Feb. 22, 2019), <https://www.usatoday.com/story/opinion/2019/02/22/marijuana-legalization-exposes-cannabis-industry-racial-injustice-incarceration-minorities-column/2836449002/>.