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CANNABIS CREDIT

SAFER Banking Is Only the First Step on a Long Road

Senate Committee Vote a Symbolic Milestone

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SPECIAL TO BANKER & TRADESMAN



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The cannabis industry cheered as The Secure and Fair Enforcement Regulation Banking Act, commonly known as the SAFER Banking Act, was approved 14-9 in the Senate Banking Committee Sept. 27 to advance to a full vote by the U.S. Senate. While a version of this bill previously had been passed by the House of Representatives seven times, this was the first time that a Senate committee sent backed a version of the legislation and sent it to the full Senate for its vote.

The SAFER Banking Act provides a safe harbor from civil and criminal prosecution for banks and credits unions to offer banking services to the cannabis industry and provides similar protections to the Federal Reserve banks, the federal home loan banks and insurers for transacting with state-licensed operators.

If passed, it would be the first concrete step that the U.S. Senate has taken to normalize aspects of the cannabis industry. Currently, 38 states permit license-holders to sell cannabis, whether medical or adult-use, resulting in over \$25 billion in annual U.S. revenues.

While important for the industry, the bill is not as revolutionary as it seems. There are already hundreds of banks and credit unions that have been providing depository, lending services or both to state-licensed cannabis dispensaries. Almost all licensed, compliant cannabis operators should be able to obtain banking services. Thus, one might ask, is the bill even needed? The answer is “yes.”

What's Missing

Although a step in the right direction, the SAFER Banking Act is not a comprehensive piece of cannabis reform legislation. It does not make cannabis federally legal. The present version of the bill also does not: address social equity concerns, provide a safe harbor for uplifting to the U.S. stock market, mandate financial institutions to offer services to any and all licensed cannabis operators or require major credit card companies to allow their credit cards to be used for the purchasing of cannabis or cannabis-related products, although the present iteration does seem to provide some “cover.”

Neither does it eliminate the harsh impact of the U.S. tax code, which prohibits operators from taking most business deductions other than cost of goods sold, nor does it do away with the enhanced due diligence and continuous monitoring that banks/credit unions must undergo to bank the industry.

The passage of the SAFER Banking Act may be seen as symbolically important to the industry.

Just as many financial institutions have policies not to bank or lend to companies in the adult entertainment or gun industries – both federally legal – so it should not be surprising if many banks wait to service the industry until marijuana is federally legal.

Despite the legislation's shortcomings, this is still progress for the industry. For example, presently, when our firm advises financial institutions considering establishing a cannabis banking or lending program, a director inevitably will ask whether they could face potential criminal liability for approving such a program.

Continued on Page 2

Our answer to date has been “yes,” as technically the federal Department of Justice could bring criminal charges for aiding and abetting a violation of the Controlled Substance Act, even though no such charges have been filed to date to our understanding. The SAFER Banking Act’s passage would address this concern directly, alleviating bank directors’ and bank officers’ concerns about being arrested.

Bill Has Benefits

The SAFER Banking Act should allow for more liquidity to enter the marketplace, however, with more financial institutions lending to credit worthy operators and the potential opening of federal loan assistance programs, like those run by the Small Business Administration, to the industry. This legislation should also

bring down the cost of banking cannabis operators, which in the past had been expensive due in part to the lack of competition.

Questions remain whether the passage of the bill would allow licensed entities access to U.S. bankruptcy court protection, whether it could be a factor in the rebound of the mostly moribund cannabis equities markets, or whether it could revive the presently dormant M&A market due to increased liquidity. All are potentially possible results of the passage of the SAFER Banking Act, although until the final version is released, we still are making some educated guesses.

There are likely other beneficial results benefiting the industry from the passage of the bill but the largest benefit may be the increasing legitimization of the industry as reflected by congressional approval of pro-cannabis legislation.

Although cannabis operators generally can obtain banking services, the passage of the SAFER Banking Act may be seen as symbolically important to the industry. While advocates are lobbying for more comprehensive cannabis reforms, the bill provides a foundation for further legislative changes to propel the industry forward. The cannabis industry is not asking for special treatment – it wants to be treated like any other emerging industry with basic business protections. Passage of the SAFER Banking Act provides the first federal step to achieving this goal. ◀

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