wm policy

# Banking the U.S. Cannabis Industry

## The cannabis industry's lack of access to financial services has grown from a niche issue impacting a handful of states into a national issue impacting dozens—in fact, a majority—of states in the U.S.

Whereas a mere two states had adult-use cannabis laws on the books in 2012, eighteen states and the District of Columbia had adopted adult-use cannabis laws as of April 2021. Moreover, there are thirty-six states—representing over two-thirds of the U.S. population—with medical cannabis laws.[1] In short, the cannabis industry's lack of access to banking and financial services is no longer a peripheral issue; it is a mainstream issue that has ramifications for the vast majority of America. This issue will only become more problematic as additional states adopt medical and adult-use cannabis laws.

## With the increased adoption of medical and adult-use cannabis laws across the U.S., the cannabis industry is projected to grow considerably in the coming years.

The industry's expansion will only further aggravate the challenges posed by federal regulations that prohibit access to banking and financial services for cannabis industry participants and ancillary service providers, such as those lending insurance, legal, government relations and traditional business support consultants. In 2017, the U.S. cannabis industry generated $8.5 billion in sales, and this figure is projected to grow dramatically. According to Arcview Market Research and BDS Analytics, America's cannabis industry is expected to generate $23.4 billion in sales by 2022.[2] If all 50 states legalized adult-use cannabis, total U.S. industry sales would eventually reach upwards of $55 billion.[3] As a point of comparison, in 2017 McDonald's and Starbucks generated $22.8 billion and $22.4 billion in companywide sales, respectively.[4] As another point of comparison, American households spent $23.8 billion on milk and $12.4 billion on eggs in 2017.[5] Placing the U.S. cannabis industry's current and future size into perspective underscores how acute the need for access to banking and financial services truly is.

## The federal government's cannabis policies are the primary reason why the cannabis industry cannot access banking and financial services.

There are several federal policies that prevent financial institutions from servicing the regulated cannabis industry. Chief among these are the Controlled Substances Act (CSA), the Bank Secrecy Act (BSA), the USA Patriot Act, and the Racketeer Influenced and Corrupt Organizations (RICO) Act. Until the federal government removes cannabis as a Schedule I substance and/or adopts incremental reforms that provide clarity to financial institutions and parity in regulatory compliance to other business types banked by these institutions, the cannabis industry will continue to languish outside of the mainstream, established financial system.

## The cannabis industry's lack of access to banking and financial services poses public safety issues for a broad range of stakeholders.

The industry's reliance on cash transactions makes businesses, industry employees, medical patients, adult-use consumers, and the broader public vulnerable to violence and crime. Despite stringent security requirements for dispensaries, they remain an attractive target for robberies primarily due to the unprecedented amounts of cash on hand. The best way to control crime and threats to public safety is to take cannabis cash off the streets by opening avenues to legitimate banking services to the industry.

- In 2012, a cannabis business owner was kidnapped, tortured, and left for dead in the Mojave Desert when the thieves incorrectly believed he had buried money in the desert.[6]
- In 2014, a cannabis delivery driver was robbed and beaten with a gun in Lake Forest, California.[7]
- In 2015, a security guard for a medical marijuana dispensary in Anaheim, California was forced to shoot and kill a burglar.[8]
- In 2016, a former marine was shot in the head and killed as he guarded a dispensary in Aurora, Colorado. It was his second week on the job.[9]

According to a public policy study done by researchers at the Wharton School of the University of Pennsylvania, one in two cannabis dispensaries were robbed or burglarized in Denver in 2015. The average thief could walk away with anywhere from $20,000 to $50,000 from a single act. Mitch Morrissey, district attorney of Denver, sees the reasoning behind the robberies stating, "You hit a 7-Eleven, you'll get 20 bucks. You hit a dispensary, you'll get $300,000 on a good day."[10] Don Murphy, the director of federal policies for the Marijuana Policy Project stated, "Depriving state-legal cannabis businesses of basic banking services and forcing them to operate entirely in cash presents a significant safety risk, not just to those businesses and their employees, but to the public."[11]

## The lack of access to banking and financial services poses a major burden on the cannabis industry and its affiliates.

Industry reports indicate that as many as 70 percent of cannabis businesses lack bank accounts.[12] This means that the vast majority of business owners are burdened with the task of having to pay their employees, contractors/vendors, utility bills, and taxes all in cash.[13] The situation is so burdensome that, as an example, one cannabis business owner in Denver, CO routinely carries upwards of $20,000 of cash around in duffle bags every month just to operate her business.[14] This has implications for the industry's rapidly growing workforce.

- According to Arcview Market Research and BDS Analytics, the cannabis industry directly employed 120,000 workers in 2017.[15] That's more than twice the number of workers employed by the U.S. coal industry, which employed 53,051 workers that same year.[16]
- By 2022, the cannabis industry is projected to employ 330,000 workers.[17] That's more than the 268,000 iron and steel mill workers employed last year.[18]

Expecting such a significant portion of the American workforce to be paid in cash on account of the industry's lack of banking access, is extremely burdensome. This also has implications for small businesses seeking to enter and thrive in this emerging industry. Until cannabis businesses have standard access to the U.S. financial sector, participation in this industry will largely continue to be reserved for high net worth individuals and those with access to venture capitalists and angel investors. Opening up the cannabis industry to standard business loans via credit unions and other FDIC-insured banks will broaden both equity and market participation in this burgeoning multi-billion dollar sector.[19]

## The lack of access to banking and financial services poses burdens upon all levels of government.

All levels of government struggle to find effective and safe ways to collect massive amounts of taxes in cash due to the lack of proper banking and financial services. At the federal level, as CNBC reports, "the volume of payments coming into the IRS from the legal cannabis industry has prompted the IRS to increase cash-counting capability in Denver and Seattle."[20] At the state level, the cannabis industry is generating hundreds of millions of dollars in state and local tax revenue each year.[21] The burden such an enormous influx in cash has placed upon state tax agencies is so severe that governments have remodeled field offices and used armored cars to enhance security, among other measures.22 Auditing also becomes extremely difficult, unreliable, and cumbersome for both the public and private sectors since there is a lack of a digital “paper trail.”[23]

## Federal policies inhibit financial institutions from engaging this growing, multi-billion dollar sector.

Under the previous Administration in 2013 and 2014 respectively, federal regulators from the U.S. Department of Justice and the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) issued the Cole Memo and what has simply become known as the FinCEN guidance. These two policies provided U.S. financial institutions with a degree of clarity as to how they could service the U.S. cannabis industry while concurrently adhering to federal law.

However, many financial institutions felt that additional policies were needed to further protect against federal repercussions for servicing cannabis businesses. Others are refraining from providing services to cannabis businesses due to the elevated costs associated with meeting the overly burdensome regulatory reporting requirements financial institutions must adhere to under the FinCen guidance. For example, FinCen requires financial institutions banking cannabis businesses to submit a suspicious activity report to the U.S. Treasury Department every 90 days, regardless of whether or not the cannabis business has breached any compliance obligations required by the states in which they are operating.

With the subsequent repeal of the Cole Memo in January 2017, financial institutions are even more reluctant to service the cannabis industry. As such, among the 12,000 financial institutions in the United States, only 400 are currently transacting with the cannabis industry for fear of federal intervention.[24] This means that only 0.03% of banks and credit unions are working to bring the cannabis industry into the U.S. financial system.[25] This has been a major point of concern for the American Bankers Association, which in a recent issue brief, asserted that “the time has come for Congress and the regulatory agencies to provide greater legal clarity to banks operating in states where marijuana has been legalized for medical or adult use.”[26]

## States are experimenting with short-term solutions; however, federal action is critical.

In states that have adopted adult-use cannabis laws, policymakers have explored potential stop-gap solutions to this pressing policy issue. As an example, in California, policymakers considered launching a public bank for servicing the cannabis industry, but that effort has not made significant progress on account of both the fiscal and legal challenges brought upon by restrictive federal policies.[27] Until the federal government passes meaningful reform, the cannabis industry’s challenges surrounding access to banking and financial services will persist.

## Federal lawmakers have introduced the SAFE Act (HR 1595) to address the financial services access gap for commercial cannabis businesses.

In March 2019 Colorado Congressman Ed Perlmutter introduced the SAFE Act (HR 1595), legislation designed to protect U.S. financial institutions and their employees from federal regulatory enforcement for providing banking services to cannabis businesses. The legislation was approved by the House Financial Services Committee in late March and was amended favorably to extend protections beyond commercial banks to credit unions, de novo banks and insurance providers. The bill is expected to take on additional reforms before it is packaged into a manager’s amendment ahead of House floor consideration.

The bill would ensure that Massachusetts cannabis businesses could access traditional financial service products offered by commercial banks and credit unions, reducing burdens on state and local governments and cannabis businesses in the Commonwealth and improving public health and safety outcomes in communities. However the legislation is not without flaws in design. For example the bill's provisions pertaining to reducing FinCEN's regulatory burdens on financial service provides to the U.S. cannabis industry are not well articulated, and as such do not adequately reduce this burden in a sufficient manner to motivate financial institutions to bank cannabis businesses. While the measure would convene federal banking regulators to address regulatory compliance challengers presented by the 2014 guidance, it does not present any specific solutions or guidance to regulators.

A noteworthy challenge to the bicameral congressional approval of the bill includes the position of the U.S. Department of Justice on cannabis, and the positions on cannabis policy reform held by leadership of the U.S. Senate and the Senate Banking Committee. For example, the U.S. Drug Enforcement Agency maintains cannabis as a Schedule I drug, making possession, use and sale of the substance illegal. This position makes it extremely unlikely that Senate majority leadership or the majority leadership of the Senate Banking Committee would permit cannabis businesses, who are cultivating, manufacturing, testing, distributing and retailing cannabis to secure legal access to U.S. financial institutions. Procedurally it would be optimal if the House and Senate Judiciary Committees approved legislation to de-schedule cannabis from the DEA schedule prior to or in concert with the SAFE Act. Barring that, or any attempts to deviate from regular order and bring the measure directly to the Senate floor, it is unlikely that the SAFE Act will secure House and Senate passage during the current congressional session.

## Related Legislation

In addition to the SAFE Act, legislation has been introduced in the House and Senate that aims to strike a balancing act between the actions already taken by 47 states to reform their cannabis laws and the federal government's existing policy position on cannabis. This legislation, the STATES Act (HR 2093/S 1028), would protect the authority of state governments to enact cannabis policy reforms by amending the Controlled Substances Act to exempt cannabis-related activities that comply with state and tribal laws. The legislation would also protect financial institutions that serve cannabis businesses.

While many states have implemented reforms, none have realized the performance of these reform models projected due in large part to concerns expressed by state lawmakers about the conflict of laws between states and the federal government on cannabis policy. The SAFE Act and the STATES Act are important pieces of legislation to support in assisting states realize meaningful reform.

# End Notes


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