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National Association of Federally-Insured Credit Unions

September 25, 2023

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing,
and Urban Affairs
U.S. Senate
Washington, D.C. 20510

The Honorable Tim Scott
Ranking Member
Committee on Banking, Housing,
and Urban Affairs
U.S. Senate
Washington, D.C. 20510

Re: Markup S.2860, Secure and Fair Enforcement Regulation (SAFER) Banking Act

Dear Chairman Brown and Ranking Member Scott:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only trade association exclusively representing the federal interests of our nation's federally-insured credit unions, I write to share our thoughts on the bipartisan, S. 2860, *Secure and Fair Enforcement Regulation (SAFER) Banking Act*. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 138 million consumers with personal and small business financial service products. We appreciate the Committee tackling this important issue.

As you are aware, the vast majority of states have authorized varying degrees of marijuana use, ranging from limited medical use to decriminalization and recreational use. NAFCU has heard from a number of our member credit unions in these states that their members are being approached by small businesses in the legal cannabis industry seeking financial services. The risks associated with a lack of access to financial services, including deposit accounts, are too high.

As the cultivation, sale, distribution, and possession of marijuana remains illegal at the federal level under Schedule I of the *Controlled Substances Act*, the majority of credit unions remain hesitant to provide financial services to these members and their small businesses. While the 2013 memo from U.S. Deputy Attorney General James M. Cole ("Cole Memo") and the 2014 guidance from FinCEN have attempted to provide clarity to financial institutions, uncertainty remains for financial institutions in this area. Guidance can be rescinded at any time and in fact, former Attorney General Jeff Sessions took action in 2018 to essentially rescind the "Cole Memo."

For financial institutions, such as credit unions, there are additional regulatory challenges that compound the uncertainty of providing financial services to state-authorized marijuana-related businesses (MRBs). These go beyond just concerns about criminal or civil penalties, but also extend to requirements related to proper Suspicious Activity Report (SAR) and anti-money laundering (AML) filings as required under the *Bank Secrecy Act*, access to federal deposit insurance and a Federal Reserve master account, and even potential issues with the Internal Revenue Service (IRS). Missteps in these areas could prove devastating to an institution. It should be noted that these risks also exist when providing financial services to ancillary businesses that provide products and services to MRBs and fall within the credit union's field of membership, even if the state-authorized MRB does not.

NAFCU does not have, and is not taking, a position on the broader question of the legalization or decriminalization of marijuana to any degree at the federal or state level. However, we do support Congress taking the steps found in the SAFER Banking Act, a revised version of legislation to provide greater clarity and legal certainty at the federal level for financial institutions to provide services marijuana-related businesses (MRBs) in states that have legalized marijuana.

NAFCU supports the intent of this bill, but we are concerned that the new language in the base text could be read to dramatically increase regulators' authorities and discretion, which could have a significant impact on credit unions. We are pleased to see that there have been amendments filed to address these issues. We encourage the Committee to review our concerns regarding Section 10 and address them at markup while moving this legislation forward.

The following is a summary of our top concerns and suggestions regarding section 10.

- The new language in the base text for 10(f)'s creates rulemaking requirements that are overly broad and appears to give regulators new authority and broad discretion to determine ways in which financial institutions should engage with consumers to "increase access." While we don't think it is the intent of the sponsors, left unchanged this language could open the door for increased regulatory burdens and regulator overreach. We support amendments to strike or clarify this provision.

- New 10(b)(2)(A)(ii) is a catch-all provision that would allow regulators to have "another reason" that they determine to be valid, at their discretion for making a request to terminate a deposit account. We are concerned that this is overly broad and could certainly lead to some creative decisions from banking regulators. Termination decisions should only be based on violations of the law, unsafe or unsound practices, or violations of exam-related issues.

- 10(c)'s notice requirement leaves a lot to the direction of regulators, which also could lead to varying notice requirements across the banking regulators. There should at least be a requirement that the banking regulators provide a consistent notice requirement.

- The National Credit Union Administration (NCUA) should be added to biennial survey in Section 10(g) on accessing deposit accounts for businesses.

NAFCU supports the overall goals of the SAFER Banking Act, to provide a safe harbor for financial institutions that wish to serve such businesses and to improve clarity by addressing what is often perceived as misalignment between federal and state laws and is pleased to see this legislation advance. However, NAFCU urges the committee to adopt amendments that make the necessary changes to Section 10 and to adopt any amendment filed during the markup that would help to improve the bill and alleviate our concerns.

Thank you for your attention to this important issue. We look forward to continuing to work with you on this and other issues of importance to credit unions. Should you have any questions or require any additional information, please do not hesitate to contact me or Amber Milenkevich, NAFCU's Senior Associate Director of Legislative Affairs, at amilenkevich@nafcu.org.

Sincerely,

Brad Thaler

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the U.S. Senate Committee on Banking, Housing, and Urban Affairs