MARIJUANA BANKING
ISSUE BRIEF

NAFCU
National Association of Federally-Insured Credit Unions

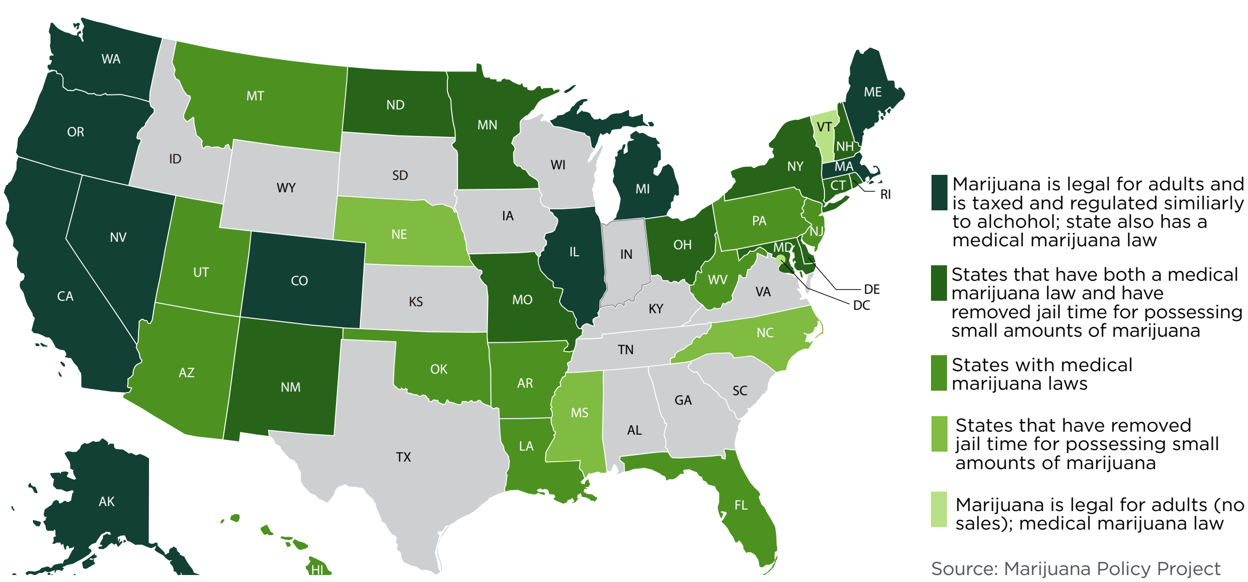
BACKGROUND

If it were legalized today, the marijuana industry is projected to be worth upwards of $28 billion. Medical marijuana is now legal in 33 states and 11 states have legalized recreational marijuana, although Vermont and Washington D.C. prohibit the sale of marijuana. Some states, including North Carolina, Mississippi, and Nebraska, have decriminalized marijuana. Illinois is the first state to legalize recreational marijuana sales through successful state legislation versus a voter referendum. This could put pressure on neighboring Midwest states to legalize or decriminalize marijuana. Other states, including New Jersey and New York, have attempted to pass state legislation for recreational marijuana but have been unsuccessful thus far. Sufficient signatures were collected in Mississippi and South Dakota to qualify a medical marijuana initiative in 2020. Additionally, sufficient signatures were collected in South Dakota to qualify a recreational initiative in 2020. Both Florida and Arizona are working towards obtaining the required signatures necessary for a 2020 ballot measure legalizing recreational marijuana. Therefore, we may see additional states legalize both recreational and medical marijuana in 2020.

Despite varying levels of legalization at the state level, marijuana continues to be illegal at the federal level. Marijuana is categorized as a Schedule I substance under the *Controlled Substances Act* (CSA); defined as having no currently accepted medical use and a high potential for abuse or misuse. Besides the CSA, there are additional criminal provisions under federal money laundering statutes, unlicensed money remitter statutes, and the *Bank*

Marijuana Laws in the US

Note: Vermont and Washington, DC, do not allow marijuana sales for recreational purposes



Source: Marijuana Policy Project

Secrecy Act (BSA). To illustrate, any financial transaction involving proceeds generated by "marijuana-related conduct" could subject a credit union to prosecution under the money laundering statutes, the unlicensed money transmitter statutes, and the BSA. Further, if a credit union makes transactions by or through a money transmitting business where the funds were "derived from" marijuana-related activity, then that could be the basis of prosecution under the unlicensed money transmitter statues. The conflicts between current state and federal laws leave credit unions uncertain whether they should provide services to marijuana-related businesses (MRBs). In 2017, it was estimated that one-third of marijuana businesses could not obtain a bank account.

HEMP BANKING

Although hemp is derived from the marijuana plant, the two are treated differently under the law, and the broader discussion of marijuana banking includes both marijuana and hemp. In the context of marijuana banking, it is important to look at the legislative and regulatory changes regarding hemp. Prior to the beginning of the 116th Congress, the *Hemp Farming Act* was included as part of the Agricultural Improvement Act of 2018 (2018 Farm Bill), with the support of Senate Majority Leader Mitch McConnell, and was passed and signed into law in December 2018. This included an important change to the CSA, removing hemp-derived products from Schedule I substance classification under the CSA. The definition of "marijuana" previously included hemp and hemp byproducts such as cannabidiol (CBD). This change now allows hemp cultivation, the transfer of hemp-derived products across state lines for commercial purposes, and imposes no restrictions on the sale, transport, or possession so long as the hemp is produced in a manner consistent with the law.

Before the 2018 Farm Bill, hemp could only be produced under federal law if part of an industrial hemp pilot program as prescribed by the Agricultural Act of 2014 (2014 Farm Bill). Some State and Tribal laws may still prohibit the production or possession of hemp, but as a result of changes in federal law, may not prohibit the interstate transportation or shipment of lawful hemp or hemp-derived products pursuant to the 2018 Farm Bill or 2014 Farm Bill.

Although legalized, hemp will remain regulated, imposing restrictions such as a THC threshold level that cannot exceed more than 0.3 percent, and states will possess the power over licensing and regulation with the assistance of the United States Department of Agriculture (USDA). Further, any CBD that is hemp-derived may also be legal under this definition, but those that are not hemp-derived would remain illegal as a Schedule I substance. This legislative change illustrates the possibility of further modification of the definition of marijuana in the CSA and could signal a change in Congress's appetite in providing clarity on marijuana policy.

LEGISLATIVE OUTLOOK

NAFCU is not taking, and will not take, a position on the broader question of legalization or decriminalization of marijuana at the state or federal levels. However, NAFCU does support legislative steps to provide clarity and legal certainty to the question of whether financial institutions may safely allow state-authorized MRBs to have access to their services. Legislation from the 115th and 116th Congresses that addresses these issues in part includes, but is not limited to:

- **H.R.1595 – Secure and Fair Enforcement (SAFE) Banking Act.** This bipartisan bill, by Reps. Ed. Perlmutter (D-CO), Denny Heck (D-WA), Steve Stivers (R-OH), and Warren Davidson (R-OH), would align federal and state laws concerning MRBs and their access to banking services by prohibiting federal banking regulators from engaging in adverse actions against financial institutions. The 115th Congress introduced a similar bill, but did not hold a hearing or mark-up. On February 13, 2019, the House Financial Services Subcommittee on Consumer Protection and Financial Institutions held a hearing on a draft of the bill, and the full Committee held a mark-up and reported the bill on March 26, 2019. Senators Jeff Merkley (D-OR) and Cory Gardner (R-CO) introduced a Senate version of the legislation (S. 2100) on April 11, 2019.

  - The SAFE Banking Act has garnered support from state Attorneys General and governors. On May 8, 2019, a group of 38 bipartisan state Attorneys General asked members of Congress to advance the SAFE Banking Act. On June 13, 2019, a group of 20 bipartisan governors also asked members of Congress expressing their support of the SAFE Banking Act.

  - On May 24, 2019, the Congressional Budget Office (CBO) released a cost estimate projecting that H.R. 1595 would provide a $4 million net decrease in direct federal spending, and decrease the federal deficit by $2 million over the next 10 years. Additionally, the CBO projects insured deposits at credit unions to increase by $100 million by 2022 and $350 million by 2029.

  - On September 25, 2019, the House passed the SAFE Banking Act 321-103. The bill came to the House floor via suspension, needing a two-thirds vote to pass. Language was added to include hemp banking given the federal legalization, and provision to prevent financial institutions from discriminating against legal marijuana and hemp businesses. The legislation now awaits action in the Senate.

- **H.R. 3884 – Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019.** Introduced during the 116th Congress, this bill is the only bill to decriminalize marijuana at the federal level by removing it from the CSA. The bill includes provisions for the expungement of records of previous marijuana convictions, and reinvestment of tax revenue in certain communities. In November 2019, the bill passed the House Judiciary Committee. Senator Kamala Harris (D-CA) introduced S. 2227, a Senate companion bill.
- **S.421 – the Responsibly Addressing the Marijuana Policy Gap Act of 2019.** Introduced by Senate Finance Committee Ranking Member Ron Wyden (D-OR), this bill includes, among other things, a section dedicated to legislative protections for financial institutions doing business with MRBs similar in fashion to the SAFE Banking Act.
- **S.1028 – the Strengthening the Tenth Amendment Through Entrusting States (STATES) Act.** Introduced during the 115th Congress by Sens. Cory Gardener (R-CO) and Elizabeth Warren (D-MA) and Reps. Earl Blumenauer (D-OR) and David Joyce (R-OH), this bicameral and bipartisan bill would exempt federal enforcement against individuals acting in compliance with state laws. Additionally, to address financial issues caused by federal prohibition, the bill states that compliant transactions are not trafficking and do not result in proceeds of an unlawful transaction. Senators Warren and Gardner have reintroduced the STATES Act in the 116th Congress. A House version of the bill, H.R. 2093, has also been introduced.

NAFCU has not endorsed a specific legislative proposal, but we do support Congress examining what legislative steps can be taken to provide greater flexibility and legal certainty at the federal level for credit unions that choose to provide financial services to state-authorized MRBs and ancillary businesses in states where such activity is legal. Although not a total solution, a strong safe harbor for financial institutions that wish to serve such businesses would be one-step toward improving clarity and addressing what is often perceived as misalignment between federal and state laws. We are pleased to see legislation that takes steps toward this goal; however, Congress should continue to examine all possible solutions in this area.

POLITICAL LANDSCAPE

Marijuana banking is a polarizing issue that has yet to gain overwhelming support in Congress. To date, there has not been a serious effort at the federal level to remove marijuana from its Schedule I classification under the CSA. The most serious effort is the recent passage of the SAFE Banking Act in the House, which narrowly focuses on assisting banking MRBs. Previous, more narrow, efforts to assist MRBs have not been successful. In June 2018, the Senate Appropriations Committee, in a 21-10 vote, tabled an amendment to a broader budget bill that would have shielded from liability financial institutions that open accounts for MRBs that are complying with state laws. Around the same time, the House Appropriations Committee defeated a similar marijuana banking proposal. This legislative advance was possible, in part, to Democratic control of the House. With Democratic control of the House, the odds have increased that we may see legislation advance that could provide a safe harbor for financial institutions to serve MRBs or provide greater clarity on marijuana policy at the federal level as it impacts states that have legalized marijuana to varying degrees.

The House's bipartisan passage of the SAFE Banking Act seems to have put pressure on Senate Banking Committee Chairman Mike Crapo. Chairman Crapo outlined the committee's agenda for the 116th Congress, and marijuana banking was noticeably absent. In April 2019, Chairman Crapo stated that it was difficult to resolve the issue of marijuana banking as long as marijuana remained illegal under federal law and that the DOJ needed to resolve the issue before Congress. On July 23, 2019, the Senate Banking Committee held its first hearing regarding access to financial services for MRBs. Chairman Crapo was the only Republican committee member in attendance. While recognizing the need for resolution of banking MRBs, Chairman Crapo also raised concerns regarding risks for money laundering and difficulties in regulating marijuana.

Pivoting from his earlier stance, Chairman Crapo later stated he wanted to vote on legislation that would enable financial institutions to serve MRBs. However, in December 2019, Chairman Crapo issued a press release re-affirming his opposition to legalizing marijuana at the federal level as well as his opposition to the SAFE Banking Act as it was passed by the House. The press release outlined Chairman Crapo's concerns with the current legislation and called for public feedback on several issues, including: adding public health and safety solutions as a requirement for banks to do business with legally-operating state cannabis companies; preventing bad actors and cartels from using legacy cash and the financial system to disguise ill-gotten cash or launder money; updates to the 2014 FinCEN rulemaking and guidance; respecting States' rights in interstate commerce and banking; and eliminating "Operation Choke Point" and preventing future "Operation Choke Point" initiatives.

Despite Chairman Crapo's willingness to vote on legislation, the house-passed SAFE Banking Act may not be the mechanism that will enable financial institutions to serve MRBs. Chairman Crapo may introduce a separate bill that provides some of the considerations he raised. Alternatively, amendments could be made to the house-passed SAFE Banking Act.

Although the issue of marijuana banking garnered a lot of attention in 2019, it is unclear whether legislative relief will be passed and signed into law in 2020 given it is an election year. Furthermore, if there are changes leading to Democratic control of both chambers after the 2020 elections, legislation similar to the SAFE Banking Act would be a prime candidate for early action in 2021, if not enacted before then. Given the slow pace of federal legislation, several states have introduced legislation that allows for a safe harbor for banking MRBs.

REGULATORY LANDSCAPE

The regulatory landscape is constantly changing as the marijuana industry evolves and more states seek to legalize either medical or recreational marijuana use. Moreover, with the shifting of leadership at various agencies and departments of the executive branch, guidance has been both loosened and pulled back in recent years. This has created a patchwork of considerations to weigh for credit unions that are determining whether to offer financial services to MRBs. It is possible that a credit union may be unknowingly providing financial services to a MRB if their member is providing ancillary services or products to a MRB. The guidance governing MRBs affects credit unions broadly in this case, and not just those who expressly choose to service MRBs. The uncertainty of the regulatory environment creates complexities for credit unions, and barriers and instability for those MRBs seeking financial services.

A brief background and explanation of guidance from each agency is listed below.

Department of Justice & Financial Crimes Enforcement Network

In 2013, the Department of Justice (DOJ) issued guidance in what is commonly known as the "Cole Memo." The Cole Memo did not alter the criminality of marijuana or address marijuana banking, but instead laid out the enforcement objectives of the DOJ and attempted to reduce prosecution of marijuana offenses by determining a priority for those offenses. The DOJ outlined the following eight enforcement priorities:

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

Anything that falls outside of the DOJ's listed priorities would be handled by state and local law enforcement agencies, pursuant to their applicable state laws. This guidance was prompted, in part, by the legalization of marijuana at the state level; however, the guidance did not specifically address applicability to financial institutions, or financial crimes involving marijuana-related funds.

In 2014, the DOJ published a second Cole Memo addressing enforcement of money laundering and laws under the Bank Secrecy Act (BSA), including the filing of Suspicious Activity Reports (SAR). The second Cole Memo stated that if a financial institution or individual provided banking services to a MRB that engaged in any of the activities outlined in the eight priorities listed in the first Cole Memo, that financial institution or individual could be subject to federal prosecution. The second Cole Memo also emphasized that financial institutions that chose to serve MRBs in a state that is not compliant with state regulatory and enforcement systems, or operates in a state that lacks a clear and robust regulatory schedule, are at a greater risk for federal prosecution. Lastly, the DOJ reiterated that financial institutions must adhere to the Financial Crimes Enforcement Network (FinCEN) guidance issued concurrently with the second Cole Memo.

FinCEN issued guidance in 2014 regarding the BSA expectations for banking MRBs. This guidance included establishing best practices for customer due diligence (CDD), a SAR filing structure, and ways to identify MRB red flags. Issued concurrently with the second Cole Memo, and the two were intended to supplement one another. FinCEN's guidance provided that CDD for MRBs included:

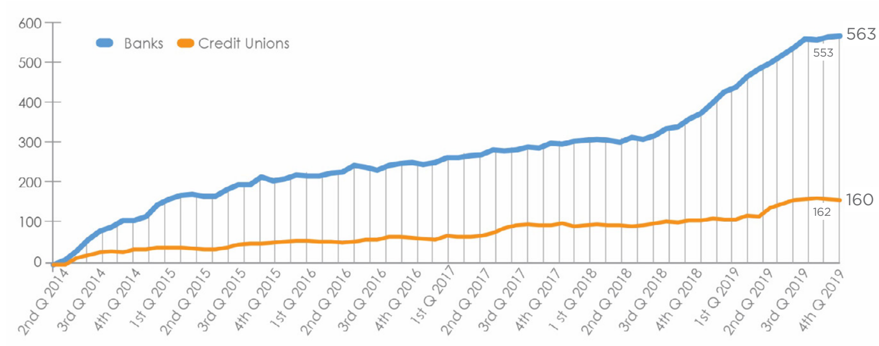
- Verifying with state authorities that the business is duly licensed and registered;
- Reviewing of the business license application and related documentation;
- Requesting from state licensing and enforcement authorities any available information about the business;
- Developing an understanding of the normal and expected activity for the business, including the types of products sold and types of customers served;
- Performing ongoing monitoring for suspicious activity; and
- Refreshing information as obtained as part of CDD on a periodic basis and commensurate with the risk.

FinCEN's guidance provided that BSA regulations require the filing of a SAR when a financial institution knows, suspects, or has reason to suspect that a transaction: (1) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (2) is designed to evade regulations promulgated under the BSA; or (3) lacks a business or apparent lawful purpose. SAR reporting for MRBs is categorized under three key phrases that denote the type of activity involved: (1) marijuana limited; (2) marijuana priority; and (3) marijuana termination. The filing of a SAR is required at the time of account opening and every 90 days thereafter. Those financial institutions that do not implicate one of the eight Cole Memo priorities should file a marijuana limited SAR. If a financial institution provides services to a MRB that does implicate one of the eight priorities, then the financial institution should file a marijuana priority SAR. In cases where a financial institution deems it appropriate to terminate a relationship with a MRB to effectively carry out its anti-money laundering compliance program, then the financial institution should file a marijuana termination SAR.

According to FinCEN's Marijuana Banking Update (dated September 2019), 723 depository institutions, including 160 credit unions, were providing banking services to MRBs as of September 30, 2019. This represents an increase of 8 total depository institutions, and for the first time a decrease in the number of credit unions (two total) providing banking services to MRBs since the previous Marijuana Banking Update in June 2019. The total number of depository institutions saw the slowest growth from June to September 2019. However, the total number of depository institutions providing banking services to MRBs has increased year-over-year, with a total of 486 depository institutions providing banking services in September 2018. This slow growth may in due, in part, to financial institutions waiting for the outcome on passage of the SAFE Banking Act.

Despite modest growth in the total number of depository institutions providing services, the volume of SARs filed continues to increase. FinCEN's data also indicated that it received a total of 102,807 SARs using the key phrases associated with MRBs. This equated to a 15 percent increase in SARs since June 2019. Of the total amount of SARs filed, 76,203 contained the phrase "marijuana limited," indicating that none of the eight Cole Memo priorities were involved; whereas, 7,821 SARs filed contained the phrase "marijuana priority," indicating that one of the eight Cole Memo priorities were implicated. The remaining SARs filed contained the phrase "marijuana terminated." Between 2014 and 2018, "marijuana limited" SAR filings saw the largest increase. This data illustrate that the majority of SARs filed do not implicate the Cole Memo enforcement priorities.

In January 2018, former U.S. Attorney General Jeff Sessions rescinded both Cole Memos and directed all U.S. Attorneys to use "previously established prosecutorial principles" for marijuana enforcement. Attorney General Sessions recognized the DOJ's finite resources and directed prosecutors to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.



Depository Institutions (by type) **Providing Banking Services to Marijuana Related Businesses**

(SARs filed through 30 September 2019)

Despite this rescission, FinCEN's 2014 guidance remains intact, leaving the industry to face an uncertain future because on the one hand, you have a financial regulator allowing the banking of a MRB, but on the other hand you could face federal prosecution by the DOJ.

To date, the DOJ has not taken action against a financial institution for banking a MRB after the rescission of the Cole Memos. Attorney Jeff Sessions resigned in November 2018, which could lead to new DOJ guidance regarding marijuana banking, and perhaps a re-installation of the previous Cole Memos. During his confirmation hearing, now Attorney General William Barr stated that he would uphold the Obama-Era Cole memoranda and not "go after" people and businesses that relied on the memoranda.

In written responses to questions from senators, Barr said that although he "has not closely considered or determined whether further administrative guidance would be appropriate," he would carefully consider the matter. He also called for the approval of more legal growers of marijuana for research purposes and noted that the *Hemp Farming Act* has broad implications for the sale of marijuana products across the country. Barr noted that to fully address the differences between state and federal marijuana laws, Congress must act and such legislative action, instead of administrative guidance, is "ultimately the right way to resolve whether and how to legalize marijuana." Barr's perspectives on the issue mark a substantial deviation from the Jeff Sessions DOJ's hard line approach to cracking down on marijuana and MRBs and could signal a return to the Obama-era "hands off" approach. Barr was confirmed as the new Attorney General on February 14, 2018, but until he takes action on this issue uncertainty still persists.

National Credit Union Administration

The NCUA has been largely silent on the issue of marijuana banking; however, on August 19, 2019, the agency published interim guidance on banking hemp businesses. The NCUA published the guidance in response to a request from Senate Majority Leader Mitch McConnell (R-KY), after he heard from Kentucky hemp farmers about difficulties obtaining financial services despite the legalization of hemp in the 2018 Farm Bill. The interim guidance informs credit unions that they may provide financial services for business accounts, including loans, to lawfully operating hemp businesses within their fields of membership. NAFCU expects updates to the interim guidance now that the USDA has published an interim final rule setting forth a regulatory framework.

In the interim guidance, the NCUA notes that providing services and accounts to hemp-related businesses is a business decision, and credit unions must ensure their BSA/AML programs are commensurate with the complexity and risks involved. The interim guidance lists several items that credit unions must incorporate into their BSA policies, procedures and systems if they plan to service hemp businesses, including: (1) proper due diligence procedures to help with SAR filings for suspicious activity; (2) awareness of state laws, regulations, and agreements pertaining to hemp-related businesses operating under the 2014 Farm Bill pilot provisions; and familiarity with other federal and state laws and regulations that may prohibit, restrict, or otherwise govern these businesses and their activity. The guidance points out that the production or possession of hemp may still be illegal under some State or Tribal laws.

Following the interim guidance, the NCUA updated its examination procedures. Serving hemp-related businesses is included in the NCUA's 2020 Supervisory Priorities; however, only to the extent that examiners will be collecting data through the examination process regarding types of services that credit unions are providing hemp and hemp-related businesses. As the NCUA updates the interim guidance we may see more comprehensive changes to examinations in this area.

Treasury Department

Although FinCEN is a bureau of the Treasury Department (Treasury), Treasury Secretary Steven Mnuchin has expressed that the Treasury is "reviewing the existing guidance" as the administration considers whether to revoke FinCEN's 2014 guidance. Mnuchin stressed the importance of not rescinding the guidance without a replacement policy in place. In addition, Mnuchin noted that the Treasury wants to ensure that it can collect necessary taxes on the profits of MRBs. In his February 2018 testimony before the House Financial Services Committee, Mnuchin addressed concerns regarding public safety as a result of unbanked MRBs: "I assure you that we don't want bags of cash." Further, Mnuchin noted in his February 2018 testimony before the House Ways and Means Committee that addressing MRBs access to banking remains at the "top of the list" of the department's concerns. Most recently, Mnuchin commented during an April 2019 House appropriations subcommittee hearing that "there is no regulatory solution to existing banking access issues for the marijuana industry," and he encouraged Congress to take a bipartisan approach to resolution.

Small Business Administration

Small businesses across the country may be providing products and services to MRBs either knowingly or unknowingly in an ancillary capacity. In an effort to address concerns raised, the Small Business Administration (SBA) issued SBA Policy Notice 5000-17057 in April 2018 regarding businesses involved with marijuana and their eligibility for SBA financial assistance - including obtaining 7(a) and 504 loans. This policy notice expired in April 2019 and the language was incorporated into SBA Standard Operating Procedure (SOP) 50 10 5 K. The SBA's policy provides that those businesses engaged in any illegal activity, either federal or state, would be ineligible for SBA financial assistance. This includes businesses that derive revenue from MRBs, or support the end-use of marijuana, including sellers of marijuana.

Ineligible businesses are those that fall into one of the following three categories: (1) direct marijuana businesses; (2) indirect marijuana businesses. "Direct marijuana businesses" include growers, producers, processors, distributors, or sellers. "Indirect marijuana businesses" are those businesses that derive any of their gross revenues in the previous year from sales to direct marijuana businesses. Examples include businesses that provide lights or hydroponic equipment. The SOP notes that a business that grows, produces, processes, distributes, or sells hemp products is eligible consistent with the 2018 Farm Bill. Unless the business can demonstrate that the products or services are legal under federal and state law, they remain ineligible for SBA financial assistance.

In addition, the SBA's policy notice provides guidance on SBA-guaranteed loan proceeds being utilized for the leasing of a building for a business engaged in marijuana related activities. The SBA advises lenders that during the life of the SBA-guaranteed loan, a borrower cannot lease a building to one of the ineligible businesses listed in the policy. The underlying property is at risk for seizure, as the payments on the SBA loan would be derived from illegal activity.

Department of Agriculture

On October 31, 2019, the USDA published an interim final rule establishing a domestic hemp production program as required by the 2018 Farm Bill to create a consistent regulatory framework throughout the country. Under this framework, a State or Indian Tribe that wishes to have primary regulatory authority over hemp production may submit, for approval by the USDA, a plan concerning the monitoring and regulation of hemp production. Otherwise, a State or Indian Tribe may avail themselves of the USDA's regulatory framework. The USDA's interim final rule does not preempt or limit any State or Tribal laws that are more stringent than the provisions in the 2018 Farm Bill. The USDA does note that nothing in the interim final rule prohibits interstate commerce of hemp and no State or Indian Tribe may prohibit the transportation or shipment of hemp produced according to the 2018 Farm Bill. The interim final rule does not cover the importing or exporting of hemp in and out of the country; however, the USDA may address this in the future if there is sufficient interest. Lastly, this interim final rule will be effective for a two-year period, from October 31, 2019 through November 1, 2021, with a final rule replacing it upon its expiration.

All state plans submitted to the USDA must include certain requirements, including: land use for production; sampling and testing to ensure the cannabis grown and harvested does not exceed the acceptable hemp THC levels; the disposal of non-compliant plants; compliance and enforcement procedures including annual inspection of hemp producers; and information sharing. In addition, a submitted plan must also include a certification that the State or Indian Tribe has the resources and personnel necessary to carry out the practices and procedures described in the plan. For the 2020 planting season, the 2018 Farm Bill provides that States and institutions of higher education can continue operating under the authorities of the 2014 Farm Bill. The 2018 Farm Bill extension of the 2014 Farm Bill will expire October 31, 2020.

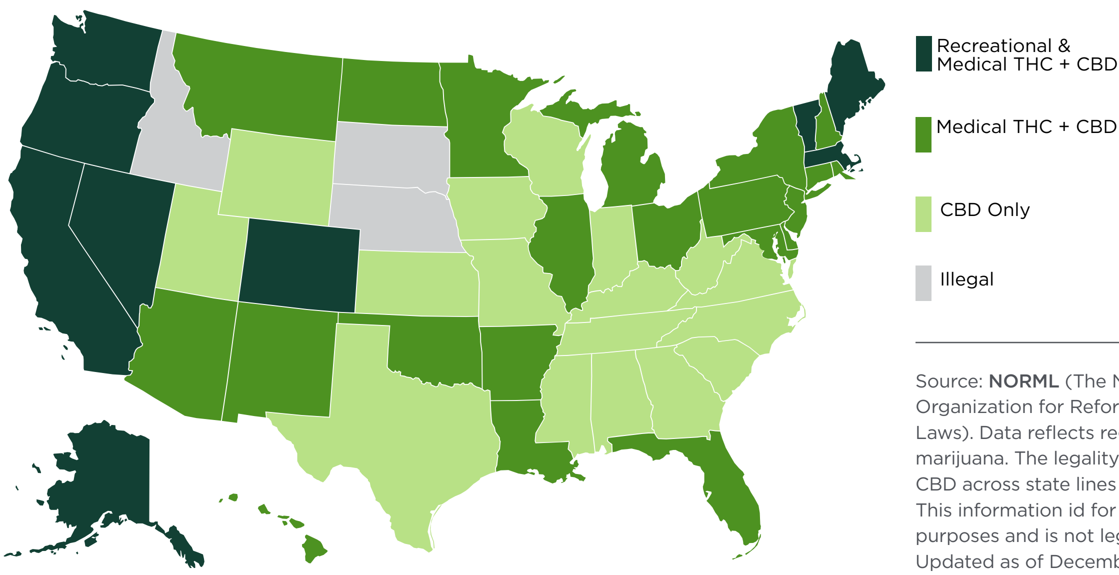
Currently, seven Tribal and six State plans have been approved by the USDA. An additional ten States will continue to operate under the 2014 Farm Bill, with the extension of that pilot program expiring later this year. Several other States have submitted their plans to the USDA and are awaiting approval. Once a plan is submitted to the USDA, the agency has 60 days to render a decision.

Food and Drug Administration

An important item to note is that despite the removal of hemp-derived products from the CSA, the Food and Drug Administration (FDA) regulations still apply. After the 2018 Farm Bill was signed into law, former director of the FDA, Scott Gottlieb, issued a statement that the FDA still has the authority to regulate products containing hemp and CBD under the Federal Food, Drug, and Cosmetic Act (FD&C Act). Recognizing that this industry is rapidly growing, former director Gottlieb formed an internal agency working group to consider regulatory changes and the impacts on public health. On May 31, 2019, the FDA held a public hearing for stakeholders. Subsequently, the FDA released a consumer update titled, "What You Need to Know (And What We're Working to Find Out) About Products Containing Cannabis or Cannabis-derived Compounds, Including CBD," explaining that CBD products are subject to the same rules as FDA-regulated products that contain other substances. The FDA is expected to issue regulations regarding hemp-derived products in the near future; the agency has indicated that this will likely happen in 2020. In the meantime, the FDA has provided a list of updated FAQs.

The FDA continues to have regulatory and enforcement authority over the marketing and distribution of hemp-derived products. Although there have been no enforcement actions taken against a company, the FDA has issued several warning letters. In 2019, the FDA issued 22 warning letters to companies for illegally selling and marketing products containing CBD in violation of the FD&C Act. Comparatively, the FDA issued one warning letter in 2018. This uptick is likely due to the opening of the marketplace after the 2018 Farm Bill changes to the CSA. Additionally, the FDA concluded in November 2019 that CBD is not generally recognized as safe for use in human or animal food. The agency's viewpoint is subject to change if there is supporting scientific evidence. In conjunction with the FDA, the Federal Trade Commission (FTC) possess authority over the advertising of CBD products in the marketplace. The FTC has joined the FDA on some issued warning letters.

The map below shows the variations among state rules regarding hemp and CBD. Litigation:



Source: **NORML** (The National Organization for Reform of Marijuana Laws). Data reflects regulations for marijuana. The legality of shipping CBD across state lines is ambiguous. This information id for educational purposes and is not legal advice. Updated as of December 7, 2018

LITIGATION

Fourth Corner Credit Union

After a lengthy legal battle with the Federal Reserve Bank of Kansas City, on February 7, 2018, the Federal Reserve granted Fourth Corner Credit Union conditional approval of its master account application. The conditions included obtaining share deposit insurance from the NCUA, and an amendment to the bylaws stating that Fourth Corner would not serve MRBs directly until doing so becomes federally legal. Fourth Corner subsequently decided to serve supporters of marijuana legalization, which could include trade associations that support the marijuana industry. Until recently, Fourth Corner was also involved in litigation with the NCUA. On June 25, 2018, the U.S. District Court for the District of Colorado denied Fourth Corner's motion to compel mediation with the NCUA and dismissed the case. The court held that Fourth Corner's case is moot because the credit union agreed not to serve MRBs and must now simply reapply for share insurance from the NCUA, so the court can no longer redress a harm to the credit union.

Big Sky Scientific LLC

An interesting case has emerged over the interstate transport of industrial hemp under the 2018 Farm Bill, which allows for interstate transport of hemp. The 2018 Farm Bill also prohibits states from restricting interstate transportation of industrial hemp but until the USDA set forth a regulatory framework, the provisions of the 2014 Farm Bill would control.

Big Sky Scientific LLC (Big Sky), a Colorado company that purchases industrial hemp from state-licensed hemp growers, was shipping industrial hemp from a farmer in Oregon to their operations in Colorado when Idaho police seized it during transport. The seizure occurred on January 24, 2019, after the enactment of the 2018 Farm Bill, but before the USDA published regulations. There is no distinction between hemp and marijuana in Idaho, and both remain illegal. As a result of the incident, the driver was charged with marijuana trafficking in an Idaho State Court.

Idaho contends that although the 2018 Farm Bill was signed into law, there was no regulatory framework in place by the USDA at the time of the seizure, nor did Oregon have a plan that was approved by the USDA under the 2018 Farm Bill. However, Oregon was operating a pilot program under the 2014 Farm Bill. Big Sky filed a federal lawsuit seeking a preliminary injunction, which was denied by the United States District Court for the District of Idaho. Big Sky filed an appeal in the Ninth Circuit on September 4, 2019, and the court ruled solely on procedural matters, holding that the parties should pursue their claims in state court. The Ninth Circuit may have decided to not hear the substantive matter of interstate commerce because, at the time, the USDA's regulations were still forthcoming. Although this case does not involve a banking or financial services issue, it is important to point out the nuances involved in determining whether a hemp-related business is operating legally.