MAY 2021

NAFCU

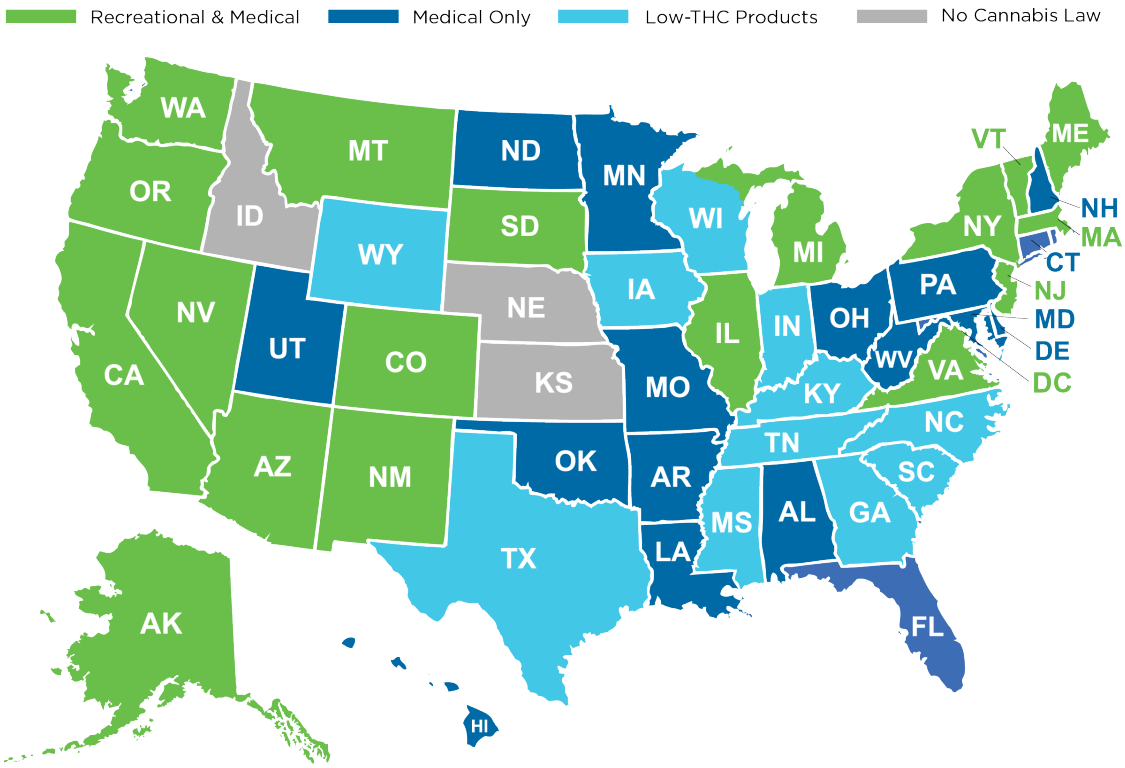
ISSUE BRIEF

Marijuana Banking

BACKGROUND

Recent reports predict legal marijuana sales to reach $30 billion by 2025. Medical marijuana is now legal in 36 states and recreational marijuana has been legalized in 17 states plus Washington D.C. Some states, including North Carolina and Nebraska, have decriminalized marijuana. Illinois is the first state to legalize recreational marijuana sales through successful state legislation versus a voter referendum. The 2020 election was momentous for the marijuana industry. Mississippi and South Dakota voters passed ballot initiatives to legalize medical marijuana, while Arizona, Montana, South Dakota, and New Jersey joined the growing number of states to legalize recreational marijuana for adult use. The future of marijuana legality in South Dakota is currently being heard by the South Dakota Supreme Court and the Mississippi Supreme Court quickly overturned the medical marijuana initiative. Post-election, New York legalized recreational marijuana after numerous failed attempts. In addition, both New Mexico and Virginia legalized recreational marijuana and Alabama legalized medical marijuana. The commercial sale of cannabis is still prohibited in Washington D.C. as well as Vermont, although Vermont licenses for sale will be available in 2022.

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 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).



Source: Bloomberg Government

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 as part of an industrial hemp pilot program 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. NAFCU has endorsed the bipartisan, bicameral Secure and Fair Enforcement (SAFE) Banking Act as a good step to provide greater clarity and legal certainty at the federal level for credit unions that choose to provide financial services to state-authorized MRBs and ancillary businesses that may serve those businesses in states were such activity is legal.

The SAFE Banking Act was introduced in the 116th Congress as H.R. 1595 by Reps. Ed. Perlmutter (D-CO), Denny Heck (D-WA), Steve Stivers (R-OH), and Warren Davidson (R-OH), and 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. Perlmutter introduced a similar bill in the 115th Congress, but no hearing or mark-up was held. In the 116th Congress, 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 H.R. 1595. Senators Jeff Merkley (D-OR) and Cory Gardner (R-CO) introduced a Senate version of the legislation (S. 2100) on April 11, 2019. H.R. 1595 passed the House by a vote of 321-103 on September 25, 2019, but no action was taken in the Senate. Also of note, on May 15, 2020, the House passed H.R. 6800, the HEROES Act,

a pandemic relief bill offered by House Democrats, that included the language from the SAFE Banking Act. Ultimately, the HEROES Act did not move in the Senate.

As expected, Perlmutter reintroduced the SAFE Banking Act during the 117th Congress as H.R. 1996. The House passed H.R. 1996 by a vote of 321-101 on April 19, 2021. The Senate companion bill, S.910, was re-introduced on March 23, 2021.

The SAFE Banking Act has garnered broad support, including 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 April 19, 2021, a group of 21 bipartisan governors urged Congress to pass the SAFE Banking Act.

Of note, on May 24, 2019, the Congressional Budget Office (CBO) released a cost estimate projecting that the SAFE Banking Act 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.

While NAFCU endorses the efforts of the SAFE Banking Act, it is not a total solution. NAFCU supports Congress continuing to examine all possible solutions in this area. While NAFCU has not taken a position on other legislative efforts, there are several bills from the last few Congresses that address these issues in part. These include, but are not limited to:

- **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, and now Vice President, Kamala Harris (D-CA) introduced S. 2227, a Senate companion bill.

  - On December 4, 2020, the MORE Act passed the House by a vote of 228-164. While the Senate did not consider it in the 116th Congress, the legislation could emerge again in the 117th Congress, where Democratic Senators have indicated that they plan to introduce legislation in the same spirit.

› **S.421 – 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 – 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. Rep. Earl Blumenauer (D-OR) reintroduced the STATES Act in the 116th Congress.

POLITICAL LANDSCAPE

Marijuana banking is a polarizing issue that has yet to gain overwhelming support in Congress. Until the recent passage of the MORE Act, there had not been a serious effort at the federal level to remove marijuana from its Schedule I classification under the CSA. Aside from the MORE Act, the other serious effort in the House is the passage of the SAFE Banking Act, which narrowly focuses on assisting banking MRBs. Previous, narrower 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. These legislative advances were possible, in part, to Democratic control of the House. Legislative advances in the Senate have proven to be more difficult.

However, that may change with the Senate split 50-50 between Republicans and Democrats. Chairmanship of the Senate Banking Committee has switched to Sherrod Brown (D-OH). Chairman Brown is not supportive of the SAFE Banking Act as it stands and wants to include other marijuana reform efforts as part of a larger bill. Although the SAFE Banking Act may not pass as currently written, Chairman Brown is open to working on the issue compared to the previous committee Chairman Mike Crapo (R-ID) who initially punted the issue to the DOJ to resolve, held a hearing on the issue,

and then ultimately opposed the legalization of marijuana at the federal level along with the SAFE Banking Act.

Senate Majority Leader Chuck Schumer (D-NY) has publicly indicated that he plans to reintroduce the MORE Act this year and that marijuana reform will be a priority for the Senate. Schumer, along with Senators Cory Booker (D-NJ) and Ron Wyden (D-OR), issued a joint statement to expect legislation in the early part of the year that ensures restorative justice, protects public health, and implements responsible taxes and regulations. The SAFE Banking Act may be included as part of a larger Senate bill.

Although the issue of marijuana banking garnered a lot of attention in 2019, legislative efforts in 2020 were much slower given it was an election year and were further exacerbated by the COVID-19 pandemic, as lawmakers turned their attention to stimulating the economy and providing relief. Given the slow pace of federal legislation, several states have introduced legislation that allows for a safe harbor for banking MRBs. California, for example, passed a safe harbor law for banking institutions doing business with marijuana companies. Essentially, the law states that banking institutions that engage with a licensed marijuana business are not acting criminally. This law, signed by Governor Gavin Newsom, attempts to solve the fundamental issue in the age of federal prohibition. The California law explicitly covers all banking institutions, including credit unions.

Initially, the Biden-Harris Administration was looked upon as a source of optimism for marijuana businesses and banking institutions, as the incoming Administration stated they would pursue marijuana decriminalization. Moreover, Vice President Kamala Harris has repeatedly verbalized that decriminalizing marijuana would be a priority and she introduced the Senate's version of the MORE Act. However, the White House has indicated that it is unlikely President Biden would sign a bill legalizing marijuana at the federal level, as he supports legalization at the state level along with other reform such as expunging prior criminal records.

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. FinCEN guidance addresses how to bank MRBs without triggering enforcement under BSA, but it does not technically legalize such activities in a holistic way. This guidance included establishing best practices for customer due diligence (CDD), a SAR filing structure, and ways to identify MRB red flags. The various requirements aim to ensure banking institutions are complying with the Cole Memo and any supplemental or applicable state laws. Issued concurrently with the second Cole Memo, 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

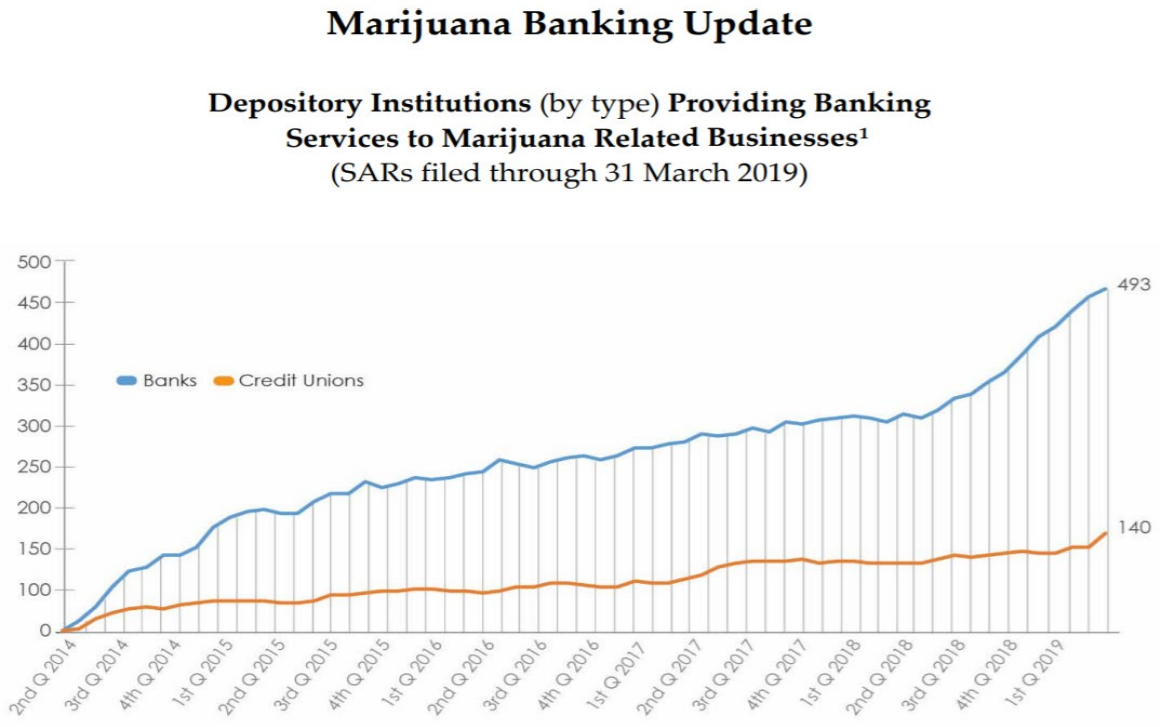
SAR is required at the time of account opening and every 90 days thereafter. Those financial institutions that do not implicate one of the eight Cole Memo priorities should file a marijuana limited SAR. If a financial institution provides services to a MRB that does implicate one of the eight priorities, 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.

In December 2019, FinCEN issued guidance in a joint agency statement clarifying the legal status of hemp and relevant requirements for providing services to hemp-related businesses. This is the first guidance released pertaining to hemp. Under this guidance, and because hemp is no longer a Schedule I controlled substance under the CSA, credit unions are not required to file a SAR solely because a member is engaged in the growth or cultivation of hemp. Standard SAR procedures should be followed and a credit union should file a SAR when a suspicious activity warrants a filing.

In June 2020, FinCEN published supplemental guidance specifically on CDD requirements. FinCEN reiterates that all financial institutions must conduct CDD for all customers, including hemp-related businesses. This supplemental guidance provides that for members who are hemp growers, a credit union may confirm the hemp grower's compliance with State, Tribal, or USDA licensing requirements by either obtaining: (1) a written attestation by the hemp grower that they are validly licensed; or (2) a copy of such license. Whether a credit union seeks additional information is dependent upon the risks posed, and additional information may include crop inspection or testing reports, license renewals, or updated attestations from the member. FinCEN expects to issue further guidance once the USDA's regulations are finalized.

According to FinCEN's Marijuana Banking Update (dated March 2021), 684 depository institutions, including 169 credit unions, were providing banking services to MRBs as of December 31, 2020. This represents an increase of 7 total depository institutions providing banking services to MRBs since the previous Marijuana Banking Update in December 2020. The total number of depository institutions has been steadily declining throughout 2020 but has leveled off. FinCEN's update speculates that the decrease in 2020 is due to the agency's guidance on providing financial services to hemp-related businesses and the impact from the COVID-19 pandemic on MRBs that had to close due to quarantine restrictions.

Despite the decrease in the total number of depository institutions providing services, the volume of SARs filed continues to increase. FinCEN's data indicated that it received a total of 170,975 SARs using the key phrases associated with MRBs. Of the total amount of SARs filed, 130,709 contained the phrase "marijuana limited," indicating that none of the eight Cole Memo priorities were involved; whereas, 12,605 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 2020, "marijuana limited" SAR filings saw the largest increase. This data illustrates that the majority of SARs filed do not implicate the Cole Memo enforcement priorities.



Source: FinCEN

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. 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. Former Attorney General William Barr upheld the integrity of the Obama-Era Cole Memos and promised that the DOJ would not prosecute people and businesses that relied on the memoranda.

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 marked a substantial deviation from the Jeff Sessions DOJ's hard line approach to cracking down on marijuana and MRBs.

On March 10, 2021, President Biden confirmed Merrick Garland as Attorney General. During his confirmation hearing, Garland stated that he did not think it was the best use of the DOJ's resources to prosecute those that comply with state laws. Garland is taking a similar approach to Barr, but he also highlighted the disparate treatment that marijuana enforcement has on communities of color. Further, Garland noted during the confirmation hearing that the DOJ should focus their attention on violent crimes that "put great danger in our society and not allocate our resources to something like marijuana possession." Although not explicitly stated by Garland, it appears that the DOJ, under his leadership, will continue to uphold the spirit of the Cole Memos and not bring action against those who are compliant with state laws.

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.

Subsequently, in June 2020, the NCUA published additional guidance regarding the servicing of hemp-related businesses. This additional guidance does not provide any new expectations or requirements for credit unions and reiterates that the NCUA does not prohibit credit unions from providing services to hemp-related businesses.

Following the guidance, the NCUA included serving hemp-related businesses in both the 2020 and 2021 Supervisory Priorities. However, the 2020 Supervisory Priorities provided that examiners would only be collecting data through the examination process regarding types of services that credit unions are providing hemp and hemp-related businesses. Elevating the issue to more than just data collection, the 2021 Supervisory Priorities provide that the NCUA will continue to encourage credit unions to consider serving lawfully operating hemp-related businesses within their fields of membership "safely and properly." It appears examination of this issue may include a credit unions' understanding of the complexities, risks involved, and obtaining the necessary expertise and resources in conjunction to operating within all applicable laws and regulations. Given the NCUA's slight pivot in supervisory priorities, we may see more comprehensive changes to examinations in this area and additional enforcement actions.

In March 2021, the NCUA took its first enforcement action against a federal credit union for their MRB program and policies. The NCUA issued a cease-and-desist order, whereby the credit union agreed to cease opening any new MRB accounts, file all SAR reports and implement other BSA measures, and cease their MRB program entirely, including the suspension of transaction activity for existing MRBs. Although the details are not included in the order, it does shed light on compliance deficiencies that examiners review and what to expect going forward.

Treasury Department:

Although FinCEN is a bureau of the Treasury Department (Treasury), past and present Treasury officials have weighed in on the issue of marijuana banking. Former Secretary Steven Mnuchin had expressed that the Treasury was "reviewing the existing guidance" as the previous administration considered whether to revoke FinCEN's 2014 guidance. During his tenure, Mnuchin stressed the importance of not rescinding the guidance without a replacement policy in place, that the Treasury wanted to ensure that it could collect necessary taxes on the profits of MRBs, and public safety as a result of unbanked MRBs. Mnuchin noted in his February 2018 testimony before the House Ways and Means Committee that addressing MRBs access to banking was at the "top of the list" of the department's concerns only to depart from this idea in 2019 when he 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.

Members of Congress questioned current Deputy Secretary Wally Adeyemo about the 2014 FinCEN guidance during his confirmation hearing as well. Deputy Secretary Adeyemo noted the importance of the issue and he would look at what changes needed to be made that are consistent with existing guidance. The Deputy Secretary was confirmed on March 26, 2021. Treasury Secretary Janet Yellen has not yet commented on the issue of marijuana banking or the Treasury's stance. The issue may not be a top priority for the Treasury under the new administration given the agency is focusing on repairing the economy after the COVID-19 pandemic.

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.

Past legislative efforts were made to prohibit the SBA from withholding certain loans from an eligible entity solely because it is a "cannabis-related legitimate business" or "service provider." Congress has not re-introduced this legislation in the 117th Congress. MRBs operating in compliance with state law were excluded from the SBA's COVID-19 aid.. The agency justified this decision by citing the federal illegality of the sale and distribution of marijuana and said it does not provide financial assistance to businesses that are illegal under federal law. Additionally, indirect marijuana businesses were also deemed ineligible for financial relief. Hemp-related businesses operating under the 2018 Farm Bill are not disqualified from consideration for relief.

Department of Agriculture

On January 19, 2021, the USDA published the final rule regulating the domestic hemp production program as required by the 2018 Farm Bill. The final rule comes after a two-year interim final rule that was set to expire in November 2021 and includes modifications after the FDA re-opened the comment period to garner more feedback on the 2020 hemp growing season. The final rule becomes effective March 22, 2021, superseding the previous interim final rule. There is a delay of enforcement regarding lab registration with the Drug Enforcement Agency (DEA), and requirement to have a DEA-registered reverse distributor or law enforcement to dispose of non-compliant plants until December 2022.

The final rule maintains a similar framework whereby 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 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 final rule does not prohibit interstate commerce of hemp and no State or Indian Tribe may prohibit the transportation or shipment of hemp produced according to the final rule. The 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.

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. Congress extended hemp production under the 2014 Farm Bill until January 1, 2022, therefore States and institutions of higher learning can continue operating under that framework until the expiration.

Several States and Indian Tribes have approved hemp plans, or will continue to operate under the 2014 Farm Bill pilot program. Several others have plans under review by the agency at this time. Once a plan is submitted to the USDA, the agency has 60 days to render a decision. With a final hemp regulation in place, we may see other agencies produce or update existing guidance.

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 FDA Director 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 previously indicated that this would happen in 2020 but re-opened the comment period indefinitely to obtain additional data. Therefore, it is unclear when the FDA will issue regulations governing CBD products. 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. This year, the FDA has issued four warning letters to companies for illegally selling and marketing products containing CBD in violation of the FD&C Act. In 2020, the FDA issued eight warning letters to companies for similar violations and an additional 13 warning letters to companies whose production or marketing was related to the COVID-19 pandemic. In 2019, the FDA issued 22 warning letters and just one warning letter in 2018. This uptick in the past few years 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) possesses authority over the advertising of CBD products in the marketplace. The FTC has joined the FDA on some issued warning letters.

Internal Revenue Service

Income derived from MRBs has been a source of contention and confusion with respect to proper taxation policies and practices. Internal Revenue Code § 61(a), the touchstone of the tax code, states that income from any source derived is taxable. The Supreme Court has also long held that income from illegal sources is taxable. Therefore, income derived from MRBs is taxable regardless of the federal illegality of marijuana. So long as marijuana remains federally illegal, industry members are deprived of tax benefits extended to other businesses but still maintain an obligation to report and pay federal income taxes.

The Internal Revenue Service (IRS) recently issued guidance in the form of FAQs to remind MRBs of their tax obligations. This guidance was issued in response to an internal watchdog report in April 2020 criticizing the IRS for failing to adequately

advise MRBs about federal tax law compliance and therefore failing to collect millions in unassessed tax dollars. The guidance includes the following topics:

- Income and employment tax filing obligations for legally operating marijuana dispensaries;
- Availability of payment plans and collection delays for qualifying MRBs;
- Penalties and additions to tax;
- Claiming deductions or credits;
- Reporting cash receipts over $10,000.

Relatedly, the IRS Commissioner Charles Rettig raised the issue of collecting taxes from MRBs. During a House Appropriations Financial Services and General Government Subcommittee hearing Commissioner Rettig highlighted that due to the lack of access to the financial system for MRBs, this creates a security issue for the IRS. Because of the tax payments in actual cash versus direct deposit, which the agency would prefer, the IRS has had to adjust collection to account for certain security measures. The IRS is certainly not the first regulatory agency to highlight the challenges or concerns with the lack of access to financial services, but the agency's concern may put additional pressure on Congress to rectify the issue.

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 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 USDA-approved plan under the 2018 Farm Bill. 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 and the court ruled solely on procedural matters, holding that the parties should pursue their claims in state court. Subsequently, the Idaho State Court upheld the Idaho police's seizure and held that Big Sky's shipment was not protected by the 2018 Farm Bill (or the 2014 Farm Bill). This is because hemp is only protected under the 2018 Farm Bill if produced in accordance with the state's plan approved by the USDA. The driver plead guilty to the lesser offense of failing to provide documents in a driver's possession. 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.

Washington v. Barr

Possibly the most significant and consequential marijuana-related lawsuit was put to rest when the Supreme Court denied to hear appellate challenges to the federal marijuana prohibition. Plaintiffs in *Washington v. Barr*, initially filed in 2017, include a former NFL football player, a disabled military veteran, two children with severe movement disorders, and the Cannabis Cultural Association, a non-profit group. Plaintiffs' arguments included: (1) the federal prohibition violates their civil and constitutional liberties, including their right to freely travel within the United States; (2) the federal prohibition of marijuana is "grounded in discrimination and [is] applied

in a discriminatory manner;" and (3) current administrative mechanisms in place to allow for the reconsideration of marijuana's Schedule I classification are "illusory" and therefore unlikely to ever be successful, regardless of the facts.

A U.S. District Court Judge rejected plaintiffs' arguments in 2018, opining that no fundamental right to possess or use marijuana exists. Plaintiffs appealed their case to the U.S. Court of Appeals for the Second Circuit, where their arguments were again rejected. As the final nail in the coffin, the Supreme Court denied certiorari on October 13, 2020.

U.S. v. Weigand and Akhavan

The Southern District of New York convicted two individuals of conspiracy to commit bank fraud for deceiving banks and credit unions into effectuating more than $150 million credit and debit card purchases of marijuana. The two individuals set up fake companies, websites, and customer service centers to move money from their marijuana delivery company. From 2016 to 2019, when the fraudulent activity took place, marijuana remained illegal in New York.

To deceive the various banks and credit unions, the defendants set up a series of offshore shell companies that opened offshore bank accounts. Credit card charges were then initiated for marijuana purchases but were in fact transacted through fake merchant accounts that disguised the purchases as a legal purchase. For example, some of the fake merchant accounts sold diving gear and face cream. Therefore, these transactions did not raise the flag of suspicion or illegality.