



Jim Nussle
President & CEO

Phone: 202-508-6745
jnussle@cuna.coop

99 M Street SE
Suite 300
Washington, DC 20003-3799

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The Honorable Mike Crapo
Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate Office Building
Washington, D.C. 20510

Dear Chairman Crapo:

On behalf of America's credit unions, thank you for inviting the public to provide its feedback on how to address the challenges that currently plague banking the cannabis industry. The Credit Union National Association (CUNA) represents America's state and federal credit unions and the 115 million members that they serve.

CUNA and our members take no position on the legalization of cannabis. Accordingly, we respect the Chairman's opposition to efforts to legalize cannabis on both the federal level and in the state of Idaho. We do recognize, however, that while cannabis remains illegal under federal law and in Idaho, thirty-three states and the District of Columbia have chosen to legally license cannabis for either medicinal or recreational use. This conflict between federal law and the laws and policies of most American state governments has immediate compliance ramifications for the financial services sector that must be addressed. As a result, CUNA continues to support the passage of federal legislation, such as the Secure and Fair Enforcement Banking Act of 2019 (SAFE Banking Act),¹ that gives explicit legal clearance for financial institutions to grant banking services to state-sanctioned Cannabis businesses and related business entities.

Enactment of this bill would offer much-needed, narrowly targeted federal protections for credit unions and other financial institutions who accept deposits from, extend credit to, or provide payment services for an individual or business engaged in cannabis-related commerce in states where the activity is legal — as long as the activity is compliant with all other applicable laws and regulations. CUNA strongly believes that federal legislation providing these protections is essential to bringing revenue from state-sanctioned cannabis entities and hemp businesses into the financial services mainstream and, as a result, keeping communities safe by removing vast amounts of cash off the streets. Credit unions also believe that enactment will increase the reporting and transparency of information about the cannabis industry to the benefit of law enforcement, tax revenue officials, and other regulators.

With these considerations in mind, CUNA and our member credit unions have chosen to respond to the request for public feedback on proposals related to cannabis banking legislation as an important opportunity to work with you to address any remaining concerns about the SAFE Banking Act, as passed by the House of Representatives. In doing so, we hope our feedback demonstrates an obvious fact: *most of your concerns and proposals for clarification can be easily integrated into the SAFE Banking Act in a manner consistent with the narrow aims and objectives the bill was designed to achieve.*

Specifically, we find that — with the exception of your proposals related to adding public health and safety solutions to the enforcement responsibilities of financial institutions as a prerequisite for operating under the safe harbor — the SAFE Banking Act is already consistent with your position and would benefit from the addition of the proposed clarification language reinforcing the bill's intent. As a result, we urge you to continue to advance the SAFE

¹ S. 1200 in the Senate and H.R. 1595 in the House

Banking Act through the Senate Banking Committee’s consideration process in order to allow the proposed changes to be considered as amendments that all of the members of the Committee can vote upon.

Proposal 1:
Adding Public Health and Safety Solutions as a Requirement for Banks
to do Business with Legally-Operating State Cannabis Companies.

As part of the feedback request, you have proposed federally funded research to examine a series of issues related to the propriety of cannabis legalization. Those issues include many important considerations about the public health and safety implications of cannabis usage, such as how cannabis potency impacts addiction and the degree to which potency levels impair judgment or cognitive reasoning.² However, because CUNA and our member credit unions: (1) do not take a position on the federal legalization of cannabis, and (2) are exclusively employed as experts in the financial services sector, we believe it is appropriate to defer to those with the necessary scientific, medical, and marketing expertise to offer substantive feedback on whether the proposed research areas outlined by the Chairman’s proposal properly cover all health and safety considerations. In addition, we note that federal financial regulators, like financial institutions, are comprised of individuals whose expertise is often limited to the financial services sector. As a result, it is likely that the federal agencies best positioned to address these issues operate independent from the federal oversight structure that currently exists in the financial services sector.

For related reasons, CUNA and our member credit unions have reservations about any proposal that would obligate financial institutions to make sure that cannabis businesses and the state entities regulating cannabis businesses are following a series of health and safety requirements as a precondition for receiving a safe harbor for offering banking services. Because federal financial institutions lack scientific, medical, marketing, and public health and safety expertise, CUNA believes that credit unions and other financial institutions would be ill-equipped to serve as the enforcement authority on these matters.

Instead, state governments, who have traditionally exercised the power to protect and legislate public health, safety, and morals, have existing regulatory infrastructures that already employ experts charged with examining and enforcing important public health and safety concerns—including those surrounding the licensing of cannabis businesses. For example, the state of California relies upon three regulatory agencies — the California Department of Food and Agriculture, the California Department of Public Health, and the California Bureau of Cannabis Control — to enforce public health and safety requirements related to the state’s licensing of cannabis.³ Existing FinCEN guidance requires financial institutions to, in turn, rely upon the state’s monitoring, regulatory, and enforcement infrastructure by routinely accessing the state’s licensing system when conducting their requisite due diligence in opening and maintaining bank accounts for cannabis and cannabis-related businesses. We believe that this approach is more feasible given concerns related to the lack of credit unions’ current expertise in these matters, the prohibitive costs of developing and maintaining that expertise within a financial institution, and reasonable concerns about the increased regulatory burden that would occur as a result.

² The Chairman also proposes studies related to issues such as the potency of cannabis and cannabis products; how different types of products and delivery mechanisms have affected minors’ access to cannabis and cannabis related products; and trends related to the prevalence of driving under the influence of cannabis.

³ See California Cannabis Portal, available at <https://cannabis.ca.gov/cannabis-regulations/> (last accessed 01/27/20).

Proposals 2 and 3:

Preventing Bad Actors and Cartels from using Legacy Cash and the Financial System to Disguise Ill-Gotten Cash or Launder Money, Updating 2014 FinCEN Rulemaking and Guidance Regarding Marijuana-Related businesses, and Ensuring FinCEN has all of the Necessary Tools it Needs to Prosecute Money Launderers and Promulgate Rulemakings.

Your proposal would also amend Section 6 of the SAFE Banking Act to direct FinCEN to timely promulgate a rulemaking addressing issues pertaining to providing financial services to cannabis and cannabis-related businesses with a focus on Suspicious Activity Reports and the treatment of Legacy Cash. CUNA and our credit union members agree with your assessment that FinCEN's 2014 guidance would be rendered outdated upon the enactment of the Safe Banking Act and, thus, existing regulations relating to the Suspicious Activity Reporting of cannabis business activity and the treatment of legacy cash would need to be updated in light of the law's passage. CUNA also notes that the factors to be included in your required rulemaking: (a) requiring thorough customer due diligence standards; (b) implementing processes and procedures to ensure funds from cannabis-related businesses and service providers are not associated with illicit activities, (c) clearly delineating BSA obligations of financial institutions providing services to cannabis-related businesses or individuals, and (d) requiring the filing of SARs in a manner that preserves FinCEN's ability to address illicit activity, are already key considerations that figure prominently in FinCEN's 2014 guidance. Specifically, credit unions have previously noted that that FinCEN's BSA Expectations Regarding Marijuana-Related Businesses ("guidance") already provides clear customer due diligence standards, monitoring and reporting instructions, and red flags for detecting illicit activity.

Accordingly, CUNA and credit union members welcome your recommendation that FinCEN be required to issue a rulemaking covering the same scope of issues currently addressed by the 2014 guidance. We also support including additional language requiring clarification of the treatment of hemp and amending Section 7 of the SAFE Banking Act to require the Federal Financial Institutions Examination Council (FFIEC) to consult FinCEN in developing guidance and examination procedures related to the banking of cannabis businesses and their related entities.

Proposal 4:

Respecting States Rights in Interstate Commerce and Banking for Institutions Who Operate in Multiple States with Different State Rules.

While noting the importance of ensuring financial institutions' compliance with all applicable laws related to cannabis products in each respective state of operation, your proposal also seeks input on whether the SAFE Banking Act, as drafted, facilitates the interstate commerce of cannabis. Cuna and our credit union members believe the answer to that question is no.

Specifically, Section 4(a) limits protections under federal law to:

providing a financial service to a cannabis-related legitimate business or service provider *within* a State, political subdivision of a State, or Indian country that allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to a law or regulation of such State, political subdivision, or Indian Tribe that has jurisdiction over the Indian country....⁴

Accordingly, the provision limits the proposed safe harbor to intrastate financial services in those states sanctioning cannabis activities and further exempts those proceeds from being defined as an unlawful activity under Section

⁴ H.R. 1595, Secure And Fair Enforcement Banking Act of 2019 (emphasis added), available at <https://www.congress.gov/bill/116th-congress/house-bill/1595/text?q=%7B%22search%22%3A%5B%22SAFE+Banking+Act%22%5D%7D> (last accessed 02/03/20).

3. This second component of the legislation is essential for ensuring that the funds remain transferable across state lines and, thus, can be freely integrated into the mainstream financial markets even while simultaneously limiting the banking of cannabis operations to only those states authorizing the activity (Section 4(a)). Though we believe that this language addresses the identified concern, CUNA and our member credit unions would be willing to support the additional inclusion of a rule of construction in Section 5, entitled Rules of Construction, of the SAFE Banking Act, which states the following:

(c) NO AUTHORIZATION OF INTERSTATE COMMERCE. – Nothing in this title or an amendment made by this title shall be construed to authorize the interstate commerce of cannabis (as defined by the meaning given to ‘marihuana’ under section 102 of the Controlled Substances Act (21 U.S.C. 802)) or cannabis products.

Proposal 5:
Eliminating “Operation Choke Point,” Preventing Future
“Operation Choke Point” Initiatives, and Options for Addressing Hemp Provisions

Finally, your proposal seeks to adequately curb potential future choke point scenarios and bring clarity to the provision of financial services to the hemp sector. CUNA and our members previously raised concerns with “Operation Choke Point,” a defunct federal enforcement initiative that purportedly sought to limit access to financial services for online payday lenders and other companies based solely on “reputational” concerns. Though CUNA remains unaware of any specific instance where the program was actually implemented on credit unions, we have repeatedly taken the position that, “[w]hile we strongly support the government’s role in ensuring the integrity of financial markets and eliminating fraud, the program’s broad enforcement tactics could create unnecessary risks to consumers and to the economy.”⁵

Accordingly, CUNA continues to back the enactment of “The Financial Institution Consumer Protection Act.” This legislation specifically bars financial regulators from formally or informally requiring a financial institution to terminate a customer’s account based solely on reputational risk and establishes a series of written notice requirements for financial institutions and customers dealing with mandated account terminations. CUNA and our member credit unions were grateful for your co-sponsorship of this bill in the Senate as S. 2790.⁶ Moreover, recognizing the benefits derived from its inclusion, the House voted to add the Financial Institution Consumer Protection Act as a component of HR 1595, the SAFE Banking Act.

As part of the public request for feedback, you have included a proposal that would modify the language of the Financial Institution Consumer Protection Act as included in HR 1595 to remove language prohibiting regulators from relying solely upon reputational risk as a basis for requiring account terminations in favor of language barring regulators from engaging in the specific action unless the institution is violating a rule, law, regulation, or other condition imposed in writing or engaging in unsafe or unsound practices. The proposed changes also include a provision excluding “reputational risk” from being defined as an unsafe or unsound practice or violation of a rule, law, regulation or other condition.

For technical reasons, we believe that the existing language of the Financial Institution Consumer Protection Act, as included in the SAFE Banking Act, is preferable to the proposed changes in your request for public feedback. Specifically, CUNA and our member credit unions are concerned that the proposed language’s provision excluding reputational risk as an unsafe or unsound practice or violation of rule, law, or regulation has the unintended consequence of making it more difficult for financial institutions to decline to bank certain businesses — such as

⁵ CUInsight, CUNA Backs Senate Companion to Limit Choke Point, (April 19, 2016), available at <https://www.cuinsight.com/cuna-backs-senate-companion-limit-choke-point.html> (last accessed 01/29/20); letter available at <https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment Calls, Letters and Testimonies/2017/Letters/Financial%20Institution%20Customer%20Protection%20Act%20of%202017.pdf>.

⁶ See <https://www.cuna.org/Advocacy/Priorities/Removing-Barriers-Blog/CUNA-Sends-Letter-to-Senate-in-Support-of-Bill-to-Limit-Operation-Choke-Point/> (last accessed 01/30/20).

those in the cannabis sector — based upon their own internal risk assessments without facing civil litigation challenging the merits of their decision and relying upon the proposed language as precedent to do so.

In its present form, the language of the Financial Institution Consumer Protection Act acknowledges that reputational risk is a factor that is properly considered by financial regulators and thus, by default, financial institutions, when determining whether to provide account services to a consumer. However, by preventing federal regulators from relying exclusively upon reputational risk to mandate account terminations, the current language blocks regulatory overreach while allowing financial institutions and their boards the requisite flexibility needed to still engage in their own internal risk assessment.

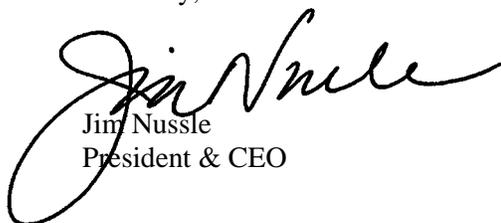
CUNA and our member credit unions support your recommendation to include the House hemp provisions passed in the SAFE Banking Act in any legislation moving forward in the Senate. These provisions require federal financial regulators to act swiftly in providing guidance to financial institutions serving businesses involved in hemp, hemp-derived CBD products, and other hemp-derived cannabinoid products and to identify and recommend best practices for providing financial services for those involved in the hemp sector. Since Hemp's legalization under the Agriculture Improvement Act of 2018, credit unions have continued to experience challenges in providing financial services to the industry. The facilitation of guidance from federal financial regulators in a timely fashion will go a long way toward improving confusion.

Yet, because of its relationship to cannabis and the current banking challenges facing the cannabis sector, CUNA and our members continue to believe that the only way to fully resolve impediments to banking the Hemp sector is to simultaneously address the challenges raised by banking the cannabis sector as whole. This is why CUNA supported efforts to include Hemp provisions in the SAFE Banking Act. By addressing both Hemp and Cannabis banking uncertainty, the legislation offers financial institutions the full measure of certainty needed to move forward with confidently provided financial services to both sectors.

Conclusion

On behalf of America's credit unions, thank you for your leadership on these important issues. We hope this letter demonstrates that most of the concerns you raised are consistent with the intent of the SAFE Banking Act and can easily be incorporated into the existing legislation without modifying the bill's narrow scope or intent. Accordingly, CUNA and credit union members look forward to working with you to advance legislation, like the bipartisan SAFE Banking Act, through the Senate Banking Committee's consideration process in order to give financial institutions the clarity needed to confidently remove cash from the streets by providing banking services to state-sanctioned cannabis businesses and ancillary entities.

Sincerely,



Jim Nussle
President & CEO

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