Potential Changes to Address Public Health & Safety Issues in Cannabis Banking Legislation

Submitted by mlongacre@csbs.org on Fri, 02/14/2020 - 10:00

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February 12, 2020

The Honorable Mike Crapo Chairman
Committee on Banking, Housing, and Urban Affairs United States Senate
Washington, DC 20510

Re: Potential Changes to Address Public Health & Safety Issues in Cannabis Banking Legislation

Dear Chairman Crapo:

The Conference of State Bank Supervisors (CSBS)[1] welcomes the opportunity to respond to various questions posed in your December 18, 2019, request for feedback (RFI) on cannabis banking legislation. State regulators across the country have a wide diversity of views and supervisory responsibilities over financial institutions that may be (or may be interested in) providing services to cannabis-related legitimate businesses (CRLBs). This diversity reflects the various and evolving nature of many states' legal regimes and their treatment of different types of cannabis products.

Since its members have a wide variety of viewpoints, CSBS does not endorse or oppose any current House or Senate legislation related to the banking of CRLBs, including the SAFE Banking Act. However, CSBS clearly recognizes and is actively monitoring the many complications arising from financial institutions banking CRLBs, rooted in the conflict between certain state laws and federal law. CSBS also provides practical tools to state regulators who must navigate CRLB supervisory challenges.[2] The RFI raises new questions and implications related to state regulators' work supervising state-licensed and state-chartered financial services companies. As such, the following comments tie directly to state regulators' roles as licensing, chartering, and supervisory authorities. They do not indicate support or opposition by CSBS to the banking of CRLBs or federal legislation that would affect the ability of financial services companies to provide services to CRLBs.

State regulators from states that have legalized cannabis have their "boots on the ground," wrestling with many of the very issues and questions raised in the RFI. Through firsthand experience, state regulators have gained critical insights on the respective challenges financial institutions and CRLBs face, and they have learned important lessons about supervising financial institutions who choose to bank CRLBs. This irreplaceable experience is unique among financial regulatory agencies, and CSBS requests that you require federal regulatory agencies, FinCEN, and other stakeholders to consult state regulators on what they have learned from overseeing financial institutions currently banking CRLBs.

Issues 2, 3: Options for addressing legacy cash and money laundering

The RFI proposes a FinCEN rulemaking and guidance related to financial institutions providing services to CRLBs, including the filing of Suspicious Activity Reports (SARs) and dealing with legacy cash. While FinCEN has rulemaking authority over the Bank Secrecy Act (BSA) and associated anti-money laundering (AML) laws, BSA/AML supervisory authority has been delegated to state and federal financial regulators. The RFI states:

Additionally, Section 7 of S. 1200 should be amended to ensure that the Federal Financial Institutions Examination Council (FFIEC) must consult with FinCEN on its development of uniform guidance and examination procedures for depository institutions as they relate to CRLBs and service providers.

To supplement this proposal, CSBS strongly encourages requiring FinCEN consult with the FFIEC during its rulemaking process. Since BSA/AML rulemaking and supervision are split between FinCEN and FFIEC member agencies – the Federal Reserve, FDIC, OCC, NCUA, and state bank and credit union regulators through the State Liaison Committee – coordination and consultation between all parties, during each step of the policymaking process, is critically important for ensuring optimal regulations and examination procedures. The critical insights gained by state and federal financial regulators during their BSA/AML supervisory activities should serve as a formal source of information for FinCEN as it conducts BSA/AML rulemakings, just as FinCEN's financial crime expertise should help inform financial regulators as they develop their supervisory guidance and examination processes for financial institutions.

Indeed, recent experience has proven insufficient consultation with financial regulators during the BSA/AML rulemaking process makes it difficult to establish uniform guidance and effective supervisory practices. FinCEN's Customer Due Diligence Requirements for Financial Institutions (CDD rule) rulemaking was conducted with minimal consultation with the various agencies charged with BSA/AML supervision, and no consultation occurred with state regulators.
Subsequently, the FFIEC and its member agencies encountered difficulties transposing the final CDD rule into practical examination guidance and processes.

For these reasons, state regulators propose amending 31 U.S.C. 5318 (see Appendix) to ensure future changes to BSA/AML regulations and supervisory practices are conducted in coordination through the FFIEC. This approach will ensure all state and federal depository institution supervisors are properly consulted as FinCEN conducts its various rulemakings, thereby improving the quality of BSA/AML regulations and uniformity of supervisory practices across state and federal regulatory agencies.

Issue 4: Options for addressing interstate commerce and banking

The RFI states:

> Additionally, given the tension between the state legality of cannabis and federal illegality, it should be made clear that the federal banking regulators should consult with state regulators ahead of any implementation, or give some notice.

The RFI rightly identifies the conflict between various state and federal laws related to cannabis. However, the complexities of the issue require much more than simple notification (in and of itself) to state regulators as their federal counterparts work to implement a "fix" for financial institutions providing services to CRLBs. Federal regulators must be required to conduct robust consultation and coordination with state regulators to avoid mixed messages to and adverse scenarios for financial institutions and CRLBs.

Issue 5: Options for addressing hemp provisions and "Operation Choke Point"

In furtherance of improving coordination and consultation among state and federal regulators, CSBS proposes adding a section to the Financial Institution Customer Protection Act that would require federal banking agencies to consult and notify state regulators when formally or informally requesting a state-chartered bank terminate a customer account (see Appendix).

More robust conversations between state and federal regulators, particularly regarding CRLBs that face complex state-to-state and state-federal legal regimes, will help prevent inappropriate "de-risking" or termination of legitimate banking accounts or services.

Additional Recommendations: Enhance third-party service provider oversight by passing the Bank Service Company Examination Coordination Act (H.R. 241)

Financial institutions outsource a variety of core services to third-party service providers (TSPs), including to firms specializing in payment processing, audit, transaction monitoring systems, and regulatory reporting. There are unique challenges associated with banking CRLBs, such as processing payments, filing marijuana SARs, clearing legacy cash, and navigating complex or conflicting state and federal legal requirements. These high regulatory and business hurdles will likely create an increased reliance on TSPs to help banks manage their CRLB relationships.

While TSPs allow banks to leverage outside expertise and services, they have the potential to expose banks to operational risks such as cybersecurity risk, fraud risk, and business continuity risks. Many state regulators[3] are authorized to examine bank TSPs under various state laws to ensure they do not pose undue risks to the state-chartered banking system. Similarly, the Bank Service Company Act (BSCA) authorizes federal banking regulators to examine TSPs to assess the potential risks they pose to banks. However, the BSCA is silent regarding the authorities and/or roles of state regulators, which hinders information sharing and supervisory coordination among state and federal regulators on TSPs that work with state-chartered banks.

State regulators encourage inclusion of the "Bank Service Company Examination Coordination Act" (H.R. 241), which amends the BSCA to reflect states' authority to examine TSPs (see Appendix). This bipartisan bill, which passed the House of Representatives by voice vote in September 2019, will improve state-federal exam coordination and information sharing and promote more efficient supervision of TSPs, particularly as new TSPs enter the market to facilitate financial institutions banking CRLBs.

Conclusion

State regulators appreciate the opportunity to share their views on supervisory and regulatory issues related to the banking of CRLBs. CSBS thanks you in advance for considering the proposed changes and welcomes any further questions. State regulators stand committed to working with you and others to ensure financial institutions operate in a safe and sound manner.

Sincerely,

John W. Ryan President & CEO

Footnotes

1 CSBS is the nationwide organization of banking regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. State banking regulators charter and supervise approximately 4,170 banks, representing more than 79 percent of the nation's banks. Additionally, most state banking departments regulate a variety of nonbank financial services providers. For more than a century, CSBS has given state supervisors a national forum to coordinate supervision of their regulated entities and to develop regulatory policy.

2 CSBS Cannabis Job Aid: https://www.csbs.org/system/files/2020-02/CSBS%20Cannabis%20Job%20Aid.pdf

3 About 36 state banking agencies currently have authority under state law to examine TSPs.

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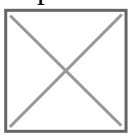

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