



# Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

Author: Carla Napolitano, Attorney  
Reviewer: Michael J. O’Neill, Division Chief

Volume 134 Issue 68  
December 22, 2022

## Cannabis Banking

Ohio’s Medical Marijuana Control Program, authorized in 2016, allows individuals with specified medical conditions to purchase and use medical marijuana. Although medical marijuana businesses are regulated by the state, financial services for licensed medical marijuana businesses are limited, mainly due to the illegal status of marijuana under federal law. There are many legal questions relating to the policy gap between the state and federal law, particularly as it relates to the legality of financial services for state-authorized marijuana businesses.

This brief explains both the state and federal laws relevant to financial services for authorized marijuana businesses.

### Contents

Introduction .....	1
The federal Controlled Substances Act (CSA) .....	2
Federal banking law .....	3
BSA/AML.....	3
FinCEN guidance .....	4
Suspicious Activity Reports (SARs) .....	6
Federal legislation .....	6
SAFE Banking Act of 2021.....	6
Marijuana Opportunity Reinvestment and Expungement Act .....	7

### Introduction

As of September 20, 2022, 37 states (including Ohio) authorize the medical use of cannabis products, and 19 states have enacted measures to regulate cannabis for adult nonmedical use.<sup>1</sup> Ohio’s Medical Marijuana Control Program was established in 2016 by H.B. 523

<sup>1</sup> National Conference of State Legislatures (NCSL), [State Medical Cannabis Laws](https://www.ncsl.org/state-info/state-medical-cannabis-laws), which can be found on the NCSL website: [ncsl.org](https://www.ncsl.org).

of the 131<sup>st</sup> General Assembly. It allows individuals with specified medical conditions to purchase and use medical marijuana. The first sales of medical marijuana in Ohio occurred in January 2019.<sup>2</sup> The State Board of Pharmacy regulates medical marijuana retail dispensaries, registers medical marijuana patients and caregivers, and approves new forms of medical marijuana. The Department of Commerce is responsible for licensing medical marijuana cultivators, processors, and testing laboratories. Federal and, in general, Ohio law classify marijuana as a Schedule I controlled substance, making its distribution, including by prescription, illegal. For the purpose of Ohio's Medical Marijuana Control Program only, medical marijuana under Ohio law is a Schedule II controlled substance.<sup>3</sup>

H.B. 523 created a safe harbor for financial institutions in Ohio that provide financial services to a licensed cultivator, processor, retail dispensary, or laboratory that is in compliance with Ohio's program, by exempting such financial institutions from certain state criminal laws.<sup>4</sup> Although medical marijuana businesses are regulated by Ohio law and financial institutions offering services for these licensed businesses have protections under Ohio law, there is currently no safe harbor under federal law for these financial institutions. Marijuana currently remains a Schedule I controlled substance under federal law in all circumstances. Therefore, whether financial institutions can legally offer financial services to licensed medical marijuana businesses in Ohio is still unclear.<sup>5</sup>

## The federal Controlled Substances Act (CSA)

The federal Controlled Substances Act (CSA) places various substances in one of five schedules, Schedules I through V, based on their medical use, potential for abuse, and safety or risk for dependence. A lower schedule number corresponds to greater restrictions, so substances in Schedule I are subject to the strictest controls, while substances in Schedule V are subject to the least strict. Schedule I substances are considered the most dangerous and addictive. Marijuana has been listed as a Schedule I controlled substance under the CSA since it was enacted in 1970. The CSA prohibits the manufacture, distribution, dispensation, and possession of

---

<sup>2</sup> For more background about the program see the LSC *Members Brief*, [Ohio's Medical Marijuana Control Program \(PDF\)](#), which can be found on LSC's website: [lsc.ohio.gov](http://lsc.ohio.gov).

<sup>3</sup> R.C. 3796.01(B).

<sup>4</sup> R.C. 3796.27.

<sup>5</sup> See, for example, [In the Matter of Live Life Federal Credit Union](#), Administrative Order, Docket No. 21- 0105-ER (February 22, 2021), which can be found on NCUA's website: [ncua.gov](http://ncua.gov); and related article Benzinga, [Michigan-Based Credit Union Receives Cease-And-Desist Order over Cannabis Banking](#), April 7, 2021, which can be found on the Benzinga website: [benzinga.com](http://benzinga.com). In addition, this brief does not discuss financial services for businesses that exclusively work with hemp, which is legal under both Ohio and federal laws; see the [LSC Final Analysis \(PDF\)](#) of S.B. 57 of the 133<sup>rd</sup> General Assembly, which can be found on the General Assembly's website: [legislature.ohio.gov](http://legislature.ohio.gov); and the federal [Agriculture Improvement Act of 2018 \(PDF\)](#), Pub. L. No. 115-334, which can be found on Congress's website: [congress.gov](http://congress.gov). That said, the hemp industry does face some similar problems. Forbes [Yes, Cannabis Banking Liberalization – SAFE Banking Act – Would Indeed Make the U.S. More Competitive](#), March 18, 2022, which can be found on the Forbes' website: [forbes.com](http://forbes.com).

Schedule I substances, including marijuana, except for federal government-approved research studies.<sup>6</sup>

Because most states currently allow some form of marijuana cultivation, processing, and selling, while the federal government maintains marijuana listed as a Schedule I substance, there are many legal questions relating to the policy gap between the state and federal law, particularly as it relates to the legality of financial services for state authorized marijuana businesses. As long as marijuana remains classified as a Schedule I controlled substance under the CSA, financial institutions and their officers and employees could be subject to criminal and administrative sanctions under federal law for providing financial services to marijuana businesses, even if those businesses are operating in compliance with state law. This uncertainty has made many financial institutions unwilling to provide financial services to state-authorized marijuana businesses.<sup>7</sup> Consequently, many state-authorized marijuana businesses largely conduct operations with all cash transactions, accepting only cash as payment for the purchase of cannabis products. News reports indicate that some businesses pay suppliers and taxes in cash. This cash-only approach can create financial and safety risks for these businesses.<sup>8</sup>

## Federal banking law

The United States has a dual banking system. Banks and credit unions can choose a federal charter or a state charter. Through federal deposit insurance, federal holding company regulation, and federally administered payment systems, federal financial regulators have significant oversight of state-chartered banks and credit unions and other financial institutions (herein “financial institutions”).<sup>9</sup> Both federal and state financial institutions must comply with federal anti-money laundering laws.

### BSA/AML

The Currency and Foreign Transactions Reporting Act of 1970, commonly referred to as the “Bank Secrecy Act” (BSA), requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. The BSA is sometimes referred to as an “anti-money laundering” (AML) law or jointly as “BSA/AML.” Under the act, financial institutions must keep records of cash purchases of negotiable instruments (such as checks and money orders), file reports of cash transactions exceeding \$10,000 (daily aggregate amount), and report

---

<sup>6</sup> The Congressional Research Service (CRS), [The Schedule I Status of Marijuana \(PDF\)](#), which can be found on the CRS website: [crsreports.congress.gov](https://crsreports.congress.gov); 21 United States Code (U.S.C.) 801 to 904.

<sup>7</sup> CRS, [The Marijuana Policy Gap and the Path Forward \(PDF\)](#), pp. 10 and 20-21, which can be found on the CRS website: [crsreports.congress.gov](https://crsreports.congress.gov).

<sup>8</sup> Forbes, [The Cost Of Cash For Unbanked Cannabis Businesses](#), July 13, 2020, which can be found on the Forbes.com website: [forbes.com](https://forbes.com); and Reuters, [U.S. pot sellers stash cash as banks leave them high and dry](#), May 24, 2021, which can be found on the Reuters website: [reuters.com](https://reuters.com).

<sup>9</sup> See generally CRS, [Federal Preemption in the Dual Banking System: An Overview and Issues for the 116<sup>th</sup> Congress \(PDF\)](#), May 17, 2019, which can be found on the CRS website: [crsreports.congress.gov](https://crsreports.congress.gov); 31 U.S.C. 5312(a)(2) for definition of “financial institution,” which includes banks, credit unions, and other financial institutions.

suspicious activity that might signify money laundering, tax evasion, or other criminal activities.<sup>10</sup> The act requires financial institutions to establish and maintain AML programs designed to prevent the institutions from facilitating money laundering, and to ensure that the institutions' officers and employees have sufficient knowledge of their customers to identify when a Suspicious Activity Report (SAR) should be filed.<sup>11</sup>

Under the law, financial institutions must file SARs with the federal Financial Crimes Enforcement Network (FinCEN), which is part of the U.S. Treasury Department, for (1) any transaction that involves more than \$10,000 in cash and (2) transactions involving at least \$5,000 in funds or other assets if the financial institution knows, suspects, or has reason to suspect that the transaction involves illegal activity, designed to evade requirements of the law, or has no business or apparent lawful purposes.<sup>12</sup> Since marijuana is illegal under federal law, transactions with marijuana is considered "illegal activity." A financial institution and its officers and employees are at risk for committing money laundering if it engages in a monetary transaction in criminally derived property of a value greater than \$10,000.<sup>13</sup> Violations of the BSA/AML laws can result in civil and criminal penalties, asset forfeiture, and administrative enforcement actions initiated by federal financial regulators.<sup>14</sup>

Because marijuana is illegal under federal law, financial intuitions, such as banks and credit unions, are reluctant to offer financial services, such as holding deposits or issuing credit and debit cards, to state authorized marijuana businesses. Visa and MasterCard bar their networks from being used in the cannabis industry. Financial institutions fear that they could be charged with money laundering or otherwise violate federal law if they serve firms engaged in any type of commerce involving marijuana.<sup>15</sup>

## FinCEN guidance

In 2014, FinCEN published guidance for financial institutions to clarify how financial institutions can provide services to marijuana-related businesses consistent with their BSA/AML obligations. The aim of the guidance, as stated, was to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses." The guidance was

---

<sup>10</sup> [Bank Secrecy Act](#), which can be found on the Financial Crimes Enforcement Network website: [fincen.gov](https://www.fincen.gov); see also 12 U.S.C. 1829b, 12 U.S.C 1951-1960, 31 U.S.C. 5311 to 5314, 5316 to 5336, and 31 Code of Federal Regulations (C.F.R.) Chapter X.

<sup>11</sup> 31 U.S.C. 5311 *et seq.*

<sup>12</sup> 31 C.F.R. 1010.310, 1010.311, and 1020.320.

<sup>13</sup> 18 U.S.C. 1956 and 1957.

<sup>14</sup> 12 U.S.C. 1786 and 1818; 18 U.S.C. 981 and 982, and 1956 and 1957; and 31 U.S.C. 5318, 5321-5322, and 5324.

<sup>15</sup> See generally Forbes [Yes, Cannabis Banking Liberalization – SAFE Banking Act – Would Indeed Make U.S. More Competitive](#), March 18, 2022, which can be found on the Forbes website: [forbes.com](https://www.forbes.com); and CATO AT LIBERTY, Cannabis Banking, [A Clash Between Federal and State Laws](#), May 27, 2022, which can be found on the CATO website: [cato.org](https://www.cato.org).

based on a memorandum released by the U.S. Department of Justice referred to as the “Cole Memo,” named after the U.S. deputy Attorney General, at the time, James Cole, under President Obama. In general, the Cole Memo stated that given its limited resources, the Justice Department in general would not enforce the federal marijuana prohibition in states that had legalized marijuana in some form and that had implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana. The Cole Memo maintained that federal enforcement would still be in effect for a number of federal priorities, such as preventing the distribution of marijuana to minors, preventing the revenue from the sale of marijuana from going to criminal enterprises, and other criminal activity. The Cole Memo was rescinded in 2018 by Attorney General Jeff Session during the Trump administration. However, the 2014 FinCEN guidance is still in effect.

The 2014 FinCEN guidance states that a financial institution’s decision to open, close, or refuse any particular account or relationship with a customer should be made by each financial institution based on a number of factors specific to that institution, which may include the evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. In assessing the risk of providing services to a marijuana-related business (MRBs), a financial institution should conduct customer due diligence that includes:

- Verifying with the appropriate state authorities whether the business is duly licensed and registered;
- Reviewing the license application submitted by the business for obtaining the state license;
- Requesting from state licensing and enforcement authorities available information about the business and related parties;
- Developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served;
- Ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- Ongoing monitoring for suspicious activity, including for any of the red flags described in the guidance; and
- Refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.<sup>16</sup>

---

<sup>16</sup> Financial Crimes Enforcement Network, [BSA Expectations Regarding Marijuana-Related Businesses](#), February 14, 2014, which can be found on the FinCEN website: [fincen.gov](#); James M. Cole, Deputy Attorney General, U.S. Department of Justice, [Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement \(PDF\)](#), August 29, 2013, which can be found on the U.S. Department of Justice website: [justice.gov](#); Jefferson B. Sessions, Attorney General, [Marijuana Enforcement \(PDF\)](#), January 4, 2018, which can be found on the U.S. Department of Justice website: [justice.gov](#).

## Suspicious Activity Reports (SARs)

The FinCEN guidance states that even if the financial institution believes that the MRB is compliant with state law, it must still file a SAR. The financial institution must file one of the following SARs when engaging with an MRB:

- **The Marijuana Limited** filing means the financial institution's due diligence indicates that the MRB does not raise any of the red flags as defined in the Cole Memo and is compliant with the appropriate state's regulations regarding marijuana businesses. The financial institution is providing banking services to the MRB.
- **The Marijuana Priority** filing means the financial institution's due diligence indicates that the MRB may raise one or more of the red flags as defined in the Cole Memo or may not be fully compliant with the appropriate state's regulations regarding MRBs. The financial institution is providing banking services to the MRB while further investigation is being conducted.
- **The Marijuana Termination** filing means the financial institution's due diligence indicates that the MRB raises one or more of the red flags as defined in the Cole Memo, or is not fully compliant with the appropriate state's regulations regarding MRBs, or has decided not to have marijuana related customers for business reasons, and the financial institution has decided to terminate its relationship with the MRB.<sup>17</sup>

The guidance does not define "marijuana-related business," which makes the guidance less clear when it comes to whether a financial institution needs to file a SAR on a customer that may offer ancillary services to an MRB. For example, should the financial institution file a SAR on a customer who is a landlord renting a commercial space to an MRB or an attorney offering legal advice to an MRB? FinCEN has not released any public guidance on this issue.

## Federal legislation

Members of Congress have introduced several bills in the 117<sup>th</sup> Congress to address the gap in state and federal policy on cannabis. The SAFE Banking Act of 2021 and the Marijuana Opportunity Reinvestment and Expungement Act are the two that have had significant press and if enacted would provide more legal clarity for financial institutions in this space.<sup>18</sup> Both bills have passed the first house.

### SAFE Banking Act of 2021

The Secure and Fair Enforcement Banking Act of 2021 (SAFE Banking Act) was introduced in the 117<sup>th</sup> Congress to address some of the key issues facing financial institutions when offering financial services to marijuana-related businesses. The bill had been previously introduced in the 116<sup>th</sup> Congress and passed the House but died in the Senate committee. The latest bill also passed

---

<sup>17</sup> FinCEN, [BSA Expectations Regarding Marijuana-Related Businesses](#), February 14, 2014, and [Marijuana Banking Update \(PDF\)](#), both of which can be found on the FinCEN website: [fincen.gov](http://fincen.gov).

<sup>18</sup> See the [full list](#) of bills and amendments on [congress.gov](http://congress.gov), search terms: "Cannabis" and "Marijuana."

the House and is now pending in the Senate Banking, Housing, and Urban Affairs Committee. The bill does the following:

1. Prohibits a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business.
2. Specifies that proceeds from a transaction involving activities of a legitimate cannabis-related business are not considered proceeds from unlawful activity and not subject to AML laws.
3. Specifies that a depository institution is not, under federal law, liable or subject to asset forfeiture for providing a loan or other financial services to a legitimate cannabis-related business.

The bill's protections also apply to financial services offered to ancillary businesses in the cannabis industry. The bill does not make changes to the illegal status of marijuana.<sup>19</sup>

### **Marijuana Opportunity Reinvestment and Expungement Act**

The Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act") proposes to decriminalize marijuana by removing it from the CSA completely, and would make the change retroactive. The bill would allow individual states to continue to criminalize marijuana but it would eliminate any federal conflicts for states that have legalized marijuana in some form.<sup>20</sup>

---

<sup>19</sup> [H.R. 1996 – SAFE Banking Act of 2021](#), which can be found on Congress's website: [congress.gov](https://www.congress.gov); and see THE HILL, [Momentum builds in Senate for major cannabis bill](#), May 4, 2022, which can be found on The Hill's website: [thehill.com](https://thehill.com).

<sup>20</sup> [H.R. 3617 – Marijuana Opportunity Reinvestment and Expungement Act](#), which can be found on Congress's website: [congress.gov](https://www.congress.gov).