RESOLVED, That the American Bar Association urges Congress to enact legislation to clarify and ensure that it shall not constitute a federal crime for banking and financial institutions to provide services to businesses and individuals, including attorneys, who receive compensation from the sale of state-legalized cannabis or who provide services to cannabis-related legitimate business acting in accordance with state, territorial, and tribal laws; and

FURTHER RESOLVED, That the American Bar Association urges that such legislation should clarify that the proceeds from a transaction involving activities of a legitimate cannabis-related business or service provider shall not be considered proceeds from an unlawful activity solely because the transaction involves proceeds from a legitimate cannabis-related business or service provider, or because the transaction involves proceeds from legitimate cannabis-related activities.
INTRODUCTION

This Resolution addresses the current banking uncertainties facing lawyers who provide services to, and other businesses operating in, the legitimate cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana for medical or recreational use, while the federal government continues to ban the drug outright. Although the federal government has taken limited steps to accommodate state reforms, the gap between state and federal law has created tension and uncertainty relating to the criminal prosecution of activity in, or relating to, marijuana. Regardless of current federal prohibitions, the state-legalized marijuana industry was estimated to reach $10.4 billion as of the end of 2018, employing some 250,000 Americans.\(^1\) By 2025, the U.S. cannabis market is estimated to nearly triple, reaching $30 billion.\(^2\)

This Resolution addresses the provision of banking services in jurisdictions where marijuana has been legalized for medicinal or other purposes. Lawyers are key to upholding the rule of law. Legal advice is particularly necessary for an emerging industry such as cannabis, especially given the divergence of state and federal laws and the multiplicity of local, state, and federal regulations. Concerns about banking keep many lawyers and law firms from representing clients involved in the state-legalized marijuana trade or representing ancillary companies providing services to companies directly involved in the state-legalized marijuana trade.

Currently, the threat of criminal prosecution prevents most depository institutions from banking clients, including lawyers, who are in the stream of commerce of state-legalized marijuana.\(^3\) This Resolution is necessary to clarify that such provision of legal and other services in compliance with state law should not constitute unlawful activity pursuant to

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federal law. This Resolution is crucial for allowing lawyers to advise clients without fear of criminal liability or private repercussions such as the loss of their banking and credit relationships. Ensuring qualified and competent counsel can advise clients without fear of such repercussions will assist clients to comply with both state and federal laws, allow for the development of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

BACKGROUND ON STATE REFORMS

The myriad state laws, state and local regulations, and federal laws dealing with the state-legalized cannabis industry is truly a thicket that competent counsel must help companies, individuals, and investors wade through.

Over the past two decades, a majority of states have legalized “marijuana” for at least some purpose. The regulatory approaches pursued by these states vary, as befits our federal system, but each of these states can be divided into one of two basic groups: (1) “Medical Only” states; and (2) “Adult and Medical Use” states.

“Medical Only” states have legalized the use of marijuana that contains tetrahydrocannabinol (THC), the psychoactive cannabinoid produced by the cannabis plant, for the treatment of symptoms associated with certain medical conditions. “Adult and Medical Use” states have adopted broader reforms. Like “Medical Only” states, each of these states has legalized the medical use of marijuana, but they have also legalized adult use of the drug for non-medical purposes as well, in the same way they once legalized the consumption of alcohol by adults following the repeal of Prohibition. As of October 2019, 23 states had adopted “Medical Only” laws, and another 11 states (12, if we include the District of Columbia) had adopted “Adult and Medical Use” laws.

Each of these states has adopted, is adopting, and continues to refine a comprehensive body of regulations to replace outright prohibition. The regulations stipulate detailed rules for a litany of marijuana-related activities. For example, Colorado has adopted nearly two-hundred pages of regulations governing the supply of marijuana just for the adult-use market. Among many other things, this Retail Marijuana Code requires vendors to apply for a special license from the state, maintain detailed records of inventory, limit their advertising, and apply warning labels to all marijuana products. The state has even...
created a Marijuana Enforcement Division within its Department of Revenue to regulate the state’s more than 1,000 licensed marijuana facilities. Many states also allow local municipalities and counties to determine whether marijuana can be legally produced or sold within the jurisdiction’s boundaries.8

BACKGROUND ON FEDERAL PROHIBITION

Even as these state reforms have proliferated—and public support for them has ballooned,9 federal law governing marijuana has remained essentially unchanged since the passage of the Controlled Substances Act (CSA) in 1970.10

Under the CSA, all controlled substances (essentially, all substances—with the notable exceptions of alcohol and tobacco—that can cause dependence) are placed onto one of five Schedules (I-V) using criteria that relate to the substance’s medical benefits and its harms.11

Congress itself placed marijuana on Schedule I when it passed the CSA.12 It did so based, in part, on a recommendation from the Assistant Secretary of the U.S. Department of Health, Education, and Welfare that cannabis be placed on Schedule I, “at least until the completion of certain research.”13 The Drug Enforcement Administration has the authority to issue licenses for such research. Indeed, the CSA provides a mechanism to administratively reschedule cannabis, based on such new research and discoveries demonstrating marijuana’s medical efficacy.14 The DEA has repeatedly rejected requests to reschedule cannabis, most recently, in August 2016, when it denied a petition from the states of Rhode Island and Washington.15 The agency’s rationale for refusing to reschedule is always the same: the dearth of clinical trials demonstrating cannabis’s medical efficacy: “there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is not widely available.”16 The 33 states and various countries, including Canada, that have legalized

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8 See, e.g., Oregon Laws 2017, Chapter 475B Section 461 (ORS 475B.461) (allowing a referendum to prohibit an applicant for a license for the production, processing or sale of marijuana items to operate in a city or county); Oregon Laws 2017, Chapter 475B Section 928 (ORS 475B.928) (allowing for local time, place and manner regulations).
9 See, e.g., Justin McCarthy, Two in Three Americans Now Support Legalizing Marijuana, Gallup, Oct. 22, 2018 (reporting that 66% of Americans support legalizing marijuana, up from only 12% in 1970).
10 The CSA is codified at 21 U.S.C. §§ 801 et seq. Congress has recently enacted one notable reform: it narrowed the definition of “marijuana” for purposes of the CSA, and thus the scope of the statute’s ban on the drug, when it passed the 2018 Farm Bill. See Robert A. Mikos, See New Congressional Farm Bill Legalizes Some Marijuana, Marijuana Law, Policy and Authority Blog, https://my.vanderbilt.edu/marijuanalaw/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/ (Dec. 13, 2018) (noting that the 2018 Farm Bill excludes from the definition of marijuana cannabis that contains less than 0.3% THC by dry weight).
11 21 U.S.C. § 812(b). These criteria include the substance’s accepted medical use (if any), it’s potential for abuse, and its physical and psychological effects on the body. Id.
12 Gonzales v. Raich, 545 U.S. 1, 13-14 (2005).
13 Id.
16 Id. at 53688.
cannabis for medicinal purposes, disagree with the DEA’s assessment. Nevertheless, marijuana remains a Schedule I drug in the United States.

This classification means that marijuana—like other Schedule I drugs, such as heroin and LSD—is subjected to the strictest possible regulatory controls. Indeed, the manufacture, distribution, and even possession of Schedule I substances, including marijuana, are criminal offenses outside of very narrowly circumscribed FDA-approved clinical research trials.17

THE RESULTING REGULATORY QUAGMIRE

There is an obvious tension between marijuana’s Schedule I status—which prohibits marijuana in virtually all circumstances—and state regulatory reforms—which increasingly authorize marijuana for at least some purposes. While state and federal law often diverge—on everything from environmental to workplace laws—marijuana policy is the only area where the states regulate and tax conduct that the federal government nearly universally prohibits.

In recent years, the federal government and the states have reached an uneasy truce that has reduced, but not eliminated, this tension. Guidance memos from the Department of Justice (DOJ) to United States Attorneys around the country once generally counseled deference to state policy as a matter of policy (not law).18 While those memos were rescinded by then-Attorney General Sessions, and then apparently re-adopted by Attorney General Barr,19 Congress has not changed the Controlled Substances Act, nor has the Drug Enforcement Agency rescheduled Cannabis. Within the last few years, Congress has written some temporary protections against federal criminal enforcement into appropriations legislation. In particular, beginning in 2014, Congress has attached riders prohibiting the DOJ from using any of its budgeted funds to “prevent . . . states from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”20 The federal courts have interpreted these riders to bar federal prosecution of persons acting in conformity with state medical marijuana laws.21

Notwithstanding these steps, however, the tension between state and federal laws governing marijuana persists. For one thing, spending riders do not shield anyone acting in compliance with any state’s Adult Use marijuana laws. Moreover, the protection afforded by such riders is only temporary. If a rider lapses, both medical and non-medical

17 See 21 U.S.C. at § 841 (criminalizing marijuana trafficking); id. at § 844 (criminalizing marijuana possession).
18 See Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct 19. 2009); Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys (Aug. 29, 2013).
19 See Memorandum from Jefferson B. Sessions, III, Attorney General, to All United States Attorneys (Jan. 4, 2018).
21 E.g., United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016) (“We therefore conclude that, at a minimum, [that the spending rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.”).
marijuana users and suppliers would be subject to arrest and prosecution by the DOJ, and not just for their conduct going forward. Those using and producing marijuana could also be prosecuted for violations of the Controlled Substances Act they committed while the riders were in effect (so long as the statute of limitations has not expired). Moreover, anyone out of compliance with state regulations would also be subjected to criminal sanctions, even if their violations of state regulations were de minimis.

Because the spending riders operate only as a restraint on DOJ action, they have not prevented other parties from using federal law against state-compliant marijuana businesses and users. For example, state-licensed and state law-abiding marijuana businesses continue to have difficulty obtaining banking services, due to financial regulations that limit transactions in the proceeds of “unlawful” activities; they pay unusually high federal taxes, due to federal tax code rules that deny them deductions other (federally legal) businesses are allowed to take; they cannot secure federal protection for their trademarks, due to administrative rules that limit such protection to marks used in “lawful” commerce; and they have faced a growing number of private lawsuits under federal law because the federal RICO statute considers growing and selling marijuana to be actionable racketeering activities.

What is more, the ongoing tension has generated considerable confusion over the enforceability of some state regulations. Although Congress may not force the states to ban marijuana (e.g., to enact or retain their own state law prohibitions on marijuana activities), just how far the states may depart from the federal government’s approach to regulating marijuana remains unclear. State laws regulating a variety of activities—from employment discrimination against marijuana users to taxation of marijuana sales—have been subject to preemption challenges brought by private parties and even state officials.

In short, despite State law, Cannabis remains an illegal controlled substance everywhere in the United States.

No one should be satisfied with the legal and regulatory quagmire that has resulted from the unresolved tension between state reforms and federal law. Although many of the

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22 McIntosh, 833 F.3d at 1179 n.5 (“Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding.”).

23 See Erwin Chemerinsky, et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 90-100 (2015); Mikos, Marijuana Law, Policy, and Authority, supra note 2 at 396-412 (detailing these and other obstacles faced by state-licensed marijuana businesses).


25 E.g., Bourgoin v. Twin Rivers Paper Co., LLC. 187 A.3d 10 (Maine 2018) (holding state workers’ compensation law preempted to the extent it required employer to compensate injured employee for purchase of medical marijuana); Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (denying states’ request for leave to file complaint in Supreme Court’s original jurisdiction; complaint had sought declaration that regulatory structure created by Colorado’s Amendment 64 conflicts with and is thus preempted by the federal CSA).
burdens described above fall upon marijuana users and suppliers, not all of these costs are internalized to those violating federal law. For example, the unavailability of even the most basic banking services means that marijuana is a multi-billion dollar cash business. This makes marijuana businesses and their clients the targets of crime and significantly hampers the work of the state regulators and tax collectors who govern them.

THE EFFECTS ON BANKING AND THE UNCERTAINTY FACING LAWYERS

This tension between federal and state laws affects all those working in or for the state-legalized marijuana industry, including attorneys. Regardless of state law, so long as marijuana remains a Schedule I controlled substance, an attorney accepting funds from a client’s marijuana business activities remains criminal conduct under federal law. Thus, remunerations from the provision of legal advice and services to assist clients in such conduct may also in itself constitute a criminal offense, whether under a theory of conspiracy or aiding and abetting.

Because “the possession, distribution, or sale of marijuana remains illegal under federal law, any contact with money that can be traced back to state marijuana operations could be considered money laundering. . . .” This exposes banks and financial institutions to significant legal, operational, and regulatory risk. “In addition to growers and retailers, there are vendors and suppliers, landlords and employees[,] [lawyers and consultants] that are indirectly tied to the cannabis industry, thus posing legal risk for banks serving such entities and individuals. . . .”

The Federal Reserve System and the Office of the Comptroller of the Currency within the U.S. Treasury Department primarily regulate banks. Because cannabis is federally illegal, few banks are willing to allow those interacting with the industry to continue to maintain accounts. Lawyers and others regularly lose their accounts for working with the cannabis industry. Even one group dedicated to lobbying Congress to reform marijuana laws has had its long-term banking relationship interrupted by a bank’s fear of prosecution, directly threatening the group’s First Amendment right to petition the

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26 “Section 846 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter I of Title 21 (“Control and Enforcement”)—in other words, Section 846 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 801-904. Analogously, Section 963 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter II of Title 21 (“Import and Export”)—in other words, Section 963 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 951-971.” Cited in U.S. Attorney’s Manual, § 9-100.020.

27 See 18 U.S.C. § 2(a): “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”


29 Id.


31 See, e.g., Note 3, supra.
government. This is because banks risk losing their master account with the Federal Reserve or having their assets seized under criminal and civil asset forfeiture laws for failing to comply with federal laws, including the Bank Secrecy Act, that prohibit, which requires banking institutions to maintain comprehensive compliance programs designed to prevent money laundering—criminal activity that involves the transformation of illegally obtained funds into the appearance of legitimate funds.

Ironically, by preventing banks from working with the cannabis industry, current law fosters potential money laundering. Most transactions with cannabis companies must be done in cash. This includes paying taxes, bills, and payrolls. This has spawned an industry of off-the-books alternative payment systems. Payments in cash and through alternative payment systems only cloud investigators’ abilities to trace transactions and inhibit law enforcement from determining whether transactions and businesses are legitimate or fronts for illegal activity. This erodes the rule of law in and of itself.

In 2014, the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) issued guidance for banks working with the cannabis industry. Unfortunately, this did not provide sufficient safety for many financial institutions. Out of approximately 12,000 banks and credit unions in the United States, only 633 provide services to the cannabis industry, including attorneys. Federal Reserve Chairman Jerome Powell testified that banking the cannabis industry “puts financial institutions in a very difficult place and puts

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the supervisors in a difficult place, too. It would be nice to have clarity on that supervisory relationship.”39

On September 25, 2019, the U.S. House of Representatives passed the Secure And Fair Enforcement Banking Act of 2019 (H.R. 1595) by a vote of 321-103. The Act would explicitly allow depository institutions to bank attorneys and others serving the cannabis industry without fear of legal violations. This would allow banking regulators to provide the clearer rules and guidelines Federal Reserve Chairman Powell feels are necessary. The bill awaits action in the U.S. Senate.

THIS RESOLUTION

Clear statutory guidance is needed that explicitly ensures that financial institutions can provide services to firms, companies, and individuals, particularly attorneys, who provide services to the Cannabis industry consistent with state law. This Resolution accomplishes this by supporting ongoing Congressional action. Passage of the SAFE Banking Act or similar legislation will provide security for lawyers and firms acting to advise companies in the industry against having their accounts closed or deposits seized. This will also foster the rule of law by ensuring that those working in the state-legalized legitimate cannabis industry can seek counsel and help prevent money laundering and other crimes associated with off-the-books cash transactions.

CONCLUSION

The right to seek the assistance of counsel, in civil and criminal matters, is a bedrock constitutional principle and a vital component of any system that adheres to the rule of law. Legal counsel is vital to the development of law and regulations. Yet, too many attorneys refuse to represent business or individuals in the stream of commerce of the cannabis industry for fear of having their own bank accounts closed or seized. Because of the central importance of the rule of law to the American system of government and the conflict between federal and state laws related to marijuana, it is the purpose of this Resolution to ensure attorneys and others working in states that have chosen to legalize marijuana can represent clients, in accordance with state law, without fear of having their bank accounts closed or seized. Until such fear is addressed, lawyers will continue to be deterred from advancing the rule of law, and clients will continue to be deprived of much needed legal guidance and counsel.

Respectfully submitted,

Dorothea M. Capone
Chair, Tort Trial and Insurance Practice
February 2020

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GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice

Submitted By: Dorothea M. Capone, Chair

1. **Summary of Resolution(s).**

   This Resolution encourages Congress to enact legislation to ensure financial institutions, attorneys, and others may provide services to individuals and businesses operating in, or as part of, the state-legalized cannabis industry, consistent with state or tribal law in jurisdictions where cannabis has been legalized, without fear of federal prosecution. The Resolution further encourages Congress to ensure that proceeds from transactions involving cannabis-related businesses in such jurisdictions are not considered proceeds from an unlawful activity solely because the transaction involves proceeds from the state-legalized cannabis industry.

2. **Approval by Submitting Entity.**

   This resolution was approved by the Tort Trial and Insurance Practice Section Council during the Section’s Fall Leadership Meeting on October 19, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   19A104 called for marijuana to be removed from Schedule I of the Controlled Substances Act. This Resolution seeks to supplement 19A104 by calling on Congress to clarify that banking institutions serving the cannabis industry, and serving those who serve the state-legalized legitimate cannabis industry, may do so without fear of regulatory or legal repercussions.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   N/A

6. **Status of Legislation. (If applicable)**

   Not applicable.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Provide the ABA’s support to ongoing efforts to secure Congressional passage of legislation to address cannabis banking, including passage of the SAFE Banking Act (H.R. 1595) or similar legislation.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Business Law Section.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of this Resolution

This Resolution encourages Congress to enact legislation to ensure financial institutions, attorneys, and others may provide services to individuals and businesses operating in, or as part of, the state-legalized cannabis industry, consistent with state or tribal law in jurisdictions where cannabis has been legalized, without fear of federal prosecution. The Resolution further encourages Congress to ensure that proceeds from transactions involving cannabis-related businesses in such jurisdictions are not considered proceeds from an unlawful activity solely because the transaction involves proceeds from the state-legalized cannabis industry.

2. Summary of the Issue that this Resolution Addresses

This resolution addresses the main issues that cause depository institutions to close accounts owned by lawyers and others providing services to the state-legalized cannabis industry by supporting congressional legislation to provide statutory and regulatory clarity to depository institutions. Statutory and regulatory clarity will remove the fear of prosecution or regulatory violations, allowing banks to provide services to lawyers and others who advise clients in the state-legalized cannabis industry. The provision of banking services to attorneys serving the state-legalized cannabis industry will advance the rule of law by removing a major barrier that has prevented many attorneys and law firms from providing such clients with much needed counsel and guidance on adhering to state and federal laws and regulations.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This resolution will support congressional action to provide explicit statutory clarity that exempts from criminal prosecution the provision of banking services to the state-legalized cannabis industry. This will allow attorneys and law firms to provide legal services relating to statute-authorized marijuana activity or business, without fear of having their accounts closed and lines of credits revoked.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

Not applicable / None.