September 25, 2019

VIA EMAIL AND MAIL

Dear Bipartisan Group of State and Territorial Attorneys General,

We, the undersigned group of legal cannabis business trade organizations and industry leaders, write to thank you for your important letter, dated September 23, 2019, urging Congress to pass bipartisan legislation to address the untenable disparity between state and federal law on cannabis. The growing bipartisan, nationwide recognition that federal cannabis law must be changed in light of the fact that a majority of States, comprising a majority of the U.S. population, have legalized at least some uses of cannabis is critical.

Further, it is critically important that the federal government respect the rights of States, territories, outlying possessions, and localities to choose whether and to what extent to legalize cannabis, or not to do so, and protect the right of States that choose to legalize cannabis to engage in free trade amongst themselves and globally in a manner that does not impose negative externalities on the States that have not. The end of Prohibition showed that federal law can and must protect both States' choice, including freedom from negative externalities, and interstate trade.

We share your views that federal law must reduce regulatory uncertainty while protecting the States' authority to choose whether and to what extent to legalize cannabis, and the urgent need to prevent crime by providing legal cannabis businesses access to the banking system. To advance these shared goals, we would like to bring to your attention the several policy concerns we have with the particular piece of legislation discussed in your letter, the STATES Act, S. 1028, H.R. 2093, and the benefits of SAFE Banking Act, H.R., 1595, S. 1200. The SAFE Banking Act is a strong first step toward a regulatory regime that promotes these goals.

While we appreciate the intent behind the STATES Act to create regulatory certainty, we are concerned that the bill would result in federal criminal penalties for patients and adult consumers using cannabis products in the States where they are legal. The STATES Act "ensur[es] the CSA does not 'apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, [sale,] or delivery of mari[j]uana,'" however, it is not sufficient to allow for the use or transport of cannabis between States.

Regardless of that provision, the STATES Act would maintain cannabis' designation as a Schedule I substance under the Controlled Substances Act. Thus, medical patients merely traveling down the West Coast from Seattle, through Oregon to Southern California, airline travelers such as elderly patients visiting family, or businesses operating in multi-state capacities would not be protected. Moreover, with respect to any federal agent, or any adoptive or assumptive federally-partnered forfeiture program, that status remains unchanged under the Supremacy Clause of the Constitution and U.S. Supreme Court precedent directly on point.[1]

[1] U.S. CONST. art. VI, cl. 2; *see also Gonzales v. Raich*, 545 U.S. 1 (2005) (holding expressly that "limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is

The adverse effects of this aspect of the bill would be significant. Millions of Americans use cannabis to treat medical conditions, including pain management. Many patients rely on legal medicinal cannabis as an alternative to or a means to stop using addictive pain-killers like opioids. For patients that might be confused about the intricacies of Commerce Clause regulation and hermetic marketplaces, the STATES Act would result in stiff federal criminal penalties and forfeitures.[2]

In fact, the STATES Act would both create and compound this problem because all state-licensed packaging of legal cannabis products bears a state-specific moniker that a police officer could see in plain sight. As a result, law enforcement would be immediately aware that the individual is in possession of a cannabis product that is legal in the state of origin but not in the state of transport, creating substantial criminal liability for residents and tourists, irrespective of the State's choice to legalize or decriminalize cannabis.

Moreover, we are concerned that the STATES Act would create barriers to accessing banking services for legal cannabis businesses, and presents more questions than answers with respect to interstate trade and transport in cannabis products among legal States. With respect to banking access, we share your concern that "financial institutions face substantial constraints in providing financial services to the cannabis industry."

However, the STATES Act simply does not appropriately address banking issues because it does not contain sufficient clarifications or protections to expand the current slate of available services. For example, as Senate Banking Committee Chairman Mike Crapo pointed out in the recent hearing addressing this issue, "legacy cash" from cannabis businesses *is* the proceeds of criminal enterprises and subject to the vast penalties and forfeitures as federal law may impose. The STATES Act does not address retroactively legalizing the proceeds of state-licensed businesses so that cannabis businesses are not subject to immediate seizure and forfeiture.

To remedy the banking issue, and to allow for intrastate banking, we ask that you consider support for the SAFE Banking Act as the first step toward a new federal regulatory regime. The bill addresses several key and current problems, such as improving anti-money laundering oversight of the legal cannabis industry, and reducing crime against legal cannabis operators, without raising barriers between state markets that can have long term consequences for the cannabis marketplace.[3] As with alcohol, which can be transported through dry counties, federal law can both allow for interstate trade and protect states and localities that choose not to legalize a product

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'"superior to that of the States to provide for the welfare or necessities of their inhabitants," ' however legitimate or dire those necessities may be….The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected."). While cannabis remains in Schedule I, a congressional exercise of commercial power to allow activity "in accordance with state law" only goes as far as the individual states' jurisdictional borders; the Court presumes in reading statutes Congress is aware of its decision in legislating and the narrowness of "hermetically" permitting or rejecting intrastate-only commerce while maintaining prohibitive federal interstate and international Schedule I status, particularly in light of the Executive Branch's views of its treaty obligations under the 1961 Single Convention. *See The Charming Betsy*, 6 U.S. 64 (1804) (congressional acts cannot be construed to violate a treaty if any other possible construction remains).

[2] *E.g.*, 21 U.S.C. §§ 841 960, 962; 46 U.S.C. § 70506.

[3] *See, e.g.*, *Tennessee Wine and Spirits Retailers Association v. Thomas*, No. 18–96 (July 29, 2019) (ending balkanization of state-based alcohol markets after 80 years).

from negative externalities. Unlike the STATES Act, the SAFE Banking Act would not preclude such protections.

Additionally, the SAFE Banking Act would provide the greatest benefit to state-chartered banks, who are already interested in and are banking legal cannabis businesses. At present, State activity in intrastate cannabis commerce is protected under the Blumenauer-Joyce appropriations amendment, and has been consistently since 2014. A legislative change, such as the SAFE Banking Act, however, would create long-term certainty for and provide more robust protections to state-chartered banks. Such regulatory certainty and protections are essential to facilitating the financial services, including capital information, legal intrastate businesses will need to compete in a federally-legalized marketplace open to global competitors.

Importantly, the SAFE Banking Act is a bipartisan bill with over 200 co-sponsors in the House of Representative that is widely supported by the legal cannabis industry as well as the financial services industry, specifically by the American Bankers Association, Credit Union National Association, Independent Community Bankers of America, and National Bankers Association. The bill is expected to pass the House this week and has already received attention in the Senate as the Senate Banking Committee held a hearing on cannabis banking. Moreover, we believe the bill likely will be improved upon in the Senate to clarify the "legacy cash" issue unaddressed by the STATES Act.

Thank you for your attention to this urgent issue that affects millions of American patients and adult-users in the various states. Please let us know if we can be a resource.

Best Regards,

Global Alliance for Cannabis Commerce (GACC)
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