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## **Legal Impediments to Banking Services for Recreational Cannabusinesses: Comparing Oregon to Canada**

Introduction .....	216
I. Legalization of Cannabis: Moving from Medical to Recreational.....	218
A. Historical Context .....	218
B. Decriminalization in Oregon.....	219
C. Decriminalization in Canada.....	222
II. Legal Impediments to Cannabusinesses: Why Is There No Bank of Pot? .....	224
A. Oregon.....	225
1. Controlled Substances Act .....	226
2. Federal Anti-Money Laundering Statutes.....	227
a. Money Laundering Control Act .....	227
b. Bank Secrecy Act .....	228
c. Patriot Act.....	230
3. Sessions’s Rescission Memorandum.....	231
4. Tax Treatment .....	233
5. Oregon-Specific Regulatory Framework .....	235
B. Canada.....	237
1. Jurisdictional Responsibilities .....	237
2. Excise Duty Treatment .....	239
3. Correspondent Banking Relationships .....	241
III. Financing Cannabusinesses: Pot Accounts and Piles of Cash.....	242

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A.	Oregon.....	242
1.	Pot Accounts.....	242
2.	CanPay.....	244
3.	A Possible State-Chartered Bank and Cryptocurrency Alternatives .....	244
B.	Canada.....	245
IV.	The Case Against Cannabis: Does Legalization Harm the Environment and Fail to Combat Black Markets? .....	247
A.	Environmental Harm.....	247
B.	Black Markets .....	248
1.	Oregon .....	249
2.	Canada .....	250
V.	Future Developments: Increased Liberalization and Profitability of Cannabis .....	252
A.	The STATES Act: A Call to End the Federal Prohibition.....	252
B.	2018 U.S. Midterm Elections: Growing Support for Cannabis Reform.....	253
C.	Representative Blumenauer’s Blunt Blueprint for Legalization in the 116th Congress.....	253
D.	SAFE Banking Act.....	255
E.	Green Rush and Pot Tourism.....	256
	Conclusion.....	258

## INTRODUCTION

Cannabis<sup>1</sup> legalization is a hot topic on the world stage.<sup>2</sup> Yet before 2018, Uruguay was the sole country to legalize cannabis

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<sup>1</sup> People often confuse the terms “cannabis,” “hemp,” and “marijuana” and incorrectly consider all three plants to be one in the same. To clarify, *Cannabis* is a genus of plants with two primary species: *indica* and *sativa*. Brette Warshaw, *Sativa or Indica? CBD or TCH? What to Know Before Cooking with Cannabis*, L.A. TIMES (Nov. 15, 2018), <https://www.latimes.com/food/dailydish/la-fo-co-cannabis-definitions-20181115-story.html>. Marijuana is a term that refers to the female plants of either the *indica* or *sativa* species, whereas hemp refers to the male *Cannabis sativa* plants. *Id.* However, where possible, this Article avoids the term marijuana and replaces it with cannabis to refer to plants that are not hemp. For a discussion of the racist and xenophobic past of the usage of the word “marijuana,” see Matt Thompson, *The Mysterious History of ‘Marijuana,’* NAT’L PUB. RADIO (NPR) (July 22, 2013), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana>.

<sup>2</sup> Ben Curren, *As UN Discusses Cannabis, Three Important Justifications for Descheduling*, FORBES (Mar. 22, 2019), <https://www.forbes.com/sites/bencurren/2019/03/22/as-un-discusses-cannabis-three-important-justifications-for-descheduling/#4fa132c4be76>.

for recreational use.<sup>3</sup> Other countries have since come on board, including Canada, South Africa, and Georgia.<sup>4</sup> In February 2019, the World Health Organization proposed recommendations to reschedule cannabis, THC, and CBD under international treaties.<sup>5</sup> These developments on the international stage are timely, as experts project global sales of cannabis to grow at a rate of thirty-five percent per year, with some projecting \$146.4 billion in revenues for 2025.<sup>6</sup>

Cannabis popularity in North America has grown significantly in recent years even though regulatory frameworks for recreational cannabis are of a recent vintage. According to Canada's national statistics office, 4.9 million Canadians consumed cannabis in 2017, and the per capita consumption of cannabis was twenty grams.<sup>7</sup> In the same year, a Gallup poll found twelve percent of Americans said they smoke cannabis, and forty-five percent admitted they had at least tried it.<sup>8</sup> Therefore, unpacking the complex interplay of state and federal law in the United States, as well as the parallel interplay between American and Canadian laws, is crucial for businesses that are related—even tangentially—to the cannabis industry.

Recreational cannabis's recent spike in popularity necessitates cannabis law reform, especially in regard to cannabis banking services—in both the United States and Canada. Canada's legalization of recreational cannabis could help inspire cannabis law reform at the federal level in the United States, thereby increasing cannabis business (cannabusiness) owners' access to reliable banking options in both countries. This Article examines how the legal, regulatory framework for providing banking services for cannabusinesses in Oregon and Canada prevents legitimate cannabusinesses from thriving and suggests future possibilities for improving the existing framework. Part I discusses the paths Oregon and Canada took to legalize medical and recreational cannabis and how those paths recently diverged. Next, Part

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Rob Koyfman, *Cannabis Stocks Are Full of Hot Air*, FORBES (Mar. 20, 2019), <https://www.forbes.com/sites/robkoyfman/2019/03/20/cannabis-stocks-are-full-of-hot-air/#75abc7315d31>.

<sup>7</sup> Dan Bilefsky, *Legalizing Recreational Marijuana, Canada Begins a National Experiment*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/world/canada/marijuana-pot-cannabis-legalization.html>.

<sup>8</sup> Art Swift, *In U.S., 45% Say They Have Tried Marijuana*, GALLUP (July 19, 2017), <https://news.gallup.com/poll/214250/say-tried-marijuana.aspx>.

II examines how banking access and service restrictions affect business operations and growth and why neither jurisdiction has created a bank specifically for the cannabis industry. Part III examines the alternative means cannabis businesses use to finance their operations in light of limited access to banking services. Part IV looks at the negatives of cannabis liberalization with a focus on the environment and the unintended effects on the black market. Finally, Part V examines future developments in the cannabis industry with an eye toward the trend of increased profitability and liberalization.

## I

### LEGALIZATION OF CANNABIS: MOVING FROM MEDICAL TO RECREATIONAL

The regulatory regimes for cannabis policy in the United States and Canada mirror each other in several important ways, diverging only recently in their paths toward cannabis liberalization. Despite the federal prohibition of cannabis in the United States, legalization is taking place at the state level.<sup>9</sup> On the other hand, the courts largely drove Canada's path toward national legalization.<sup>10</sup> While Canada's subsequent regulatory frameworks have been as inconsistent as those experienced by U.S. states, Canada's nationwide experience with cannabis regulation could serve as a meaningful jumping-off point for the United States to pursue recreational cannabis legislation and regulation.<sup>11</sup>

#### *A. Historical Context*

In the past, federal cannabis policy in both the United States and Canada focused on prohibition.<sup>12</sup> Both were hostile toward cannabis use throughout the early part of the twentieth century.<sup>13</sup> In 1923, Canada listed marijuana as a prohibited substance in the Prohibit the Improper Use of Opium and Other Drugs Act.<sup>14</sup> Similarly, the United States first introduced federal cannabis regulation through the

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<sup>9</sup> Ryan B. Stoa, *Comparative Cannabis: Approaches to Marijuana Agriculture Regulation in the United States and Canada*, 49 MCGEORGE L. REV. 89, 91 (2017).

<sup>10</sup> *Id.* at 92.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 90.

<sup>13</sup> *Id.* at 98.

<sup>14</sup> *Id.*

Marihuana Tax Act of 1937.<sup>15</sup> While the Marihuana Tax Act did not make cannabis illegal, it created a complex and onerous system of requirements that were so difficult to comply with that it effectively banned the use of cannabis.<sup>16</sup>

Both the United States' and Canada's cannabis prohibitions were partially motivated by racism and fears that drug users would "corrupt and violate innocent women and children."<sup>17</sup> A wave of drug criminalization took place in Canada between 1908 and 1920 due to the animosity between white Canadians and Chinese-Canadians; Chinese-Canadians were negatively associated with psychoactive drugs because of their opium use.<sup>18</sup> In the United States, twenty-nine states banned cannabis between 1915 and 1931 despite medical and pharmaceutical industries' strong support for the drug.<sup>19</sup> Once the Great Depression hit, immigrants "became an unwelcome minority linked with violence and with growing and smoking marijuana."<sup>20</sup> Western states were particularly concerned, leading them to call for federal cannabis controls.<sup>21</sup>

### ***B. Decriminalization in Oregon***

In 1996, California became the first state to legalize cannabis for medical use.<sup>22</sup> In 2012, Colorado and Washington became the first states to legalize recreational cannabis use.<sup>23</sup> The 2016 elections resulted in twenty-nine states legalizing cannabis in some form, and

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<sup>15</sup> Adrian A. Ohmer, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 97, 99 (2013). Note that the spelling of "marihuana" was prevalent at this period in time, and the government began to use the "marijuana" spelling only under the Nixon Administration. Jon Gettman, *Marijuana vs. Cannabis: Pot-Related Terms to Use and Words We Should Lose*, HIGH TIMES (Sept. 10, 2015), <https://hightimes.com/culture/marijuana-vs-cannabis-pot-related-terms-to-use-and-words-we-should-lose/>.

<sup>16</sup> *Id.*

<sup>17</sup> Stoa, *supra* note 9, at 98.

<sup>18</sup> CATHERINE CARSTAIRS, 'HOP HEADS' AND 'HYPES': DRUG USE, REGULATION AND RESISTANCE IN CANADA, 1920-1961 6 (2000) (unpublished Ph.D. dissertation, University of Toronto) (on file with the National Library of Canada).

<sup>19</sup> Stoa, *supra* note 9, at 96.

<sup>20</sup> David F. Musto, *Opium, Cocaine and Marijuana in American History*, 265 SCI. AM. 40, 46 (1991).

<sup>21</sup> *Id.* at 46.

<sup>22</sup> Stoa, *supra* note 9, at 91.

<sup>23</sup> *Id.*

three more followed suit in the 2018 midterm elections.<sup>24</sup> However, in the United States, cannabis is still not legal on a federal level.<sup>25</sup>

In 2014, Oregon legalized recreational cannabis production, sales, and possession with its passage of the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, Measure 91 (Measure 91).<sup>26</sup> In doing so, Oregon became the third state to allow the possession and sale of cannabis for recreational rather than strictly medical use.<sup>27</sup> Just two years before, in 2012, Oregon voters rejected an initiative to legalize recreational cannabis.<sup>28</sup> However, Measure 91 had a hefty advertising budget featuring a campaign that included a retired judge, a retired deputy sheriff, and a former top drug addictions official for the state.<sup>29</sup> Measure 91 proponents used the slogan “Regulate it, legalize it, tax it.”<sup>30</sup> With 56.1% of voters in favor of Measure 91, Oregonians decided it was the right time and the right initiative for repealing the cannabis prohibition.<sup>31</sup>

On December 4, 2014,<sup>32</sup> Measure 91 went into effect to provide a detailed framework for the state’s adult recreational use cannabis law. Much like alcohol, twenty-one is the legal age of possession for cannabis under Measure 91.<sup>33</sup> Measure 91 also set the personal

<sup>24</sup> Carlos Alvarez, *A Call to Higher Action: Cannabis Prohibition in the United States and Canada Makes for an Uncertain Future*, 24 U. MIAMI INT’L & COMP. L. REV. 441, 448 (2017); Sarah Rense, *Michigan Just Became the First State in the Midwest to Legalize Recreational Weed*, ESQUIRE (Nov. 7, 2018), <https://www.esquire.com/lifestyle/a24750209/marijuana-legalization-vote-results-midterm-elections-2018/>.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> Kevin Sabet, *Marijuana and Legalization Impacts*, 23 BERKELEY J. CRIM. L. 84, 84 (2018); Ken Helm & Logan Leichtman, *Implementation of Oregon’s Measure 91 in the State Legislature*, 52 WILLAMETTE L. REV. 1, 6 (2015).

<sup>27</sup> Noelle Crombie, *Recreational Marijuana Passes in Oregon: Oregon Election Results 2014*, THE OREGONIAN/OREGONLIVE (Nov. 5, 2014), [https://www.oregonlive.com/politics/2014/11/recreational\\_marijuana\\_passes.html](https://www.oregonlive.com/politics/2014/11/recreational_marijuana_passes.html).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Emily Badger, *The Marijuana Legalization Pitch for People Who Don’t Actually Want to Smoke It*, WASH. POST (Oct. 23, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/10/23/the-marijuana-legalization-pitch-for-people-who-dont-actually-want-to-smoke-it/?utm\\_term=.3a4861b5203d](https://www.washingtonpost.com/news/wonk/wp/2014/10/23/the-marijuana-legalization-pitch-for-people-who-dont-actually-want-to-smoke-it/?utm_term=.3a4861b5203d).

<sup>31</sup> Helm & Leichtman, *supra* note 26, at 6.

<sup>32</sup> Anna Marum, *Marijuana Legalization: Measure 91 Passed, but Don’t Reach for That Joint Quite Yet*, THE OREGONIAN/OR. LIVE (Nov. 5, 2014), [https://www.oregonlive.com/marijuana/2014/11/measure\\_91\\_passed\\_can\\_i\\_smoke.html](https://www.oregonlive.com/marijuana/2014/11/measure_91_passed_can_i_smoke.html). Measure 91’s primary drafter was Dave Kopilak, an alumnus of University of Oregon School of Law with Order of the Coif honors. *Dave Kopilak*, EMERGE L. GROUP, <https://emergelawgroup.com/2017/> (last visited Jan. 23, 2020).

<sup>33</sup> Helm & Leichtman, *supra* note 26, at 9.

possession limits to eight ounces of usable marijuana, sixteen ounces in solid form, seventy-two ounces in liquid form, and up to one ounce of extracts.<sup>34</sup> Individuals can possess, but not use, up to one ounce of marijuana in a public space and are permitted to grow their own marijuana at home, with up to four mature plants and no limit on immature plants.<sup>35</sup> However, Measure 91 specifically prohibits the importation of cannabis from other states and exportation of cannabis to other states.<sup>36</sup>

The drafters intended Measure 91 to create a regulatory framework for recreational cannabis that mirrored the existing regulatory framework for alcohol.<sup>37</sup> Accordingly, Measure 91 tasked the Oregon Liquor Control Commission (OLCC) with promulgating rules and overseeing licensing under the new regulatory regime.<sup>38</sup> Because the OLCC needed to craft regulations for the newly legal recreational cannabis industry, the bulk of the law did not become operative until July 1, 2015.<sup>39</sup> Thus, Oregon residents had to wait until July 1, 2015 to legally possess and grow recreational cannabis at home.<sup>40</sup> Measure 91 allowed the OLCC to issue four different licenses: producer, processor, wholesaler, and retailer.<sup>41</sup> The statute required the OLCC to accept license applications by January 4, 2016.<sup>42</sup>

Measure 91 established an excise tax on cannabis production that is levied only on the first sale from a producer.<sup>43</sup> The tax rate established was \$35 per ounce of flowers, \$10 per ounce of leaves, and \$5 per immature plant; there was a provision that allowed this rate to be adjusted based on changes in the consumer price index.<sup>44</sup> Measure 91 also expressly prohibited county and city governments from imposing

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<sup>34</sup> Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, 2015 Or. Laws 17, § 79(6).

<sup>35</sup> *Id.* § 6(a). Note that an “immature” plant is defined as one that does not have visible buds or flowers, and a “mature” plant is defined as any plant that is not immature. *Id.* §§ 5(9), 5(22).

<sup>36</sup> Helm & Leichtman, *supra* note 26, at 9.

<sup>37</sup> Helm & Leichtman, *supra* note 26, at 9.

<sup>38</sup> Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, 2015 Or. Laws. 3, § 7.

<sup>39</sup> Marum, *supra* note 32.

<sup>40</sup> *Id.*

<sup>41</sup> Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, §§ 19–22.

<sup>42</sup> *Id.* § 18.

<sup>43</sup> *Id.* §§ 31–42.

<sup>44</sup> *Id.* §§ 33, 33(4).

any tax or fee of their own.<sup>45</sup> The authority of counties and cities under Measure 91 is analogous to their authority for the regulation of alcohol, as they had the opportunity to use an opt-out provision.<sup>46</sup> If a city or county wanted to prohibit the establishment of licensed marijuana premises, it could do so if ten percent of its electorate signed a petition that is filed and approved by its voters in the next statewide election.<sup>47</sup>

### *C. Decriminalization in Canada*

In Canada, the courts primarily influenced the legality of cannabis. A seminal case in 2000, *Regina v. Parker*, held that the federal government's prohibition on cannabis was unconstitutional without a medical necessity exemption.<sup>48</sup> This forced the Canadian Parliament to develop a basic framework for medical marijuana use, leading to the Parliament's passage of the Marijuana Medical Access Regulations in 2001.<sup>49</sup> This was later reformed in 2014 to broaden the pool of potential medical users.<sup>50</sup> In 2015, the new Labour Party-controlled government moved forward with its promise to legalize and regulate cannabis for recreational use and later did so in 2018.<sup>51</sup>

Canada was the first country to legalize recreational marijuana use since Uruguay.<sup>52</sup> According to British Columbia's Minister of Public Safety, Mike Farnworth, "Legalization of cannabis is the largest public policy shift [the] country has experienced in the past five decades."<sup>53</sup> The legalization of cannabis had been planned since Prime Minister Justin Trudeau's election in 2015.<sup>54</sup> On June 19, 2018, the Canadian Senate passed the Federal Cannabis Act (Cannabis Act) by a vote of

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<sup>45</sup> *Id.* § 42.

<sup>46</sup> Helm & Leichtman, *supra* note 26, at 11.

<sup>47</sup> *Id.*

<sup>48</sup> Stoa, *supra* note 9, at 92.

<sup>49</sup> *Id.* at 99–100.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 100; *Cannabis Legalization and Regulation*, GOV'T OF CAN. DEP'T OF JUST., <https://www.justice.gc.ca/eng/cj-jp/cannabis/> (last visited Jan. 20, 2020).

<sup>52</sup> Lucas Laursen, *Canada Today Becomes the Second Country to Legalize Weed. Here's What It Can Learn from the First*, FORTUNE (Oct. 17, 2018), <https://fortune.com/2018/10/17/canada-marijuana-weed-legalization-uruguay/>.

<sup>53</sup> Bilefsky, *supra* note 7.

<sup>54</sup> Ian Austen, Catherine Porter & Dan Bilefsky, *Canada Legalized Marijuana. Here Are Some Questions, Answered*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/world/canada/marijuana-legalization-explainer.html?module=inline>.

52–29.<sup>55</sup> While Trudeau’s administration had hoped to legalize cannabis by July 2018, provincial and territorial governments needed eight to twelve weeks to prepare for retail sales.<sup>56</sup> As of October 17, 2018, subject to provincial or territorial restrictions, adults who are eighteen or older are legally able to possess, share, buy, and grow cannabis, as well as create cannabis products.<sup>57</sup>

“The Cannabis Act creates a strict legal framework for controlling the production, distribution, sale, and possession of cannabis across Canada.”<sup>58</sup> The underlying aims of the cannabis framework include (1) keeping cannabis out of youths’ hands; (2) keeping profits out of criminals’ pockets; and (3) protecting public health and safety by allowing adults access to legal cannabis.<sup>59</sup> The current regime continues to allow access to cannabis for medical purposes for those who have authorization from their healthcare providers.<sup>60</sup> Additionally, the Cannabis Act allows Canada’s thirteen provinces and territories to set their own rules, which has led to a patchwork of regulations.<sup>61</sup> In some provinces, cannabis is legally sold only in government stores.<sup>62</sup> In others, cannabis is legally sold only in private stores, and some provinces have a mix of both private and government stores.<sup>63</sup>

Due to the variety of systems created from allowing provinces and territories to be responsible for developing and implementing their own systems for overseeing the sale and distribution of cannabis,

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<sup>55</sup> Associated Press, *Canada’s Senate Passes Marijuana Bill but Legalization Delayed*, NAT’L BROADCASTING COMPANY (NBC) NEWS (June 19, 2018), <https://www.nbcnews.com/storyline/legal-pot/canada-s-senate-passes-marijuana-bill-legalization-delayed-n884911>.

<sup>56</sup> *Id.*

<sup>57</sup> More specifically, adults can possess up to thirty grams of legal cannabis in public; share up to thirty grams of legal cannabis with other adults; buy cannabis and cannabis oil from a provincially licensed retailer (or buy cannabis online from federally licensed producers in provinces and territories where applicable); grow up to four cannabis plants per residence for personal use from licensed seed or seedlings; and “make cannabis products, such as food and drinks, at home as long as organic solvents are not used to create concentrated products.” *Cannabis Legalization and Regulation*, *supra* note 51.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; Bilefsky, *supra* note 7.

<sup>62</sup> See *Cannabis Legalization and Regulation*, *supra* note 51. An inexperienced Canadian cannabis consumer can even get step-by-step instructions on how to roll a joint properly. *Know Your Roll*, CANNABIS NB, <https://www.cannabis-nb.com/learn/cannabis-101/know-your-roll/> (last visited Jan. 15, 2020).

<sup>63</sup> See Bilefsky, *supra* note 7.

prospective consumers must check the appropriate local laws.<sup>64</sup> For example, in Ontario, cannabis was available for purchase only on a government-run site until private stores were able to sell cannabis on April 1, 2019.<sup>65</sup> In Ontario, British Columbia, and Alberta (outside of its capital of Calgary), people can smoke cannabis only where they can smoke cigarettes.<sup>66</sup> However, in British Columbia, people cannot smoke in parks or on community beaches.<sup>67</sup> Additionally, because provinces and territories can increase, but not lower, the minimum age in their province or territory, the legal age for cannabis use ranges from eighteen to twenty-one.<sup>68</sup> This system provides a stark contrast from Oregon's regulatory framework, where the legal age for cannabis use is twenty-one regardless of county, and one central authority oversees recreational cannabis sales.<sup>69</sup>

## II

### LEGAL IMPEDIMENTS TO CANNABUSINESSES: WHY IS THERE NO BANK OF POT?

Banking access and services are not as readily available for cannabis businesses as they are for businesses in other industries.<sup>70</sup> Financial institutions have essentially determined that the risks associated with providing services to the cannabis industry, despite how lucrative the business is or is projected to be, outweigh the benefits.<sup>71</sup> In the United States, this reality is largely driven by the fact that employees, directors, and officers of financial institutions can face civil and criminal penalties, including lifetime bans from the banking industry, due to the federal drug policy and anti-money laundering laws.<sup>72</sup> In fact, three in four American Bankers Association (ABA) banks have reported needing to close an existing account, terminate a banking relationship, or turn away a potential customer because of a

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<sup>64</sup> See *Cannabis Legalization and Regulation*, *supra* note 51.

<sup>65</sup> *Id.*

<sup>66</sup> Austen, Porter, & Bilefsky, *supra* note 54.

<sup>67</sup> *Id.*

<sup>68</sup> *Cannabis Legalization and Regulation*, *supra* note 51. In keeping with the first aim of the Cannabis Act, it is a federal crime to supply cannabis to minors. Bilefsky, *supra* note 7.

<sup>69</sup> See *supra* Part I.B.

<sup>70</sup> Ohmer, *supra* note 15, at 110.

<sup>71</sup> Rachel Cheasty Sanders, *To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them*, 120 PENN. ST. L. REV. 281, 297 (2015).

<sup>72</sup> *Id.*

connection to cannabis.<sup>73</sup> Even banks that have not decided to serve cannabusinesses find themselves caught in the financial web created by the booming industry, as the money from cannabusinesses often goes to vendors, landlords, and employees.<sup>74</sup> While Canada has legalized cannabis entirely, its financial institutions want to be able to maintain relationships with American financial institutions, which means Canadian cannabusinesses continue to face difficulties in securing accounts and loans.<sup>75</sup>

### *A. Oregon*

No well-defined body of law governs how states interact with a federal system in which cannabis is illegal.<sup>76</sup> The Supremacy Clause of the Constitution of the United States provides that federal law preempts state law.<sup>77</sup> This occurs when Congress demonstrates its intent to exclusively occupy an entire regulatory field.<sup>78</sup> More importantly, federal law preempts state law where it is impossible to comply with both federal and state law.<sup>79</sup> This leads to a seemingly incongruous situation in which both the federal criminal prohibition on cannabis and state-sanctioned recreational and medical use uneasily coexist.<sup>80</sup> Therefore, Oregon must strive for a regulatory balance that satisfies concerns at federal, state, and local levels from a variety of stakeholders, including financial institutions, cannabusinesses, regulatory bodies, and consumers of cannabis. For Oregon-based cannabusinesses, the legal impediments to banking services are primarily federal in nature, including the Controlled Substances Act, federal anti-money laundering statutes, Sessions's rescission memo, and tax treatment.<sup>81</sup> However, logistical issues stemming from an overburdened regulatory agency also affect cannabusinesses' viability.

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<sup>73</sup> Rob Nichols, *End the Cannabis Banking Problem*, THE HILL (Feb. 18, 2019), <https://thehill.com/opinion/finance/430463-end-the-cannabis-banking-problem>.

<sup>74</sup> *Id.*

<sup>75</sup> See Julia Horowitz, *Cannabis in Canada: Big Banks Are Missing a Boom*, CABLE NEWS NETWORK (CNN) BUS. (Oct. 30, 2018), <https://www.cnn.com/2018/10/30/business/cannabis-canada-banks/index.html>.

<sup>76</sup> Helm & Leichtman, *supra* note 26, at 3.

<sup>77</sup> U.S. CONST. art. VI, cl. 2.

<sup>78</sup> Sanders, *supra* note 71, at 287–88.

<sup>79</sup> *Id.* at 288.

<sup>80</sup> Ohmer, *supra* 15, at 104 (quoting TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 1 (2012)).

<sup>81</sup> See discussion *infra* Part II.A.1–II.A.5.

### 1. *Controlled Substances Act*

In 1970, Congress enacted the Controlled Substances Act (CSA) as part of a larger regulatory scheme to prevent drug abuse and control illicit drug trafficking.<sup>82</sup> The CSA established five schedules of controlled substances.<sup>83</sup> Under the CSA, cannabis officially became illegal.<sup>84</sup> Congress listed cannabis in its most restrictive category, classifying it as a Schedule I drug—effectively making cannabis cultivation, distribution, and possession a federal crime.<sup>85</sup> Substances under the Schedule I category are believed by the federal government to have a high potential for abuse, no currently accepted medicinal value in the United States, and no accepted safety protocols for use under medical supervision.<sup>86</sup> The CSA ushered in a new era of cannabis prohibition, which led the legislatures of all fifty states to criminalize cannabis.<sup>87</sup> Because of the Supremacy Clause, state laws permitting legalization clearly conflict with the CSA and should presumably be struck down.<sup>88</sup>

Irrespective of state law, individuals, businesses, and financial institutions found to violate the CSA can be prosecuted under federal law.<sup>89</sup> Even if the federal government chooses not to prosecute financial institutions directly, financial institutions are vulnerable to federal officials seizing cannabis accounts due to criminal and civil forfeiture laws.<sup>90</sup> Because of the cannabis ban imposed by the CSA, those in the legitimate cannabis industry cannot deposit their legitimate profits in banks and are instead finding themselves vulnerable to theft because of the need to store cash.<sup>91</sup> To illustrate this point, Rachel Pross, Chief Risk Officer at Salem-based Maps Credit Union, testified at the hearing for the Secure and Fair Enforcement Banking Act of 2019 in front of the U.S. House of Representatives Financial Services

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<sup>82</sup> Sanders, *supra* note 71, at 288.

<sup>83</sup> Controlled Substances Act, 21 U.S.C. § 812(a) (2018).

<sup>84</sup> *Id.* § 812(c)(10) (using the alternate spelling “marihuana”).

<sup>85</sup> *Id.* §§ 812(b)(1)(A)–(B), 841(a)(1).

<sup>86</sup> *Id.* § 812 (b)(1)(A)–(C).

<sup>87</sup> Alvarez, *supra* note 24, at 455.

<sup>88</sup> Sanders, *supra* note 71, at 288–89.

<sup>89</sup> Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 610 (2015).

<sup>90</sup> *Id.*

<sup>91</sup> Alvarez, *supra* note 24, at 477.

Committee.<sup>92</sup> Ms. Pross said, “A 2015 study found that, in the absence of being banked, one in every two cannabis dispensaries were robbed or burglarized.”<sup>93</sup>

## 2. *Federal Anti-Money Laundering Statutes*

Multiple federal anti-money laundering laws impede cannabusinesses from using banking services for legitimate means. When cannabusinesses are forced to operate as cash-only businesses because they are denied access to banking services, they create a public safety issue.<sup>94</sup> Cash-based cannabusinesses become a magnet for crime.<sup>95</sup> These legal impediments have also created a regulatory issue because it is hard for regulatory bodies to track revenues and audit tax payments of cannabusinesses that do not use financial institutions.<sup>96</sup> For owners of small businesses, the lack of access to other banking services like payroll checking accounts, small business working capital, or capital construction loans creates an equity issue.<sup>97</sup> Finally, cannabusinesses face a customer service issue because people looking to buy retail marijuana enjoy the convenience of debit and credit cards for purchases.<sup>98</sup> The Money Laundering Control Act, the Bank Secrecy Act, and the Patriot Act are three anti-money laundering laws that create the barriers to banking access for cannabusinesses.

### *a. Money Laundering Control Act*

Under the Money Laundering Control Act (MLCA), individuals and entities are subject to criminal liability for money laundering.<sup>99</sup> While there are several ways to launder money, there are two that are especially relevant to cannabis banking because the MLCA explicitly

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<sup>92</sup> Janelle Polcyn, *Cannabis Banking Industries Heard at Housing Financial Services Committee*, THE NEWS-REV. (Feb. 24, 2019), [https://www.nrtoday.com/business/local\\_biz/cannabis-banking-industries-heard-at-housing-financial-services-committee/article\\_16cfa4fd-9208-5824-a34b-7205fc87d999.html](https://www.nrtoday.com/business/local_biz/cannabis-banking-industries-heard-at-housing-financial-services-committee/article_16cfa4fd-9208-5824-a34b-7205fc87d999.html).

<sup>93</sup> *Id.*

<sup>94</sup> David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 369 (2014).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 369–70.

<sup>99</sup> Hill, *supra* note 89, at 610.

provides for the “manufacture, importation, sale, or distribution” of cannabis as a “specified unlawful activity.”<sup>100</sup>

First, a financial institution commits money laundering when it conducts a financial transaction involving the proceeds of a known “specified unlawful activity” while “knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of a specified unlawful activity or to avoid a transaction reporting requirement under State or Federal law.”<sup>101</sup> Second, a financial institution commits money laundering if it “knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000.”<sup>102</sup> This is relevant to cannabusinesses because some of them have attempted to gain access to banking services by disguising the nature of their business, such as by using a holding company or a shell corporation.<sup>103</sup>

*b. Bank Secrecy Act*

Most financial institutions have a “master account” with a branch of the Federal Reserve Bank to competitively operate.<sup>104</sup> A master account enables a financial institution access to nationwide payment and settlement services that allow a bank to provide a full suite of banking services to clients.<sup>105</sup> For a financial institution to obtain and maintain a master account with the Federal Reserve, it must maintain procedures to monitor its compliance with the Bank Secrecy Act (BSA).<sup>106</sup>

Under the BSA, financial institutions are required to maintain robust anti-money laundering programs and report illegal and suspicious activities to the federal Financial Crimes Enforcement Network (FinCEN).<sup>107</sup> Every financial institution must make reasonable efforts through a customer identification program to verify the identity of the prospective account holder.<sup>108</sup> Federal regulators expect that financial institutions know the purpose of each account, the source of funds in

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<sup>100</sup> *Id.* at 611; 18 U.S.C. §§ 1956(c)(7)(B)(i), 1957(f)(3).

<sup>101</sup> 18 U.S.C. § 1956(a)(1)(B).

<sup>102</sup> *Id.* § 1957(a).

<sup>103</sup> *See* Hill, *supra* note 89, at 611.

<sup>104</sup> David Bronfein, *Maryland State Bank: The Responsible Solution for Fostering the Growth of Maryland’s Medical Cannabis Program*, 47 U. BALT. L. F. 28, 36 (2016).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 37.

<sup>107</sup> Hill, *supra* note 89, at 613.

<sup>108</sup> *Id.*

each account, and its customer's primary trade area—especially when dealing with high-risk businesses that are cash intensive.<sup>109</sup> As discussed previously, cannabusinesses are cash intensive because the CSA makes cannabis illegal under federal law, and FinCEN guidance indicates that virtually every transaction conducted by a state-legal cannabusiness involves funds derived from illegal activities as contemplated by the BSA regulations.<sup>110</sup>

Federal institutions must file currency transaction reports for any transaction involving more than \$10,000 in cash, and they must also provide suspicious activity reports for transactions involving at least \$5000 if they know, suspect, or have reason to suspect that “the transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities.”<sup>111</sup> Practically, this means financial institutions must prepare suspicious activity reports (SARs) for most “marijuana-related business” (MRB) transactions.<sup>112</sup>

FinCEN has outlined three phases for describing a financial institution's relationship to cannabusinesses in SAR filings: marijuana limited, marijuana priority, and marijuana termination.<sup>113</sup> First, a marijuana limited filing indicates that the financial institution's due diligence shows that the MRB does not raise any red flags and is compliant with the appropriate state's regulations.<sup>114</sup> Second, a marijuana priority filing indicates that the financial institution's due diligence found that the MRB may raise one or more red flags or may not be fully compliant with state regulations, signaling that the financial institution is providing banking services while further investigation is being conducted.<sup>115</sup> Finally, a marijuana termination filing means that the financial institution is terminating its relationship with the MRB because it raised one or more red flags or is not fully compliant with the state's regulations.<sup>116</sup> Because of these stringent requirements, only

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<sup>109</sup> *See id.* at 612–13.

<sup>110</sup> *Id.* at 613–14.

<sup>111</sup> *Id.*; 31 C.F.R. § 1020.320(a)(2) (2019).

<sup>112</sup> Hill, *supra* note 89, at 613–14.

<sup>113</sup> *Id.* at 615; FIN. CRIMES ENF'T NETWORK, DEP'T OF THE TREASURY, MARIJUANA BANKING UPDATE 4 (Sept. 2018), [https://www.fincen.gov/sites/default/files/shared/Marijuana\\_Banking\\_Update\\_September\\_2018.pdf](https://www.fincen.gov/sites/default/files/shared/Marijuana_Banking_Update_September_2018.pdf).

<sup>114</sup> FIN. CRIMES ENF'T NETWORK, *supra* note 113.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

three financial institutions have a memorandum of understanding with the OLCC allowing them to serve cannabusinesses.<sup>117</sup>

If there are violations of the reporting requirements or of the BSA in general, FinCEN can seek substantial civil money penalties that are often in the millions of dollars.<sup>118</sup> Federal officials, on the other hand, can pursue criminal prosecution.<sup>119</sup> Thus, a financial institution that knowingly possesses transactions for marijuana-related business commits the crime of money laundering.<sup>120</sup> For example, in 2015, Swiss bank Commerzbank AG entered into a deferred prosecution agreement with the Department of Justice for violating the BSA's reporting requirements and agreed to pay more than \$500 billion in forfeitures and fines.<sup>121</sup> But even if financial institutions think prosecutorial discretion will spare them criminal penalties, the BSA still requires costly due diligence and reporting compliance for all marijuana-related transactions.<sup>122</sup>

*c. Patriot Act*

After the terrorist attacks of September 11, 2001, Congress enacted the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act).<sup>123</sup> The Patriot Act is relevant to cannabusinesses because it amended portions of the BSA and provided for stricter requirements on financial institutions, thereby limiting cannabusinesses' access to financial services even more.<sup>124</sup> First, the Patriot Act required financial institutions to establish mandatory anti-money laundering programs that were previously optional.<sup>125</sup> Second, it expanded the scope and personnel of FinCEN by requiring it to provide policy makers with intelligence information on all financial crimes and analysis of worldwide financial crime patterns.<sup>126</sup>

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<sup>117</sup> See Polcyn, *supra* note 92.

<sup>118</sup> Hill, *supra* note 89, at 615.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 617.

<sup>121</sup> Lara L. Kessler, *Is the Grass Really Greener: Profits from State-Legalized Marijuana Businesses vs. Federal Anti-Money Laundering Rules*, 23 J.L. BUS. & ETHICS 45, 49 (2017).

<sup>122</sup> See *id.* at 54.

<sup>123</sup> Sanders, *supra* note 71, at 292.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

### 3. Sessions's Rescission Memorandum

In 2013, the Department of Justice memorandum issued by Obama-era Deputy Attorney General James Cole (Cole Memo) directed federal prosecutors not to enforce the federal cannabis ban in states that had legalized cannabis and implemented sufficient regulations to control it.<sup>127</sup> However, the Cole Memo indicated that the Department of Justice expects that state and local governments will implement strong, effective regulatory and enforcement systems to address the twin concerns of public safety and public health.<sup>128</sup> The Cole Memo listed eight enforcement priorities of the federal government.<sup>129</sup> Although these eight enforcement priorities were generic, this was the most concrete guidance that the federal government had provided to states in more than five years.<sup>130</sup>

On January 4, 2018, with a new administration in place, Attorney General Jeff Sessions issued a memorandum (Sessions Memo) rescinding Obama-era enforcement guidelines on federal marijuana enforcement.<sup>131</sup> Citing the Department of Justice's well-established principles, originally established in 1980, the Sessions Memo reiterated how the CSA and BSA "reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime."<sup>132</sup> The rescission of the Cole Memo failed to deal a major blow to the cannabis industry, as the Sessions Memo did not lead to a ramp-up of federal enforcement against it.<sup>133</sup> However, the Sessions Memo

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<sup>127</sup> See Memorandum from James Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Att'ys, Guidance Regarding Marijuana Enf't (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>128</sup> *Id.* at 2–3.

<sup>129</sup> The eight priorities are preventing the following: distribution to minors; revenue from cannabis sales from going to criminal enterprises, gangs, and cartels; diversion of cannabis from states where it is legal under state law in some form to other states; state-authorized cannabis activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; violence and the use of firearms in the cannabis cultivation and distribution; drugged driving and the exacerbation of other adverse public health consequences associated with cannabis use; the growing of cannabis on public lands; and cannabis possession or use on federal property. *Id.* at 1–2.

<sup>130</sup> Blake & Finlaw, *supra* note 94, at 369.

<sup>131</sup> Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Justice, to all U.S. Att'ys, Marijuana Enf't (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>132</sup> *Id.*

<sup>133</sup> Ben Curren, *With Jeff Sessions Out, the New AG Should Advance Marijuana Policy by Restoring the Cole Memorandum*, FORBES (Nov. 7, 2018), <https://www.forbes.com/sites/bencurren/2018/11/07/with-jeff-sessions-out-the-new-ag-should-restore-the-cole->

did serve to create more uncertainty for the industry, spooking national banks and credit card companies that were already reticent to enter the sector when the Cole Memo was in place.<sup>134</sup>

In November 2018, Sessions resigned from his position as Attorney General.<sup>135</sup> The Senate confirmed William Barr as Sessions's replacement in February 2019.<sup>136</sup> At his Senate confirmation hearing, Barr pledged that he will not "go after parties who have complied with state law in reliance on the Cole Memorandum."<sup>137</sup> Barr has not considered or determined whether additional administrative guidance following the Cole and Sessions Memos is appropriate or what it might look like, although he promised to give the matter careful consideration.<sup>138</sup> While Barr has stated that he does not support the wholesale legalization of cannabis, he is a proponent of expanding marijuana manufacturing for scientific research.<sup>139</sup> Thus, the chill that Sessions sent through the cannabis industry may come to an end once Barr finishes dealing with the fallout from the Mueller Report.

In response to these developments, the U.S. Attorney for the District of Oregon, Billy Williams, issued a memorandum on his enforcement priorities.<sup>140</sup> He refused to extend blanket immunity to those who violate federal law and wrote that Oregon's enforcement priorities concerned the overproduction and interstate trafficking of cannabis as well as the prevention of access by minors.<sup>141</sup> Because authorities have seized Oregon-grown cannabis in thirty states, the illegal flow of

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memorandum/#66dd7218705d. Note that FinCEN continues to operate under 2014 guidance for cannabis businesses, and its expectations for financial institutions' SARs refer to the red flags as defined in the Cole Memo. FIN. CRIMES ENF'T NETWORK, *supra* note 113.

<sup>134</sup> Curren, *supra* note 133.

<sup>135</sup> *Id.*

<sup>136</sup> Matt Zapotosky & Karoun Demirjian, *Senate Confirms William Barr as Attorney General in 54-to-45 Vote*, WASH. POST (Feb. 14, 2019), [https://www.washingtonpost.com/world/national-security/william-barr-expected-to-be-confirmed-as-attorney-general-thursday/2019/02/13/f162e514-2f1a-11e9-813a-0ab2f17e305b\\_story.html?utm\\_term=.6cce18f82e34](https://www.washingtonpost.com/world/national-security/william-barr-expected-to-be-confirmed-as-attorney-general-thursday/2019/02/13/f162e514-2f1a-11e9-813a-0ab2f17e305b_story.html?utm_term=.6cce18f82e34).

<sup>137</sup> Tom Angell, *Trump Attorney General Pick Puts Marijuana Enforcement Pledge in Writing*, FORBES (Jan. 28, 2019), <https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#75742a895435>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Memorandum from Billy Williams, U.S. Att'y Dist. of Or., U.S. Dep't of Justice, *Priorities in Enf't of Federal Laws Involving Marijuana in the District of Oregon* (May 18, 2018), available at [https://media.oregonlive.com/marijuana/other/2018/05/18/USAOR-Marijuana%20Enforcement%20Priorities-Final%20\(1\).pdf](https://media.oregonlive.com/marijuana/other/2018/05/18/USAOR-Marijuana%20Enforcement%20Priorities-Final%20(1).pdf).

<sup>141</sup> *Id.* at 2–3.

cannabis out of the state is Williams's top priority.<sup>142</sup> Effectively, Williams's enforcement priorities represent a continuation of the enforcement priorities in the Cole Memo.<sup>143</sup>

#### 4. Tax Treatment

Cannabusinesses are not permitted to take advantage of business deductions or credits on their taxes, meaning that they are effectively taxed on their gross revenues rather than their gross profits.<sup>144</sup> This is because any businesses that produce and/or distribute cannabis are precluded from taking ordinary business deductions under section 280E of the Internal Revenue Code.<sup>145</sup> Section 280E is the starting point for determining state income tax liability based upon federal taxable income.<sup>146</sup> Section 280E precludes cannabusinesses from deducting office supplies, furniture, business equipment, software, mileage, and insurance premiums, among other things.<sup>147</sup> As a result of the lack of deductions, cannabusinesses' taxable federal income is higher than it would be otherwise, and that extra amount flows down to the amount that the state also charges.<sup>148</sup> Furthermore, cannabusinesses bear the burden of proving deficiencies set forth

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<sup>142</sup> Noelle Crombie, *Feds Will Target Marijuana Black Market, Overproduction in Oregon*, THE OREGONIAN/OR. LIVE (May 18, 2018), [https://www.oregonlive.com/marijuana/2018/05/black\\_market\\_overproduction\\_am.html](https://www.oregonlive.com/marijuana/2018/05/black_market_overproduction_am.html).

<sup>143</sup> *Id.*

<sup>144</sup> Ohmer, *supra* note 15, at 112; I.R.C. § 280E (2019). Gross revenue is the amount of money a company generates before any expenses are taken out, whereas gross profit is the revenue minus the cost of goods sold and labor.

<sup>145</sup> Bronfein, *supra* note 104, at 33.

<sup>146</sup> Blake & Finlaw, *supra* note 94, at 371.

<sup>147</sup> *Id.* at 372. To the extent a business incurs direct costs with the acquisition, manufacturing, or sale of cannabis, those costs may be properly considered the costs of goods sold and used to reduce income with Treas. Reg. § 1.61-3(a). *See generally* Memorandum from W. Thomas McElroy, Jr., Office of Assoc. Chief Counsel of the Internal Revenue Serv., to Matthew A. Houtsma, Assoc. Area Counsel, Taxpayers Trafficking in a Schedule I or Schedule II Controlled Substance — Capitalization of Inventoriable Costs, (Jan. 23, 2015), *available at* <https://www.irs.gov/pub/irs-wd/201504011.pdf>.

<sup>148</sup> *See generally* Memorandum from W. Thomas McElroy, Jr., Office of Assoc. Chief Counsel of the Internal Revenue Serv., to Matthew A. Houtsma, Assoc. Area Counsel, Taxpayers Trafficking in a Schedule I or Schedule II Controlled Substance — Capitalization of Inventoriable Costs, (Jan. 23, 2015), *available at* <https://www.irs.gov/pub/irs-wd/201504011.pdf>.

Section 280E also has a disparate impact on cannabis retailers compared to those that grow or manufacture cannabis. Adam Detsky, *Amendment 64: Five Years Later*, COLO. LAW., Oct. 2017, at 34, 37.

in a tax deficiency notice.<sup>149</sup> Cannabusinesses that operate almost exclusively in cash face difficulties in substantiating their claims regarding expenses in tax proceedings.<sup>150</sup> In this way, section 280E indirectly highlights how detrimental the lack of banking services is for the cannabis industry and why either the CSA or BSA should be reformed to allow legal cannabusinesses access.<sup>151</sup>

Additionally, cannabusinesses must pay employee wages, but they are forced to distribute payroll in cash without access to bank accounts.<sup>152</sup> Because the Internal Revenue Service levies a ten percent tax on employment taxes that are paid in cash, cannabusinesses are often faced with an exorbitant amount of penalties.<sup>153</sup> These penalties create the perverse incentive for some businesses who fail to keep meticulous records to instead skirt the rules and pay their workers under the table.<sup>154</sup>

Ironically, while cannabusinesses are severely underserved by the banking industry, local governments, state departments of revenue, and the Internal Revenue Service have no issues with keeping the revenue that they acquire from the cannabis industry in their financial institutions.<sup>155</sup> The General Counsel of the American Bankers Association (ABA) has explained this discrepancy by asserting that tax dollars are legal even when derived from illegal sources.<sup>156</sup> As of the writing of this Article, the ABA states that “any contact with money that can be traced back to state marijuana operations could be considered money laundering and expose a bank to significant legal, operational and regulatory risk.”<sup>157</sup> The ABA’s official position is that Congress and the regulatory agencies need to provide greater legal clarity to banks operating within states where cannabis is legalized.<sup>158</sup>

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<sup>149</sup> Bronfein, *supra* note 104, at 35.

<sup>150</sup> *Id.* at 33, 35.

<sup>151</sup> *Id.*

<sup>152</sup> Sanders, *supra* note 71, at 301.

<sup>153</sup> *Id.* at 302.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 303.

<sup>156</sup> *Id.*

<sup>157</sup> *Cannabis Baking: Bridging the Gap Between State & Federal Law*, AM. BANKERS ASS’N, <https://www.aba.com/Advocacy/Issues/Pages/marijuana-banking.aspx> (last visited Jan. 19, 2020).

<sup>158</sup> *Id.*

### 5. Oregon-Specific Regulatory Framework

The Oregon Liquor Control Commission (OLCC) is the state agency that regulates the commercial growing and selling of cannabis.<sup>159</sup> The OLCC has the authority to license and regulate cannabusinesses, but has no authority to regulate or enforce the home grow or personal possession provisions of Measure 91.<sup>160</sup> The OLCC does not have to regulate these businesses alone, as Measure 91 tasks other agencies to assist with certain aspects of the regulations.<sup>161</sup> These agencies include the Oregon Health Authority, which is the agency responsible for the medical marijuana program and the inspection of restaurant kitchens; the Oregon Department of Agriculture, which regulates farm activities and inspects large-scale commercial kitchen operations and food packing; and the Department of Revenue, which now collects tax revenues in the new market.<sup>162</sup>

To apply for a license, the OLCC requires a nonrefundable fee of \$250.<sup>163</sup> Additional fees vary depending on the type of license, with a retailer or wholesaler license costing \$4750, whereas there is a tier system for producers.<sup>164</sup> The most up-to-date processing times showed that applications received by June 15, 2018, are expected to take twelve to fourteen months to process.<sup>165</sup> The OLCC stated that it will prioritize processing retailer, wholesaler, and processor applications ahead of producer applications, which are the most complex.<sup>166</sup> The Executive Director of the OLCC stated that the merger and acquisition activity in Oregon's cannabis industry is overwhelming the agency's staff because of the frequent ownership changes and continuous business structure modifications.<sup>167</sup> Currently, the OLCC does not charge an extra fee for processing business structure changes, and it assigned eleven

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<sup>159</sup> Or. Liquor Control Comm'n, *FAQs: Recreational Marijuana in General*, OREGON.GOV, <https://www.oregon.gov/olcc/marijuana/Pages/FAQs-Recreational-Marijuana-in-General.aspx> (last visited on Jan. 19, 2020).

<sup>160</sup> *Id.*

<sup>161</sup> Helm & Leichtman, *supra* note 26, at 14.

<sup>162</sup> *Id.*

<sup>163</sup> Or. Liquor Control Comm'n, *Recreational Marijuana—FAQs: Licensing-General*, OREGON.GOV, <https://www.oregon.gov/olcc/marijuana/Pages/FAQs-Licensing-General.aspx> (last visited Jan. 19, 2020).

<sup>164</sup> *Id.*

<sup>165</sup> Steve Mark, *Update on Marijuana Licensing*, OREGON.GOV (Aug. 30, 2018), [https://www.oregon.gov/olcc/marijuana/Documents/Bulletins/Licensing\\_Delay\\_Directors\\_Message.pdf](https://www.oregon.gov/olcc/marijuana/Documents/Bulletins/Licensing_Delay_Directors_Message.pdf).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

investigators to work on the backlog of license renewals and business structure changes.<sup>168</sup> While the OLCC concedes that it may appear to operate “at a glacial pace,” it is operating at capacity.<sup>169</sup> The OLCC requested additional staff from the legislature for compliance and enforcement activity but did not obtain those resources until 2019.<sup>170</sup> This extra staff was an absolute necessity, as the OLCC previously had no authority to limit the number of licenses it grants.<sup>171</sup> As of June 2019, the OLCC now has statutory authority to refuse to issue production licenses based on the supply and demand of cannabis for a period as long as it determines is necessary.<sup>172</sup>

A state audit in 2018 found that the OLCC lacked robust monitoring and enforcement controls to track the cannabis industry.<sup>173</sup> Additionally, the agency has been faced with a backlog of applications for recreational marijuana licenses, leading the OLCC to set aside any applications received after June 15, 2018, until the backlog is cleared.<sup>174</sup>

While Oregon has no general sales tax, it levies a seventeen percent sales tax on cannabis.<sup>175</sup> Even though rampant overproduction has produced a fifty percent decline in the price of cannabis (from \$14 per gram in 2015 to \$7 per gram in 2016), taxes generated nearly \$70 million in revenue in 2017.<sup>176</sup> As of 2018, Oregon’s state tracking system had over one million pounds of useable but unsold cannabis; this amounts to almost three times the amount of cannabis sold in Oregon in 2017.<sup>177</sup> Cannabis prices fell to \$4 per gram in 2018.<sup>178</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Matt Stangel & Katie Shepherd, *Oregon Grew More Cannabis than Customers Can Smoke. Now Shops and Farmers Are Left with Mountains of Unwanted Bud.*, WILLAMETTE WK. (Apr. 19, 2018), <https://www.wweek.com/news/2018/04/18/oregon-grew-more-cannabis-than-customers-can-smoke-now-shops-and-farmers-are-left-with-mountains-of-unwanted-bud/>.

<sup>172</sup> S.B. 218 § 1(1), 80th Legis. Assemb., Reg. Sess. (Or. 2019).

<sup>173</sup> Crombie, *supra* note 142.

<sup>174</sup> *Id.*

<sup>175</sup> Mike Rogoway, *Oregon Marijuana Prices Plunge – and Sales Soar*, THE OREGONIAN/OR. LIVE (Nov. 16, 2018), <https://www.oregonlive.com/business/2018/11/oregon-marijuana-prices-plunge-and-sales-soar.html>.

<sup>176</sup> *Id.*

<sup>177</sup> Lily Raff McCaulou, *Growing Pains: How Oregon Wound Up with Way More Pot than It Can Smoke*, THE GUARDIAN (Apr. 20, 2018), <https://www.theguardian.com/society/2018/apr/20/oregon-too-much-weed-oversupply-what-happened-420>.

<sup>178</sup> Stangel & Shepherd, *supra* note 171.

Despite the fact that oversupply has driven down the price, the Oregon Office of Economic Analysis expects that the cannabis tax will yield \$222 million from 2019 to 2021, with forty percent of that going to K–12 education<sup>179</sup> and the rest going to Oregon’s Mental Health, Alcoholism, and Drug Services account, law enforcement, and the Oregon Health Authority for alcohol and drug abuse prevention.<sup>180</sup>

### ***B. Canada***

Unlike the Oregon-based system in which cannabusinesses operate, Canadian cannabusinesses are governed primarily by the Cannabis Act and the Cannabis Regulations.<sup>181</sup> These regulations, however, were designed to decriminalize cannabis rather than to encourage its use or the success of cannabusinesses.<sup>182</sup> For Canadian cannabusinesses, the legal impediments to banking services involve the complex regulatory framework, which includes the excise tax system, as well as those created by the U.S. federal government.

#### *1. Jurisdictional Responsibilities*

Canada has an elaborate regulatory structure in which the federal government and provincial or territorial governments have their own roles and share responsibility in the legal production, distribution, and sale of cannabis.<sup>183</sup> The Cannabis Act abstains from fully regulating cannabis distribution and sale because aspects of these activities fall within provincial and territorial jurisdiction under the Constitution Act of 1867.<sup>184</sup> The Task Force on Cannabis Legalization and Regulation

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<sup>179</sup> Nigel Jaquiss, *Oregon Cannabis Tax Receipts Still Surging, Even as Weed Price Drops*, WILLAMETTE WK. (Nov. 17, 2018), <https://www.wweek.com/news/2018/11/17/this-weeks-state-revenue-forecast-again-showed-surging-cannabis-tax-receipts-and-continued-strong-growth/>.

<sup>180</sup> Pete Danko, *Oregon Cannabis Tax Revenue Gets Higher and Higher*, PORTLAND BUS. J. (July 25, 2019), <https://www.bizjournals.com/portland/news/2019/07/25/oregon-cannabis-tax-revenue-gets-higher-and-higher.html>.

<sup>181</sup> See Antonia Eliason & Robert Howse, *A Higher Authority: Canada’s Cannabis Legalization in the Context of International Law*, 40 MICH. J. INT’L L. 327, 333 (2019).

<sup>182</sup> See Ian Austen, *From Canada’s Legal High, a Business Letdown*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/15/world/canada/marijuana-cannabis-legalization.html>.

<sup>183</sup> See Cannabis Act, S.C. 2018, c 16, § 7 (Can.); Cannabis Regulations, SOR/2018-144 (Can.). See also *Industry Roles and Responsibilities Under the Cannabis Act*, GOV’T OF CAN. (Dec. 4, 2019), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/resources/roles-responsibilities-under-cannabis-act.html> [hereinafter *Industry Roles and Responsibilities*].

<sup>184</sup> Eliason, *supra* note 181, at 331–32.

(Task Force) created a report for the Canadian government to aid with its drafting of the legislation that would become the Cannabis Act.<sup>185</sup> In its report, the Task Force recommended that provincial and territorial governments would be best equipped to handle wholesale distribution by using the existing alcohol distribution networks.<sup>186</sup> Additionally, it recommended that provinces and territories regulate their own retail markets in cooperation with municipalities, noting that constituent support was divided over a private-enterprise model and a government-run model.<sup>187</sup> The Task Force ultimately endorsed both models, stating that it believed the decision rested with individual jurisdictions as long as they “avoid the co-location of retail cannabis and alcohol or tobacco sales wherever possible.”<sup>188</sup>

Under Health Canada, the federal government has the primary responsibility of administering the Cannabis Act and accompanying regulations.<sup>189</sup> This includes the regulatory requirements of physical and personnel security; good production practices (i.e., quality assurance, sanitary production, and product testing); packaging and labeling; and promotions and advertising restrictions.<sup>190</sup> Additionally, the federal government is the entity that authorizes and licenses indoor and outdoor cultivation, processing, and sale of cannabis for medical purposes.<sup>191</sup> Federal law enforcement shares responsibility with provincial and municipal law enforcement for carrying out enforcement of possession and cultivation limits, detecting and investigating drug-impaired drivers, and enforcement against criminal activity, such as infiltration of the legal market or illegal cross-border movement of cannabis.<sup>192</sup> When it comes to recreational cannabis sales, the federal government has little effect on the regulatory framework aside from sharing a responsibility for cannabis inventory tracking and reporting.<sup>193</sup>

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<sup>185</sup> *Id.* at 333. *See generally* GOV'T OF CAN., A FRAMEWORK FOR THE LEGALIZATION AND REGULATION OF CANNABIS IN CANADA: THE FINAL REPORT OF THE TASK FORCE ON CANNABIS LEGALIZATION AND REGULATION (2016) [hereinafter Task Force Report].

<sup>186</sup> Task Force Report, *supra* note 185.

<sup>187</sup> *Id.* at 33–34.

<sup>188</sup> *Id.* at 34.

<sup>189</sup> *Industry Roles and Responsibilities*, *supra* note 183.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Many activities involved in the regulatory framework fall within the exclusive jurisdiction of the provinces and territories.<sup>194</sup> Provincial and territorial governments are the entities that authorize and license the sale of recreational cannabis.<sup>195</sup> However, these governments can only allow the sale of cannabis that has been obtained from federally licensed cultivators and processors authorized under the Cannabis Act.<sup>196</sup> As noted earlier, these governments set the minimum age in their jurisdiction, rules for home cultivation, and restrictions on where cannabis may be consumed.<sup>197</sup> Furthermore, these governments are responsible for compliance monitoring and inspections of licensed facilities, suspending or revoking licenses or permits, and taking enforcement actions such as issuing warning letters or administrative monetary penalties.<sup>198</sup> Of course, these governments are expected to keep Health Canada or law enforcement apprised of any relevant information gleaned from their inspections.<sup>199</sup>

## 2. *Excise Duty Treatment*

One of the biggest impediments for the cannabis industry is Canada's excise duty.<sup>200</sup> Under Canada's taxation framework, licensed cannabis producers must pay a federal excise duty when they deliver packaged products to a purchaser—a provincially authorized distributor/retailer or the final consumer.<sup>201</sup> All cannabis cultivators, processors, and packagers must obtain a license from the Canada Revenue Agency (CRA).<sup>202</sup> To qualify for a CRA cannabis license, applicants are also required to obtain a license from Health Canada. Producers, otherwise known as the cannabis licensees, must purchase and affix a cannabis excise stamp on every package of cannabis product

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> An excise duty, also known as an excise tax, is a product-specific tax on a good. *At a Glance: Government Revenues from the Sale of Cannabis, March 2019*, STATCAN (June 19, 2019), <https://www150.statcan.gc.ca/n1/daily-quotidien/190619/dq190619e-eng.htm>. Canada levies such taxes on products such as tobacco, alcohol, and fuel. *Id.* I refer to this tax as a duty to be consistent with the terminology the Canadian government uses.

<sup>201</sup> *Excise Duty Framework for Cannabis*, CAN. REVENUE AGENCY, GOV'T OF CAN. (Feb. 8, 2019), <https://www.canada.ca/en/revenue-agency/campaigns/cannabis-taxation.html>.

<sup>202</sup> *Id.*

that is for sale.<sup>203</sup> Each province and territory has its own different colored excise stamp.<sup>204</sup> The excise stamp affixed to the product must match that of the province or territory where the product will be sold.<sup>205</sup> The excise stamp signals to consumers that they are legally buying from a CRA license holder who is meeting their tax obligations.<sup>206</sup>

The government charges an excise tax of the greater of ten percent of the sale price of cannabis or one dollar per gram.<sup>207</sup> Under this system, the federal government receives twenty-five percent of the excise tax revenue and the leftover amount goes to the province or territory in which the sale occurs.<sup>208</sup> For recreational consumers, legal cannabis has federal and provincial/territorial sales taxes as well as local boutique taxes such as Manitoba's six percent social responsibility tax.<sup>209</sup> Simply put, consumers may face an effective tax rate of up to twenty-nine percent in some jurisdictions.<sup>210</sup> Critics state that the excise tax system is counterintuitive to the government's overarching goal of eliminating the black market because it raises the price of cannabis on the legal market, thereby disincentivizing consumers from choosing legal cannabis.<sup>211</sup> For example, Canadians pay about ten dollars per gram for legal cannabis and an average of

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* For pictures of the excise stamps for each province and territory, see *Cannabis in the Provinces and Territories*, GOV'T OF CAN. (June 14, 2019), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/provinces-territories.html>.

<sup>205</sup> *Id.*

<sup>206</sup> *See id.*

<sup>207</sup> Vanmala Subramaniam, *Canadian Governments Raked in \$186 Million in Taxes on Cannabis Trade in First Five Months of Legislation*, FIN. POST (June 19, 2019), <https://business.financialpost.com/cannabis/cannabis-business/governments-raked-in-186-million-in-taxes-on-cannabis-trade-in-first-five-months-of-legalization>.

<sup>208</sup> Patrick Cain, *Cannabis Taxes Brought in \$186 Million in Five and a Half Months*, GLOBAL NEWS (June 19, 2019), <https://globalnews.ca/news/5403579/cannabis-taxes-brought-in-186-million-in-five-and-a-half-months/>.

<sup>209</sup> David Clement, *Are Excise Taxes Killing Canada's Cannabis Market*, THE GLOBE & MAIL (Mar. 28, 2019), <https://www.theglobeandmail.com/business/commentary/article-are-excise-taxes-killing-canadas-cannabis-market/>. In Alberta, Saskatchewan, Ontario, and Nunavut, excise sales tax adjustment rates apply; Manitoba applies a special fee and wholesale product mark-up rate rather than the federally administered, provincial portion of the excise taxes. STATCAN, *supra* note 200. For more information on how to calculate the cannabis duty, the additional cannabis duty, and the adjustment to the additional cannabis duty on dried or fresh cannabis, see *EDN55 Calculation of Cannabis Duty and Additional Cannabis Duty on Cannabis Products*, CAN. REVENUE AGENCY (Sept. 2018), [https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edn55/calculation-cannabis-duty-additional-cannabis-duty-cannabis-products.html#\\_Toc523301212](https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edn55/calculation-cannabis-duty-additional-cannabis-duty-cannabis-products.html#_Toc523301212).

<sup>210</sup> Clement, *supra* note 209.

<sup>211</sup> Subramaniam, *supra* note 207.

\$6.37 per gram for black-market cannabis.<sup>212</sup> Producers and retailers have also criticized the system for its inability to adjust with fluctuations in demand because cannabis that bears the excise stamp of one province cannot be sold in other provinces.<sup>213</sup> Alberta goes even further by prohibiting movement of products between stores within the province.<sup>214</sup> Thus, the excise duty system not only makes legal cannabis more expensive for consumers but also makes it less available.<sup>215</sup>

### 3. *Correspondent Banking Relationships*

Canadian cannabis businesses are still affected by American federal laws and regulations. Most Canadian banks maintain correspondent banking relationships with American banks, which is how banks make transactions across borders.<sup>216</sup> Correspondent banks are subject to all U.S. regulations.<sup>217</sup> Because of the Patriot Act, if a foreign bank has a correspondent relationship with an American bank, the foreign bank could be subpoenaed for banking cannabis money that the U.S. federal government considers illegal.<sup>218</sup> Because of the intersection of the Patriot Act, CSA, and MLCA, American federal law and regulations therefore discourage Canadian banks from handling cannabis businesses' money if they wish to continue an intergovernmental relationship.<sup>219</sup>

Uruguay, for example, ran into this problem when it became the first country to legalize recreational cannabis in 2017.<sup>220</sup> The Uruguayan banks received letters from their American counterparts that contained warnings, including citations to the Patriot Act, that they would terminate their relationships with Uruguayan banks that had cannabis business clients.<sup>221</sup> As a result, Uruguayan banks that wanted to protect their U.S. correspondent relationships closed the accounts of local pharmacies that legally sold cannabis.<sup>222</sup> This led to some

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<sup>212</sup> Cain, *supra* note 208.

<sup>213</sup> Clement, *supra* note 209.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Maria Murriel, *The PATRIOT Act Could Export U.S. Cannabis Banking Woes to Canada*, CANNABIS WIRE (June 28, 2018), <https://cannabiswire.com/2018/06/28/the-patriot-act-could-export-u-s-cannabis-banking-woes-to-canada/>.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *See supra* Part II.A.1–II.A.2.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

pharmacies ceasing their cannabis sales or switching to an entirely cash-based operation.<sup>223</sup> Uruguayan officials hope that American lawmakers will pass legislation that allows banks to do business with cannabis businesses in states and countries where it is regulated.<sup>224</sup> In the meantime, Uruguayans have worked with Canadian banks to discuss means for complying with the Patriot Act.<sup>225</sup> Canadian banks, however, are unlikely to repeat the pitfalls of Uruguayan banks due to the extensiveness of their cross-border connections to the United States, their massive size, and the fact that the medicinal cannabis industry had already matured before the recreational cannabis industry was legalized.<sup>226</sup>

### III FINANCING CANNABUSINESSES: POT ACCOUNTS AND PILES OF CASH

Despite the restrictions on cannabis money in banking, cannabis businesses in Oregon and Canada have started to explore alternative means instead of resigning themselves to being cash-based operations. In Oregon, cannabis businesses can rely on a few banks and credit unions, as well as apps such as CanPay that allow their customers to pay with credit or debit cards.<sup>227</sup> In addition, Oregon introduced a possible state-chartered bank and cryptocurrency alternative in the form of House Bill 3169.<sup>228</sup> Although Canadian banks are generally more welcoming to cannabis business owners in banking, a slowing market has some banks reconsidering their investments.<sup>229</sup>

#### *A. Oregon*

##### *1. Pot Accounts*

Despite the legal risks associated with serving the cannabis industry, the number of banks and credit unions in the United States that have

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<sup>223</sup> *Id.*

<sup>224</sup> Ernesto Londoño, *Pot Was Flying Off the Shelves in Uruguay. Then U.S. Banks Weighed In.*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/world/americas/uruguay-marijuana-us-banks.html>.

<sup>225</sup> Lauren Gardner & Alexander Panetta, *Pot Warnings from Uruguay*, POLITICO (Oct. 16, 2018), <https://www.politico.com/newsletters/pro-canada-preview/2018/10/16/pot-warnings-from-uruguay-327069>.

<sup>226</sup> *Id.*

<sup>227</sup> See *infra* Parts III.A.1–III.A.2.

<sup>228</sup> See *infra* Part III.A.3.

<sup>229</sup> See *infra* Part III.B.

opened accounts for cannabusinesses has more than tripled since 2014, with almost 400 institutions participating.<sup>230</sup> State-chartered local institutions have been most likely to work with the cannabis industry.<sup>231</sup> As of the writing of this Article, in Oregon only three financial institutions have a memorandum of understanding with the OLCC that allows them to serve cannabusinesses.<sup>232</sup>

Salem-based Maps Credit Union (Maps) decided to serve cannabusiness after audits revealed that some of its existing members were already in the cannabis industry, with its senior management declining to kick those members out.<sup>233</sup> According to its chief financial risk officer, the new line of business required investments in staff, anti-money laundering software, and extra security at bank branches.<sup>234</sup> Maps' staff conducts background checks on cannabusiness owners before they open an account, and then they conduct regular, in-person inspections of the businesses themselves.<sup>235</sup>

Because of the extra overhead that Maps took on to service cannabusiness clients, MRB accounts have an upfront cost of \$5000 and ongoing charges of \$500 per month.<sup>236</sup> The waiting period for getting a business account with Maps is ninety days.<sup>237</sup> Even if a cannabis retailer is able to get an account with Maps, nonlocal business owners must still contend with commuting on a daily basis to complete their deposits, taking energy and time away from running their businesses.<sup>238</sup>

As of October 2017, Maps had handled \$140 million in cash deposits from 375 cannabusiness accounts.<sup>239</sup> As of February 2019, Maps now handles 500 cannabusiness accounts, including farms, producers,

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<sup>230</sup> Sophie Quinton, *Why It's Getting Easier for Marijuana Companies to Open Bank Accounts*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffingtonpost.com/entry/why-its-getting-easier-for-marijuana-companies-to\\_us\\_5a28015de4b0cd6fb5ee8bb7](https://www.huffingtonpost.com/entry/why-its-getting-easier-for-marijuana-companies-to_us_5a28015de4b0cd6fb5ee8bb7).

<sup>231</sup> *See id.*

<sup>232</sup> Polcyn, *supra* note 92.

<sup>233</sup> Quinton, *supra* note 230.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Joseph Ditzler, *Bend Native Brings Pot Debit App to Oregon*, THE BULLETIN (July 11, 2017), [https://www.bendbulletin.com/business/bend-native-brings-pot-debit-app-to-oregon/article\\_91323e7c-ea06-5983-bd97-ecd7636a1c5b.html](https://www.bendbulletin.com/business/bend-native-brings-pot-debit-app-to-oregon/article_91323e7c-ea06-5983-bd97-ecd7636a1c5b.html).

<sup>237</sup> Polcyn, *supra* note 92.

<sup>238</sup> Jonathan Bach, *Oregon Pot Retailers' Banking Nightmare*, STATESMAN J. (Jan. 24, 2018), <https://www.statesmanjournal.com/story/news/2018/01/24/oregon-pot-regulator-upset-sales-minors-but-lack-banking-bigger-problem/1059639001/>.

<sup>239</sup> *Id.*

processors, and dispensaries.<sup>240</sup> Maps has received over \$500 million in cash deposits from cannabusinesses in the past two years, which is \$500 million in cash that legitimate business owners do not need to carry around in backpacks and shoeboxes.<sup>241</sup>

## 2. *CanPay*

CanPay is a mobile application that allows cannabis retailers, many of whom lack access to account services, to have their customers pay with debit or credit cards.<sup>242</sup> On June 29, 2017, CanPay became available at six dispensaries in Portland, Oregon City, and Eugene.<sup>243</sup> For those cannabis retailers who possess an account with a bank or credit union and are willing to pay a two-percent fee, CanPay routes funds from consumers' accounts to cannabis retailers' accounts.<sup>244</sup> Dustin Eide, the owner of CanPay, declined to name the financial institution in Oregon that he is working with to accept MRB accounts.<sup>245</sup>

## 3. *A Possible State-Chartered Bank and Cryptocurrency Alternatives*

In February 2019, Representatives Pam Marsh (D) and Ken Helm (D) introduced House Bill 3169 (HB 3169) in the 2019 Regular Session of the 80th Oregon Legislative Assembly.<sup>246</sup> This bill, had it passed, would have authorized banks and credit unions to organize as limited charter cannabis institutions, thereby creating a self-contained, state-chartered banking system for the Oregon cannabis industry.<sup>247</sup> Cannabusinesses would have been able to deposit funds in these institutions and write “special purpose” checks for the following purposes:

- (a) To pay fees or taxes to a public body;
- (b) To pay rent on property that is leased by, or on behalf of, a cannabis business;

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<sup>240</sup> Polcyn, *supra* note 92.

<sup>241</sup> *Id.*

<sup>242</sup> See Ditzler, *supra* note 236.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Mike Maharrey, *Oregon Bill Would Create Banking Alternative for Cannabis Industry, Bypass Federal Reserve*, TENTH AMEND. CTR. (Mar. 22, 2019), <https://blog.tenthamentendmentcenter.com/2019/03/oregon-bill-would-create-banking-alternative-for-cannabis-industry-bypass-federal-reserve/>.

<sup>247</sup> See H.B. 3169, 2019 Legis., 80th Sess. (Or. 2019).

(c) To pay a vendor that is physically located in Oregon for goods and services associated with a cannabis business; and

(d) To purchase bonds issued by a public body.<sup>248</sup>

These checks could be deposited only at limited charter cannabis banks or credit unions, which would keep the entire process outside the federal automatic clearing house.<sup>249</sup> The bill made it to the House Committee on Economic Development but did not progress any further before the 2019 Regular Session adjourned.<sup>250</sup>

In lieu of using the traditional banking system, cannabusinesses can use cryptocurrencies.<sup>251</sup> Much like the legal cannabis industry, cryptocurrencies are in the early stages of development and face legal and regulatory issues.<sup>252</sup> Despite this, numerous companies see the opportunity in bridging the gap between blockchain and cannabis because blockchain technology has the ability to track and record from seed to sale.<sup>253</sup> This, in turn, could serve to enhance the legitimacy of cannabusinesses in the eyes of regulators.<sup>254</sup>

### ***B. Canada***

Canadian banks have warmed to the cannabis industry more than their American counterparts. The major players in Canada are the so-called Big Five: Toronto-Dominion Bank, Royal Bank of Canada, Bank of Nova Scotia, Bank of Montreal, and Canadian Imperial Bank of Commerce.<sup>255</sup> Canada's largest lender, Toronto-Dominion, is the banker for at least nine cannabis producers, including MedReleaf Corp., Cronos Group Inc., TerrAscend, and Beleave Inc.<sup>256</sup> According

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<sup>248</sup> H.B. 3169 §§ 4(2)(a)–(c).

<sup>249</sup> *See id.* § 3(3).

<sup>250</sup> OVERVIEW, H.B. 3169 2019 Legis., 80th Sess. (Or. 2019), <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/HB3169>.

<sup>251</sup> Eimantas Žemaitis, *Crypto May Help Multibillion Cannabis Business Where Banks Can't*, CRYPTONEWS (Mar. 6, 2019), <https://cryptonews.com/news/crypto-may-help-cannabis-business-where-banks-can-t-3480.htm>.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Vanmala Subramaniam, *'They Still Don't Like You': Why Major Canadian Banks Remain Cool to the Red-Hot Cannabis Sector*, FIN. POST (Oct. 25, 2018), <https://business.financialpost.com/cannabis/why-canadian-banks-remain-cool-to-the-red-hot-cannabis-sector>.

<sup>256</sup> Doug Alexander, *Bank of Montreal and Toronto-Dominion Lead Peers in Pot Accounts*, BLOOMBERG (Oct. 5, 2017), <https://www.bloomberg.com/news/articles/2017-10-05/bank-of-montreal-toronto-dominion-are-top-canadian-pot-banks>.

to a bank spokeswoman, the lender assesses the banking and loan applications for those in the industry on a case-by-case basis.<sup>257</sup> Yet the Royal Bank of Canada and the Bank of Nova Scotia have completely shut out cannabis businesses and shuttered their accounts.<sup>258</sup> Overall, the Big Five banks lean conservative and do not offer their full range of services to cannabis businesses if they offer services to them at all.<sup>259</sup>

Alterna Savings and Credit Union is the leading cooperative lender in the industry.<sup>260</sup> As of April 2018, Alterna estimated that it has \$750 million in cannabis-related loans and deposits.<sup>261</sup> Alterna also estimated that it banked two-thirds of almost one hundred licensed cannabis producers.<sup>262</sup> Accounting and law firms are the source of most referrals to Alterna.<sup>263</sup> Most notably, the major cannabis player Canopy Growth uses Alterna for deposits and used the Bank of Montreal to help it issue \$500 million in convertible debt in June after Corona beer took a large stake in it.<sup>264</sup> How long Alterna will last as the preferred financial services provider to cannabis businesses is unclear, as bigger banks that have steadfastly refused to help the industry now state they are open to reviewing their policies.<sup>265</sup>

The muddy legal picture of cannabis in the United States has been enough to keep big Canadian banks from opening accounts for cannabis businesses.<sup>266</sup> But banks are missing out on big money, as Canadian sales are expected to hit \$5.5 billion in 2020.<sup>267</sup> The size of the cannabis sector should eventually entice major banks to service cannabis business clients for fear of missing out on lucrative fees.<sup>268</sup> Yet

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Subramaniam, *supra* note 255.

<sup>260</sup> *Id.* Alterna, however, does not have branches in all provinces and territories, so cannabis businesses have to resort to being cash-based if they are unable to find a viable option. Katie Breen, *Independent Cannabis Company Goes Cash-Only After Bank Bucks Business*, CBC NEWS (Oct. 9, 2019), <https://www.cbc.ca/news/canada/newfoundland-labrador/legal-cannabis-banks-1.5315629>.

<sup>261</sup> Doug Alexander, *Meet the Weed Banker Who Took a Chance on Canopy After the Big Five Just Said No*, BLOOMBERG NEWS (Apr. 3, 2018), <https://www.bnnbloomberg.ca/weed-banker-snags-600-million-in-business-as-rivals-just-say-no-1.1045190>.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Julia Horowitz, *Cannabis in Canada: Big Banks Are Missing a Boom*, CNN BUS. (Oct. 30, 2018), <https://www.cnn.com/2018/10/30/business/cannabis-canada-banks/index.html>.

<sup>265</sup> Alexander, *supra* note 261.

<sup>266</sup> Horowitz, *supra* note 264.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

the Bank of Montreal is warning investors that revenues from recreational cannabis in Canada will come in lower than expected over the coming quarters because of the slow rollout of retail stores, flat nationwide retail sales, and inventory depletion.<sup>269</sup>

#### IV

#### THE CASE AGAINST CANNABIS: DOES LEGALIZATION HARM THE ENVIRONMENT AND FAIL TO COMBAT BLACK MARKETS?

There is no shortage of criticism for the legalization of cannabis as many decry cannabis as a gateway to other drugs, a catalyst for an uptick in property and violent crimes, the cause of a troubling increase in motor vehicle fatalities, and a health risk to the general population.<sup>270</sup> While all of these are valid counterarguments to the legalization and further liberalization of cannabis, this Article focuses on the cannabis industry's negative externalities as they relate to the environment and black markets. Cannabis farms require large amounts of water and electricity to function, potentially having negative impacts on the environment.<sup>271</sup> In addition, although cannabis advocates argue that legalization will help eliminate the cannabis black market, opponents believe that this only makes it easier for cannabusinesses to hide criminal activity.<sup>272</sup>

##### *A. Environmental Harm*

The detrimental effects of the cannabis industry on the natural environment are not fully understood.<sup>273</sup> What is known is that vast amounts of water and electricity are needed to power cannabis farms.<sup>274</sup> An average marijuana plant uses about six gallons of water per day,

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<sup>269</sup> Matt Lamers, *Canadian Bank Throws Cold Water on Marijuana Revenue Forecasts*, MARIJUANA BUS. DAILY (Apr. 2, 2019), <https://mjbizdaily.com/canadian-bank-cannabis-revenue-forecasts/>.

<sup>270</sup> See generally Sabet, *supra* note 26, at 84–98.

<sup>271</sup> See *infra* Part IV.A.

<sup>272</sup> See *infra* Part IV.B.

<sup>273</sup> Sabet, *supra* note 26, at 94.

<sup>274</sup> *Id.* Note the OLCC requires applicants for a recreational cannabis producer license to submit a report or estimate of electrical and water usage. Or. Liquor Control Commission, *Supplemental Form: Energy and Water Use Estimate*, OREGON.GOV 1, [https://www.oregon.gov/olcc/marijuana/Documents/Licensing\\_Forms/mj\\_app\\_producer\\_electricity\\_water\\_est.pdf](https://www.oregon.gov/olcc/marijuana/Documents/Licensing_Forms/mj_app_producer_electricity_water_est.pdf) (last visited Jan. 22, 2020).

depending on where and how it is grown.<sup>275</sup> The environmental impacts of cannabis cultivation primarily depend on the manner in which it is grown, whether that be outdoors, indoors with artificial lighting, or in a greenhouse.<sup>276</sup> Outdoor cultivation is the least energy-intensive method of growing cannabis, with indoor cultivation being the most intensive.<sup>277</sup> But most of the cannabis produced in the United States is grown indoors.<sup>278</sup> The energy required to grow four cannabis plants equals the amount of energy used by twenty-nine refrigerators.<sup>279</sup> For example, the energy to produce a single joint emits three pounds of carbon dioxide, which is roughly the same energy expended by a television that is left running for fifteen hours.<sup>280</sup> The summer after Oregon legalized recreational cannabis, Pacific Power in Portland experienced seven blackouts, which were traced to cannabis production facilities.<sup>281</sup> The cannabis industry has the highest energy-to-dollar ratio of any major industry.<sup>282</sup> Accordingly, legalization of the cannabis industry has presented a unique environmental challenge that some believe can be mitigated only with a comprehensive federal regulatory response.<sup>283</sup>

### ***B. Black Markets***

Advocates of cannabis legalization have long argued that regulating and taxing cannabis allows the industry to emerge from the shadows and into the public eye, effectively eliminating the black market for the drug.<sup>284</sup> Conversely, opponents of cannabis legalization argue that

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<sup>275</sup> Harriet Taylor, *Water-Guzzling Pot Plants Draining Drought-Wracked California*, NBC NEWS (July 7, 2014), <https://www.nbcnews.com/storyline/legal-pot/water-guzzling-pot-plants-draining-drought-wracked-california-n149861>.

<sup>276</sup> Katherine Curl Reitz, *An Environmental Argument for a Consistent Federal Policy on Marijuana*, 57 ARIZ. L. REV. 1085, 1093 (2015).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 1100.

<sup>279</sup> *Id.*

<sup>280</sup> Sabet, *supra* note 26, at 95.

<sup>281</sup> Jocelyn Durkay & Duranya Freeman, *Electricity Use in Marijuana Production*, NAT'L CONF. OF ST. LEG. (Aug. 2016), <http://www.ncsl.org/research/energy/electricity-use-in-marijuana-production.aspx>.

<sup>282</sup> Curl Reitz, *supra* note 276, at 1100.

<sup>283</sup> *Id.* at 1113.

<sup>284</sup> Trevor Hughes, *Marijuana's Legalization Fuels Black Market in Other States*, USA TODAY (July 31, 2017), <https://www.usatoday.com/story/news/nation/2017/07/31/marijuana-black-market/507417001/>.

legalization has only made it easier for illegal actors to hide their black-market activity.<sup>285</sup>

### *1. Oregon*

In Oregon, a draft assessment from the Oregon State Police in 2017 estimated that the legal cannabis market comprises only thirty percent of the state's entire cannabis market.<sup>286</sup> The report concluded that legalization "has provided an effective means to launder cannabis profits and proceeds" whereby illegal actors can exploit legal mechanisms to blur the boundaries of the legal market, thus complicating regulation efforts and weakening the integrity of the legal market.<sup>287</sup> Because of the ability to hide black-market activity in legalized states, emboldened drug trafficking organizations have started to illegally grow cannabis within the United States, and the activity of Mexican cartels has expanded to Alaska.<sup>288</sup>

In the first detailed examination of Oregon's regulation of legal cannabis since voters said yes to legalization in 2014, the Oregon Secretary of State released a scathing audit on January 30, 2019.<sup>289</sup> The audit found that regulators have failed to keep up with inspections, the Oregon Health Authority's weak testing system threatens to expose consumers to contaminants, and not enough is being done to prevent black-market diversion.<sup>290</sup> Regulators had inspected only three percent of recreational cannabusinesses and roughly thirty-three percent of growers.<sup>291</sup> Furthermore, while the state requires certain tests for recreational cannabis, testing is not required for most medical marijuana.<sup>292</sup> The audit posits that growers are most likely to sell cannabis on the black market because they have taken the brunt of the financial burden associated with the drop in cannabis prices in Oregon.<sup>293</sup> Growers self-report how much they grow and where their

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<sup>285</sup> Sabet, *supra* note 26, at 89.

<sup>286</sup> Hughes, *supra* note 284.

<sup>287</sup> *Id.*

<sup>288</sup> Sabet, *supra* note 26, at 89.

<sup>289</sup> Molly Harbarger & Noelle Crombie, *Oregon Marijuana Regulators Fail to Meet Even Basic Standards, State Audit Finds*, THE OREGONIAN/OR. LIVE (Feb. 1, 2019), <https://www.oregonlive.com/news/2019/01/oregon-marijuana-regulators-fail-to-meet-even-basic-standards-state-audit-finds.html>.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

cannabis goes.<sup>294</sup> Because it is unlikely that an inspector will go through those figures and match them with the inventory and records, undetected black-market diversions are real risks in the current regulatory scheme.<sup>295</sup>

## 2. Canada

The Canadian black market, estimated to be worth 5.3 billion Canadian dollars annually, is currently thriving because the supply of legal cannabis is projected to meet only thirty to sixty percent of demand.<sup>296</sup> The shortage is largely attributed to the slow rate of licensing producers and an unexpectedly soaring demand.<sup>297</sup> As of early November 2018, of the 132 government-approved cannabis producers, only seventy-two have received sales licenses to supply their product to retailers.<sup>298</sup> Additionally, there have been issues with retailers obtaining provincial licenses.<sup>299</sup> For example, there was only one legal government cannabis retailer open on October 17, 2018, in all of British Columbia, as none of the one hundred illegal cannabis dispensaries in Vancouver had received their licenses.<sup>300</sup> In fact, Vancouver has more illegal cannabis dispensaries than Starbucks outlets.<sup>301</sup> By December 2019, Ontario had only twenty-four legal cannabis dispensaries to meet the demand of its 17.5 million residents, so people continue to buy on the black market.<sup>302</sup> Overall, only twenty-eight percent of Canadian cannabis buyers have their needs met

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Dan Bilefsky, *Dry Spell: Canada Runs Low on Legal Marijuana Just Weeks After It Goes on Sale*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/world/canada/canada-marijuana-shortage.html> [hereinafter Bilefsky, *Dry Spell*]; Jacqueline Thorpe, *Canada Is Facing a Shortage of Legal Weed*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/news/articles/2018-10-05/fear-not-dope-dealer-canada-s-facing-a-shortage-of-legal-weed>.

<sup>297</sup> Thorpe, *supra* note 296.

<sup>298</sup> Bilefsky, *Dry Spell*, *supra* note 296.

<sup>299</sup> Dan Bilefsky, *Vancouver, Canada's Marijuana Capital, Struggles to Tame the Black Market*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/world/canada/marijuana-cannabis-vancouver-legalization.html?module=inline> [hereinafter Bilefsky, *Vancouver*].

<sup>300</sup> *Id.*

<sup>301</sup> Dan Bilefsky, *High Demand and Short Supply in Canada's Legal Cannabis Trade*, N.Y. TIMES (Nov. 2, 2018), <https://www.nytimes.com/2018/11/02/world/canada/legal-marijuana-shortages-canada-letter.html> [hereinafter Bilefsky, *High Demand*].

<sup>302</sup> Austen, *supra* note 182.

through legal sources, with the lack of stores in Ontario and Quebec being a major reason why the black market remains afloat.<sup>303</sup>

Many legitimate retailers have faced severe production bottlenecks that have caused some to shutter their doors for as many as three days a week until the supply can be replenished.<sup>304</sup> Illegal dealers are taking advantage of the shortage by offering home delivery services and lowering prices in the face of angry consumers.<sup>305</sup> The police are also unlikely to crack down on illegal dealers, retailers, or growers, as they must prioritize their resources to address more overwhelming issues such as opioid overdoses, violent crime, and sex offenders.<sup>306</sup> With the Canadian market being flooded with legal cannabis, some predict it is only a matter of time before black-market growers go out of business due to falling prices.<sup>307</sup> Consumer demand will likely change to prefer government-approved, contaminant-free cannabis over street cannabis.<sup>308</sup>

For some illegal cannabusinesses in Canada, the legalization of recreational cannabis did not offer them the path to legality that they had imagined.<sup>309</sup> Some provinces, such as Quebec, structured the new industry in such a way that operated to exclude the already-existing illegal cannabusinesses.<sup>310</sup> Because all cannabis stores are government-run in Quebec, there is no path to legality for those operating in the underground cannabis industry.<sup>311</sup> Instead of creating a mechanism by which illegal producers could move quickly into the legal producing system, shutting out the black market ensured that the initial undersupply of cannabis would drive consumers back to the black market.<sup>312</sup> Just a month after legalization, more than a third of

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<sup>303</sup> *Id.*

<sup>304</sup> Bilefsky, *supra* note 7.

<sup>305</sup> *Id.*

<sup>306</sup> Bilefsky, *Vancouver*, *supra* note 299.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Selena Ross, *Canada Legalized Pot in October. But Its Black Market Is Still Going Strong.*, WASH. POST (Jan. 5, 2019), [https://www.washingtonpost.com/world/the\\_americas/canada-legalized-pot-in-october-but-its-black-market-is-still-going-strong/2019/01/04/ca09a3b0-fe53-11e8-a17e-162b712e8fc2\\_story.html?utm\\_term=.d8a371277f5a](https://www.washingtonpost.com/world/the_americas/canada-legalized-pot-in-october-but-its-black-market-is-still-going-strong/2019/01/04/ca09a3b0-fe53-11e8-a17e-162b712e8fc2_story.html?utm_term=.d8a371277f5a).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

Canadian cannabis users reported that they had not even tried the legal system.<sup>313</sup>

## V

### FUTURE DEVELOPMENTS: INCREASED LIBERALIZATION AND PROFITABILITY OF CANNABIS

Cannabis laws still have a long way to go in both the United States and Canada before cannabusinesses can uniformly and effectively secure their finances. The STATES Act, a perceived growing support for cannabis reform in the 2018 U.S. midterm elections, Representative Blumenauer’s legalization ideas in the 116th Congress, the SAFE Banking Act, and an increase in cannabis tourism demonstrate a trend toward uniform legalization, regulation, and banking access throughout the United States.<sup>314</sup> The question remains how to best regulate cannabis at the state or provincial level in such a way that will inspire confidence in the banking sector.

#### *A. The STATES Act: A Call to End the Federal Prohibition*

The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act, a bill cosponsored by Senators Elizabeth Warren (D-MA) and Cory Gardner (R-CO),<sup>315</sup> would allow states to regulate cannabis independently from the federal government and ensure that banks can lawfully provide services to cannabusinesses that operate in compliance with state law.<sup>316</sup> While the Patriot Act authorizes subpoenas of foreign banks if there is a suspicion that a bank is moving funds for an illegal business, the STATES Act would eliminate the basis for the subpoena as long as the bank in question acts in accordance with state law.<sup>317</sup> It also amends the CSA so that its provisions no longer apply to any person acting in compliance with state or tribal laws relating to the “manufacture, production, possession, distribution, dispensation, administration, or delivery of marijuana.”<sup>318</sup> If this bill passes, there is hope that the exemption for banks working with legitimate businesses in their own jurisdictions could extend

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<sup>313</sup> *Id.*

<sup>314</sup> See *infra* Part V.A.–V.E.

<sup>315</sup> Sen. Elizabeth Warren & Sen. Cory Gardner, *The STATES Act*, U.S. SEN. ELIZABETH WARREN FOR MASS., <https://www.warren.senate.gov/imo/media/doc/STATES%20Act%20One%20Pager.pdf> (last visited Jan. 20, 2020).

<sup>316</sup> Murriel, *supra* note 216.

<sup>317</sup> *Id.*

<sup>318</sup> Warren & Gardner, *supra* note 315.

beyond American borders.<sup>319</sup> The STATES Act would not, however, legalize cannabis in the eyes of the federal government.<sup>320</sup>

### ***B. 2018 U.S. Midterm Elections: Growing Support for Cannabis Reform***

As a result of recent elections, recreational cannabis is now legal in eleven states, and medical cannabis is now legal in thirty-three states.<sup>321</sup> In 2018, Michigan and North Dakota had measures on their ballots to legalize recreational marijuana for adult use, whereas Missouri and Utah had measures on their ballots to legalize medical marijuana.<sup>322</sup> In Michigan, voters decided to support progressive cannabis reform by legalizing recreational marijuana.<sup>323</sup> Both Missouri and Utah voters legalized medical marijuana.<sup>324</sup> Voters in North Dakota, on the other hand, voted against the legalization of recreational marijuana and related criminal justice reform.<sup>325</sup> Aside from North Dakota, the 2018 midterm elections show that progressive cannabis reform is the dominant political trend in the United States.

### ***C. Representative Blumenauer's Blunt Blueprint for Legalization in the 116th Congress***

Even though not a single cannabis-related measure advanced to a vote before the full body of Congress in either 2017 or 2018, Representative Earl Blumenauer (D-OR) wrote an eight-page memo to the House Democratic Leadership.<sup>326</sup> His plan calls for the Democratic

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<sup>319</sup> Murriel, *supra* note 216.

<sup>320</sup> Mike Adams, *Cannabis Advocates Will Learn Sooner Rather than Later How Congress Will Handle Marijuana*, FORBES (Jan. 14, 2019), <https://www.forbes.com/sites/mikeadams/2019/01/14/cannabis-advocates-will-learn-sooner-rather-than-later-how-congress-will-handle-marijuana/#789915677122>.

<sup>321</sup> Jeremy Berke & Skye Gould, *Legal Marijuana Just Went on Sale in Illinois. Here Are All the States Where Cannabis Is Legal.*, BUS. INSIDER (Jan. 1, 2020), <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

<sup>322</sup> Paulina Firozi, *The Health 202: These Four States Will Vote on Marijuana in the Midterms*, WASH. POST (Oct. 22, 2018), [https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/10/22/the-health-202-these-four-states-will-vote-on-marijuana-in-the-midterms/5bcc9fab1b326b7c8a8d1ab4/?utm\\_term=.f2b67a4fa72c](https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/10/22/the-health-202-these-four-states-will-vote-on-marijuana-in-the-midterms/5bcc9fab1b326b7c8a8d1ab4/?utm_term=.f2b67a4fa72c).

<sup>323</sup> Rense, *supra* note 24.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> Tom Angell, *Congressman Issues 'Blueprint to Legalize Marijuana' for Democratic House in 2019*, FORBES (Oct. 17, 2018), <https://www.forbes.com/sites/tomangell/2018/10/17/congressman-issues-blueprint-to-legalize-marijuana-for-democratic-house-in-2019/#69cf5d63aaf0>.

House to lead on the issue and build pressure on the Senate, where cannabis reform already has bipartisan support.<sup>327</sup> Because almost every standing House committee has jurisdiction over some aspect of cannabis policy, Blumenauer urges the committees to hold hearings to discuss potential policy fixes.<sup>328</sup> By April 2019, he wanted committees to pass legislation to narrow the gap between federal and state cannabis laws, including measures regarding the removal of barriers to research, making amends for racial injustices flowing from discriminatory enforcement, providing a path for greater access to banking services for cannabis businesses, providing tax reform for cannabis businesses, and more.<sup>329</sup> He suggested that such bills be brought to the House floor in August and that by September the House should begin working on a full descheduling bill to end the federal cannabis prohibition.<sup>330</sup> To that end, one of the bills Blumenauer helped develop passed the House Judiciary Committee in November 2019: the Marijuana Opportunity Reinvestment & Expungement Act.<sup>331</sup>

The success of Representative Blumenauer's plan depends on the leadership of majority leader Representative Nancy Pelosi (D-CA).<sup>332</sup> Her stance is that the bill's success would largely depend on support from President Trump because there is majority support for cannabis reform among House Democrats.<sup>333</sup> President Trump during his 2016 campaign indicated that he felt cannabis reform should be left to the states, but he has said that he supports medical over recreational cannabis.<sup>334</sup> More recently, President Trump suggested that he "probably will end up supporting" the STATES Act, perhaps stemming from the fact that Senator Gardner (R-CO) is a sponsor of the bill.<sup>335</sup>

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *House Judiciary Passes MORE Act to Decriminalize Marijuana at Federal Level*, HOUSE JUDICIARY COMMITTEE (Nov. 20, 2019), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2157>. The MORE Act aims to, inter alia, decriminalize cannabis at the federal level by removing it from the CSA, require federal courts to expunge prior convictions, and prohibit the denial of any federal public benefit or any adverse impact of immigration laws based on use, possession, or a prior conviction. *Id.*

<sup>332</sup> Angell, *supra* note 326.

<sup>333</sup> *Id.*

<sup>334</sup> Kris Kane, *Why President Trump Is Positioned to Be Marijuana's Great Savior & How the Democrats Blew It*, FORBES (July 11, 2018), <https://www.forbes.com/sites/kriskrane/2018/07/11/why-president-trump-could-be-marijuanas-savior/#1957d60e20a0>.

<sup>335</sup> Ryan W. Miller, *President Trump Says He'd Likely Support Bill to End Federal Pot Ban*, USA TODAY (June 8, 2018), <https://www.usatoday.com/story/news/politics/>

Because a record high of sixty-four percent of Americans support legalization at the federal level, including fifty-one percent of Republicans, President Trump may benefit significantly by positioning himself as the “legalization president.”<sup>336</sup>

In fact, Representative Blumenauer introduced the Regulate Marijuana Like Alcohol Act, which would eliminate cannabis from the CSA and allow the Food and Drug Administration to regulate cannabis like alcohol.<sup>337</sup> However, this bill is less likely to pass than the STATES Act because most of the support for cannabis in the House is based on states’ rights and medical marijuana.<sup>338</sup> The majority of the lower chamber is certainly not in favor of legalizing cannabis nationwide for all adults who are twenty-one or older.<sup>339</sup> Members of the Congressional Cannabis Caucus seem to believe that the best chance to further liberalize cannabis is in the form of the STATES Act, which approaches the issue from the angle of states’ rights.<sup>340</sup>

#### ***D. SAFE Banking Act***

Representatives Ed Perlmutter (D-CO), Danny Heck (D-WA), Steve Stivers (R-OH), and Warren Davidson (R-OH) reintroduced the Secure and Fair Enforcement (SAFE) Banking Act in the 116th Congress.<sup>341</sup> On April 1, 2019, the SAFE Banking Act moved to the floor of the House for further consideration.<sup>342</sup> The bill would prevent banking regulators from penalizing banks and their employees for providing services to legitimate cannabusinesses.<sup>343</sup> An important goal of the bill is to reduce the risk of violent crime by “get[ting] cash off our streets,”

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2018/06/08/donald-trump-likely-support-bill-end-federal-pot-ban-cory-gardner-elizabeth-warren/685997002/.

<sup>336</sup> Kane, *supra* note 334.

<sup>337</sup> Regulate Marijuana Like Alcohol Act, H.R. 420, 116th Cong. (2019).

<sup>338</sup> Adams, *supra* note 320.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> Sara Brittany Somerset, *SAFE Banking Act Update*, FORBES (Mar. 29, 2019), <https://www.forbes.com/sites/sarabrittany Somerset/2019/03/29/safe-banking-act-update/#48222f5b3990>.

<sup>342</sup> Dave Kovalski, *House Committee Advances Bill to Let Banks Serve Legitimate Marijuana Businesses*, FIN. REG. NEWS (Apr. 1, 2019), <https://financialregnews.com/house-committee-advances-bill-to-let-banks-serve-legitimate-marijuana-businesses/>.

<sup>343</sup> Somerset, *supra* note 341; Renae Merle, *Banks Want a Hit of the Marijuana Business. Will They Get to Partake?*, WASH. POST (Feb. 13, 2019), [https://www.washingtonpost.com/business/2019/02/13/banks-want-hit-marijuana-business-will-they-get-partake/?utm\\_term=.8a30dc7ac719](https://www.washingtonpost.com/business/2019/02/13/banks-want-hit-marijuana-business-will-they-get-partake/?utm_term=.8a30dc7ac719).

according to Representative Perlmutter.<sup>344</sup> The president and CEO of the American Banking Association, Rob Nichols, applauded the House Financial Services Committee for its support of the SAFE Banking Act, touting it as “an important step forward in providing regulatory and legal clarity for financial institutions caught in the conflict between state and federal cannabis laws.”<sup>345</sup> The likelihood that the SAFE Banking Act will pass as a stand-alone bill is unclear, especially with a Republican-controlled Senate.<sup>346</sup> In September 2019, the House passed the bill with a strong bipartisan vote of 321–103,<sup>347</sup> making it the first stand-alone cannabis reform bill to ever pass the House.<sup>348</sup> Senator Mike Crapo (R-ID), chairman of the Senate Banking Committee, has pledged to take action on the bill despite being personally opposed to cannabis legalization.<sup>349</sup> Politicians on both sides of the aisle have criticized the bill as being only a partial solution to the problem because it neither addresses the underlying issue of cannabis being a schedule I controlled substance nor decriminalizes cannabis on a federal level.<sup>350</sup>

### *E. Green Rush and Pot Tourism*

The fervor surrounding the fledgling legal cannabis industry and its so-called “green rush” is reminiscent of the dot-com boom of the 1990s.<sup>351</sup> As of October 2018, the top twelve Canadian cannabusinesses are now worth nearly \$42 billion USD.<sup>352</sup> And there are also ancillary businesses that have sprung up around the industry: businesses that create the software that allows growers to track their plants and final products according to government regulation,

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<sup>344</sup> Kovalski, *supra* note 342.

<sup>345</sup> *Id.*

<sup>346</sup> Merle, *supra* note 343.

<sup>347</sup> Sylvan Lane & Alex Gangitano, *Nearing Finish Line, Fight for Cannabis Banking Bill Shifts to the Senate*, THE HILL (Oct. 2, 2019), <https://thehill.com/business-a-lobbying/463932-nearing-finish-line-fight-for-cannabis-banking-bill-shifts-to-the-senate>.

<sup>348</sup> Marcus Hernandez, *SAFE Banking Act Passes House, Moves to Senate*, CANNABUSINESS ADVISORY (Oct. 16, 2019), <http://www.cannabusinessadvisory.com/2019/10/16/safe-banking-act-passes-house-moves-to-senate/>.

<sup>349</sup> Lane & Gangitano, *supra* note 347.

<sup>350</sup> Veronica Stracqualursi, *House Passes Cannabis Banking Bill, but It Faces Senate*, CNN (Sept. 26, 2019), <https://www.cnn.com/2019/09/26/politics/cannabis-banking-bill-house-vote/index.html>.

<sup>351</sup> Ian Austen, *Marijuana Legalization in Canada Has Companies Chasing a Green Rush*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/world/canada/cannabis-legalization-industry.html?module=inline>.

<sup>352</sup> *Id.*

greenhouse makers, and fertilizer businesses.<sup>353</sup> Abandoned factories have also suddenly become in-demand properties.<sup>354</sup> However, Canada's green rush has slowed one year after legalization because those who invested in the burgeoning industry have generally lost money.<sup>355</sup> The stock of the six largest cannabis companies in Canada fell by an average of fifty-six percent.<sup>356</sup> However, industry insiders expect that after cannabis drinks, foods, and topicals hit the Canadian market in December 2019, the market will turn around.<sup>357</sup>

In Oregon, the already tourism-centric economy is creating niche businesses as the cannabis industry grows.<sup>358</sup> Oregon has licensed cannabis retailers in every county bordering the Pacific Ocean, with the highest concentration near the coast in Lincoln County.<sup>359</sup> In fact, cannabusinesses quickly saturated the Oregon market to the point where they outnumber McDonald's and Starbucks locations.<sup>360</sup> Some cannabusinesses, like Chalice Farms, are working on building a brand and franchise empire that will be as recognizable as that of McDonald's and Starbucks, which is partially facilitated by cannabis's drop in price.<sup>361</sup> Seventy-one Oregon retailers belonged to a chain of three or more locations in 2017, but this number rose to 115 in 2018—a sixty-two percent increase.<sup>362</sup> In 2018, more than one in five of Oregon's 544 dispensaries belonged to a chain.<sup>363</sup> It remains to be seen if the consolidation trend will occur in Canada because the government itself is a cannabis retailer in some provinces and territories.<sup>364</sup>

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<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> Austen, *supra* note 182.

<sup>357</sup> *Id.*

<sup>358</sup> Jonathan Bach, *Legal Pot Dealers Find Home: Oregon's Cannabis Coast*, STATESMAN J. (July 31, 2017), <https://www.statesmanjournal.com/story/news/2017/07/31/marijuana-oregon-coast-hotels-tourism/468643001/>.

<sup>359</sup> *Id.*

<sup>360</sup> Shane Dixon Kavanaugh, *There Are More Marijuana Shops in Oregon than Starbucks and McDonald's*, BUS. INSIDER (June 30, 2015), <https://www.businessinsider.com/there-are-more-marijuana-shops-in-oregon-than-starbucks-and-mcdonalds-2015-6>.

<sup>361</sup> Katie Shepherd, *Deep-Pocketed Investors Are Storming Oregon's Cannabis Market. They're Shifting the Business Model from Mom-and-Pop Shops to Starbucks.*, WILLAMETTE WK. (May 16, 2018), <https://www.wweek.com/news/2018/05/16/deep-pocketed-investors-are-storming-oregons-cannabis-market-theyre-shifting-the-business-model-from-mom-and-pop-shops-to-starbucks/>.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> See *supra* Part II.B.1.

### CONCLUSION

Cannabis legalization, though increasingly popular, has only recently gained traction worldwide. The recent spike in popularity of recreational cannabis in the United States and Canada necessitates cannabis law reform, especially regarding cannabis banking services. By legalizing recreational cannabis nationwide, Canada forged a radical path that could influence the rest of the U.S. states to legalize cannabis if federal legalization proves impossible. However, although cannabis is currently economically and socially popular in both the United States and Canada, U.S. banking regulation restrictions on cannabis businesses negatively affect both countries. Current attempts to finance cannabis businesses through local credit unions, apps such as CanPay, and state-chartered banks are insufficient to meet the business needs of a growing industry. To move toward accessible banking services for Oregon cannabis businesses, financial institutions need a congressional green light that such banking is permissible. This could be in the form of the STATES Act, SAFE Banking Act, or the Regulate Marijuana Like Alcohol Act. In an ideal world, cannabis would be completely removed from the CSA, as called for in the latter act. Passage of the SAFE Banking Act, however, is much more likely given its broader bipartisan support.

Several recent developments indicate that public and political sentiment in the United States is beginning to shift toward wider cannabis legalization and liberalization. Most prominently, Canada's nationwide legalization of recreational cannabis, Sessions's resignation,<sup>365</sup> the passage of the 2018 Farm Bill and its legalization of commercial hemp production,<sup>366</sup> and the multitude of bills introduced in the House and Senate reflect that cannabis reform is at the forefront of the American and Canadian political agendas. Given these developments, cannabis businesses are likely to soon enjoy a future with fewer legal impediments to banking services. Thus, the next step for the industry after its banking woes are resolved is the development of regulatory systems for the importation and exportation of cannabis across state lines and the Canada-United States border.

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<sup>365</sup> Curren, *supra* note 133.

<sup>366</sup> See Andre Bourque, *How Hemp and the Farm Bill May Change Life as You Know It*, FORBES (Dec. 17, 2018), <https://www.forbes.com/sites/andrebourque/2018/12/17/how-hemp-and-the-farm-bill-may-change-life-as-you-know-it/#79d7e109694c>.