

Post-Election Update: U.S. Federal Cannabis Legislation

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We will continue to update the memorandum as the bills make their way through Congress.

The Three Paths

- There are three primary cannabis reform bills in Congress, each of which takes a very different path to legalization.
- The MORE Act will be voted on by the full House in the coming days. None of the bills have advanced through the Senate.

| | MORE Act Nationwide Descheduling | SAFE Banking Act Focus on Banking and Payments | STATES Act Defers to State Law |
|---|--|--|--|
| Bipartisan Sponsors | X | ✓ | ✓ |
| Contains Social Justice Initiatives | ✓ | X | X |
| Places a Special Tax on Cannabis | ✓ | X | X |
| Encourages Development of an Interstate Market | ✓ | X | ✓ |
| Permits Bank Accounts for Cannabis-Related Businesses | ✓ | ✓ | ✓ |
| Permits Payments and Money Transmission | ✓ | ✓ | ✓ |
| Permits Capital Markets Activity | ✓ | X | ✓ |
| Permits Investment Activity | ✓ | X | ✓ |
| Contains Directions to Regulators | ✓ | ✓ | X |
| Protects Insurers | ✓ | ✓ | ✓ |

The November 2020 Election

- The recent election demonstrated [widespread voter support](#) for marijuana legalization and related initiatives.
 - A variety of state-level legalization initiatives passed, in some cases by significant margins. As a result, [only 4%](#) of the population now live in states where marijuana is completely illegal and [1 in 3 Americans](#) live in a state where recreational marijuana use has been legalized.
 - Additional state-level initiatives are in progress. For example, the New Jersey legislature will vote on recreational marijuana in the coming days, which in turn could create a push for similar initiatives in nearby states such as New York.
 - Vice President-Elect Kamala Harris was the lead sponsor of the MORE Act in the Senate. As described later in this briefing, the MORE Act is the most ambitious of the various paths to legalization at the federal level.
 - [“We will decriminalize marijuana, and we will expunge the records of those who have been convicted of marijuana.”](#) – Vice President-Elect Harris, at the October 7, 2020 debate with Vice President Pence
 - Twenty-five of the Republican senators for the incoming 117th Congress come from states that have legalized recreational or medical marijuana, but some Republicans remain reluctant.
- Voter support for full state-level recreational legalization initiatives suggests growing bipartisan [support for legalization or some other form of relief at the federal level](#). [Views on legalization within the Biden administration will likely vary](#).
 - The progressive wing of the party will focus on full legalization with social equity initiatives.
 - Moderates will focus on relief efforts aimed at the tensions between federal and state law regarding cannabis-related activities, including with respect to financial services.
- With a marijuana legalization bill on path for passage in Mexico, and Canada having legalized marijuana in 2018, [there may be added pressure based on the geographic proximity of legalized marijuana](#).

THE MORE ACT Overview

The **Marijuana Opportunity Reinvestment and Expungement Act** (the **MORE Act**)

- The MORE Act was introduced in the [Senate](#) and the [House](#) on July 23, 2019 by:
 - Senator (now Vice President-Elect) Kamala Harris (D-CA) in the Senate (S. 2227); and
 - Representative Jerrold Nadler (D-NY) in the House (H.R. 3884).
- It was passed by the House Judiciary Committee on November 20, 2019. An updated version was sent to the House Rules Committee on November 30, 2020 and is expected to be voted on by the full House tomorrow.
- The bill [deschedules cannabis](#) on a nationwide basis while setting forth social justice goals related to business ownership, employment and criminal records.
 - The bill [amends the Controlled Substances Act \(CSA\)](#) by striking 21 U.S.C. 812(10) and (17), which currently schedule “marihuana” and THC, respectively, as Schedule I substances.
 - The bill’s provisions exclude hemp, presumably given hemp’s separate path towards federal legalization.
 - The bill preserves the ability for Federal transportation agencies and the Department of Health and Human Services to test employees in sensitive positions for marijuana use.
- The bill also implements [a national tax](#) on cannabis products manufactured or imported into the U.S., which would be used to fund the social justice programs established by the bill.
 - As part of the new tax, the bill establishes [a permitting and bonding framework](#) for a wide range of cannabis-related activities.

Congressional Findings

- The MORE Act lists extensive Congressional findings related to cannabis use and the effects of illegality in the U.S., including that:
 - The communities that have been most harmed by cannabis prohibition are benefiting the least from the legal marijuana marketplace.
 - A legacy of racial and ethnic injustices, compounded by the disproportionate collateral consequences of 80 years of cannabis prohibition enforcement, now limits participation in the industry.
 - Many states have enacted laws providing for legal access to cannabis.
 - Legal cannabis sales totaled \$9.5 billion in 2017 and are projected to reach \$23 billion by 2022, whereas enforcing cannabis prohibition laws costs taxpayers billions of dollars per year.
 - The continued enforcement of cannabis prohibition laws results in over 600,000 arrests annually, disproportionately impacting people of color who are almost 4 times more likely to be arrested for cannabis possession than their White counterparts, despite equal rates of use across populations.
 - People of color have been historically targeted by discriminatory sentencing practices resulting in Black men receiving drug sentences that are 13.1 percent longer than sentences imposed for White men and Latinos being nearly 6.5 times more likely to receive a Federal sentence for cannabis possession than non-Hispanic Whites.
 - In 2013, simple cannabis possession was the fourth most common cause of deportation for any offense and the most common cause of deportation for drug law violations.
 - Fewer than one-fifth of cannabis business owners identify as minorities and only approximately 4 percent are Black.
 - Applicants for cannabis licenses are limited by numerous laws, regulations, and exorbitant permit applications, licensing fees, and costs in these States, which can require more than \$700,000.
 - Historically disproportionate arrest and conviction rates make it particularly difficult for people of color to enter the legal cannabis marketplace, as most States bar these individuals from participating.
 - Federal law severely limits access to loans and capital for cannabis businesses, disproportionately impacting minority small business owners.

Social Justice Goals – Opportunity Fund

- The MORE Act aims to ensure that business opportunities created by federal descheduling of cannabis are distributed fairly, in light of the disproportionate impact that federal cannabis laws have had on minority communities.
- The bill establishes an [Opportunity Trust Fund](#), financed by revenues from [taxes imposed under Chapter 56](#) (described on slide 9), to fund three specific grant programs:
 - 60% of the trust would go to the [Community Reinvestment Grant Program \(CRGP\)](#) to fund 501(c)(3) non-profits providing social services, such as job training and substance use disorder services, to “[individual\[s\] adversely impacted by the War on Drugs](#).” The CRGP would be administered by a new office in the Department of Justice, the Cannabis Justice Office.
 - An “an individual adversely impacted by the War on Drugs” means an individual who (1) has had an income below 250% of the Federal Poverty Level for at least five of the past 10 years and (2) has been arrested or convicted for a cannabis-related offense, or whose family member has been arrested or convicted for such an offense.
 - 20% of the trust would go to the [Cannabis Opportunity Program \(COP\)](#) to fund loans to small businesses owned and controlled by “[socially and economically disadvantaged individuals](#)” in the cannabis industry. The COP would be administered by the Small Business Association (SBA).
 - The bill adopts the definition of “socially and economically disadvantaged individual” contained in Section 8(d)(3)(C) of the Small Business Act: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantages [under the Small Business Act].”
 - 20% of the trust would go to the [Equitable Licensing Grant Program \(ELGP\)](#) to fund State licensing programs that meet at least four of five specified factors, each aimed at [ensuring that States’ licensing regimes are equitable](#). The ELGP would be administered by the SBA.

Social Justice Goals – Criminal Records

- The bill requires **expungement and resentencing** of individuals who have been charged, arrested or convicted of a non-violent federal cannabis-related offense, with **retroactive effect**.
 - Individuals who were “**organizers**” or “**leaders**” of cannabis-related criminal activity, as those terms are defined in the Federal sentencing guidelines, are not eligible for expungement.
- The bill **prohibits denial of federal benefits or immigration status** based on an individual’s use of cannabis.
- The bill extends federal **small business loan programs** to “cannabis-related legitimate business and service providers.”
 - “Cannabis-related legitimate business and service providers” generally includes any person that handles cannabis products pursuant to State law or provides “any business” to such person.
- The bill requires the **Department of Justice**, as well as the **Treasury** and the **SBA**, to take any additional steps needed to effect implementation of the bill.

Amendments to Internal Revenue Code

- The bill imposes both an **excise tax** based on the value of certain cannabis products and an **occupational tax** on the enterprises engaging on cannabis production and sales, and generally aims to make the tax treatment of cannabis similar to the tax treatment of tobacco.
- **Excise tax:** imposes a tax on cannabis produced in or imported into the U.S.
 - **Rate of tax gradually increases from 5% to 8%** in the first 5 years after the bill is enacted. Tax assessed based on “**removal price**” which is generally (i) the price at which the cannabis is sold and (ii) if sales are not arm’s length or there are no sales, the price at which the cannabis would have been sold if it were sold in an arm’s length transaction as determined by the Treasury Secretary (i.e., fair market value).
 - After the initial 5-year period, tax is imposed at 8% and is based on:
 - For THC-measurable cannabis products, the prevailing sales price of THC during a 12 month-period (ending 9/30 of the prior calendar year), expressed on a per gram basis, and
 - For all other cannabis products, the prevailing sales price of cannabis flowers during a 12 month-period (ending 9/30 of the prior calendar year), expressed on a per ounce basis.
 - A “**cannabis product**” is one that “**contains (or consists of) cannabis**,” but excludes FDA-approved articles and industrial hemp.
- **Occupational tax:** imposes a tax of \$1,000 per year on any “person engaged in business as a producer or an export warehouse proprietary” for “each premises at which such business is carried on.” There is no requirement to pay for locations that only store cannabis.
- Additionally, every “**cannabis enterprise**” is required to hold a permit that subjects the enterprise to operational and disclosure requirements. Certain cannabis enterprises are also subject to a bonding requirement, in an amount and form to be determined by the Treasury Secretary.
 - “**Cannabis enterprise**” means a “**producer, importer or export warehouse proprietor**,” but excludes retail point-of-sale activities.

Other Provisions

- The MORE Act directs the Bureau of Labor Statistics to regularly compile and publish a [demographic survey of business owners and employees](#) in the “cannabis industry,” including information about individuals’ age, race, sex, educational attainment and veteran status.
 - “Cannabis industry” is defined as an “individual or entity that is licensed or permitted under a State or local law to engage in commercial cannabis-related activity.”
 - “Cannabis” is defined however it is defined under the relevant State or local law.
- The bill requires GAO to provide Congress “a study that addresses the [societal impact of the legalization of recreational cannabis](#) by States,” which includes “tax revenue remitted to States resulting from legal marijuana sales” and “uses of marijuana and its byproducts for medical purposes,” among other things.

THE SAFE BANKING ACT

Overview

- The **Secure and Fair Enforcement Banking Act** (the **SAFE Banking Act**)

- Most recently introduced in the [House](#) (H.R. 1595) by Reps. Ed Perlmutter (D-CO), Denny Heck (D-WA), Steve Stivers (R-OH), and Warren Davidson (R-OH) on March 7, 2019.
 - The bill passed the House on September 25, 2019 and was received in the Senate.
- Aims to improve public safety by expanding [financial services](#) (as defined below) to [cannabis-related legitimate businesses \(CRBs\)](#) and [service providers](#) and reducing the amount of cash at such businesses.
 - Given uncertain enforcement of the CSA and U.S. anti-money laundering ([AML](#)) laws and possible heavy penalties, the vast majority of financial institutions currently avoid knowingly providing financial services to U.S. CRBs.
- Clarifies that [hemp](#) is currently legal under Federal law and protects depository institutions providing financial services to [hemp-related businesses \(HRBs\)](#) and [service providers](#).
 - Due to ongoing confusion about the legal status of hemp, many financial institutions also avoid knowingly providing financial services to HRBs.
- Provides a safe harbor from Federal banking regulators taking certain actions against depository institutions solely for providing financial services to CRBs, HRBs or service providers.
- Provides that proceeds of a transaction involving a CRB, HRB or service provider shall not be considered proceeds of an unlawful activity under the Money Laundering Control Act ([MLCA](#)) solely because the transaction involves proceeds from such businesses.
- Provides certain protections from (1) liability under any Federal law for depository institutions and insurers that provide financial services to CRBs, HRBs or service providers, and (2) forfeiture of certain collateral for depository institutions that provide financial services to such businesses.
- Requires financial institutions to comply with FinCEN's guidance when filing suspicious activity reports ([SARs](#)) related to CRBs and service providers.
- Requires the Federal Financial Institutions Examination Council ([FFIEC](#)) to issue guidance and examination procedures.
- Requires Federal banking regulators to provide best practices for providing financial services to HRBs.

Safe Harbor for Depository Institutions

- The SAFE Banking Act provides a **safe harbor** for **depository institutions**, which would prohibit a **Federal banking regulator** from:
 - Terminating or limiting a depository institution’s deposit insurance, or taking any other adverse action against a depository institution solely because it provides financial services to CRBs or service providers operating pursuant to State law, or to HRBs or service providers operating pursuant to Federal law.
 - Prohibiting or penalizing a depository institution for or discouraging a depository institution from providing financial services to such businesses or to a State exercising jurisdiction over such businesses
 - Recommending or incentivizing a depository institution not to offer financial services to certain account holders involved in such businesses
 - Taking adverse or corrective actions on loans to such businesses, to certain persons involved in such businesses, or to owners or operators of real estate or equipment leased to such businesses solely because such businesses are CRBs, HRBs or service providers
 - Prohibiting or penalizing a depository institution (**or entity performing services for the depository institution**) for or discouraging such institution from engaging in a financial service for CRBs, HRBs or service providers.
- The safe harbor also extends to institutions applying for **depository institution charters**.

Federal banking regulators

- Federal Reserve Board
- Consumer Financial Protection Bureau (CFPB)
- Federal Deposit Insurance Corporation (FDIC)
- Office of the Comptroller of the Currency (OCC)
- National Credit Union Administration (NCUA)
- Treasury Department
- FinCEN
- Office of Foreign Assets Control (OFAC)
- Any Federal agency or department that regulates banking or financial services

THE SAFE BANKING ACT

Selected Definitions

- The SAFE Banking Act covers **depository institutions** and **insurers** that offer a **financial service** to CRBs, HRBs or service providers.
 - “**Depository institution**” means a depository institution (as defined in 12 U.S.C. § 1813(c)); or a Federal credit union or State credit union (as defined in 12 U.S.C. § 1752).
 - “**Financial service**”
 - means a “**financial product or service**,” as defined in 12 U.S.C. § 5481;
 - plus the following additional products and services:
 - the “**business of insurance**,” which is cross-referenced to mean “the writing of insurance or the reinsuring of risks by an insurer” as well as all necessary acts and related activities;
 - whether performed directly or indirectly, **functions related to payments or funds**, where such payments or funds are made or transferred by any means (e.g., payment cards, accounts, checks, or electronic funds transfers);
 - acting as a **money transmitting business** which directly or indirectly makes use of a depository institution in connection with effectuating or facilitating a payment for a cannabis-related legitimate business or service provider in compliance with 31 U.S.C. § 5330, and applicable State law; and
 - acting as an **armored car service** for processing and depositing with a depository institution or the Federal Reserve Board with respect to any monetary instruments.

financial product or service

The term comes from the consumer provisions of the Dodd-Frank Act establishing the CFPB.

Protections for Ancillary Businesses and Directions to Regulators

Protections for Ancillary Businesses

- For the purposes of the MLCA and all other provisions of Federal law, the **proceeds** from a transaction involving a CRB, HRB or service provider shall not be considered proceeds from an unlawful activity solely because the transaction involved proceeds from a CRB, HRB or service provider, as applicable.
 - Notably, this provision is *not* limited to any particular type of entity or individual institution and appears to apply to depository institutions, other financial institutions, and even to CRBs, HRBs and service providers.

Directions to Regulators

- The SAFE Banking Act requires the Treasury Secretary to ensure that guidance issued by FinCEN:
 - Is consistent with the SAFE Banking Act's purpose and intent; and
 - Does not **significantly** inhibit financial institutions from providing services to CRBs or service providers in State or local jurisdictions that permit such cannabis-related activity.
- Within 90 days after the SAFE Banking Act's enactment, Federal banking regulators must jointly issue guidance (1) **confirming** the legality of hemp under Federal law and (2) providing **best practices** for financial institutions providing financial services to HRBs.
- Within 180 days after the SAFE Banking Act's enactment, the FFIEC must develop **uniform guidance and examination procedures** for **depository institutions** that provide financial services to CRBs, HRBs and service providers.

THE STATES ACT Overview

The **Strengthening the Tenth Amendment Through Entrusting States Act** (the **STATES Act**)

- The STATES Act was most recently introduced in the [Senate](#) on April 4, 2019 by:
 - Senators Elizabeth Warren (D-MA) and Cory Gardner (R-CO) in the Senate (S. 1028); and
 - Representatives Earl Blumenauer (D-OR) and David Joyce (R-OH) in the House (H.R. 2093).
- The purpose of the bill is to [amend the CSA](#) to create a new standard regarding the CSA's application to marijuana.
- The bill provides that the CSA generally would not apply to marijuana-related conduct that is legal under State law, including the CSA's restrictions on trafficking in a controlled substance.
- The bill protects CRBs and their investors by providing that:
 - The proceeds of any marijuana transaction conducted in compliance with State law would not be deemed the proceeds of an unlawful transaction under the [MLCA](#) or [any other provision of law](#); and
 - Marijuana-related conduct that is legal under State law would not serve as a basis for criminal or civil asset forfeiture.

Amendment to the CSA

- The STATES Act amends the CSA by inserting a [new section \(710\)](#) that specifically governs marijuana-related activities:
 - Renders inapplicable CSA prohibitions on “[the manufacture, production, possession, distribution, dispensation, administration, or delivery](#)” of marijuana where such activity complies with State or tribal law.
 - This language would encompass a [wide range](#) of CRB business models.
 - The STATES Act does not apply if the CRB violates other provisions of the CSA, distributes to persons under 21 years old or if another exception applies.
 - For a full list of exceptions, see the July 22 version of this memorandum, slide 22 [\[Link\]](#).

Protections for Investors

- Of particular importance to investors is the STATES Act's new rule of construction, which provides that proceeds from CRBs operating in compliance with the STATES Act will not trigger prosecution under the MLCA.
 - **Marijuana-related activity** in compliance with State law and the STATES Act shall not:
 - Be unlawful;
 - Constitute "trafficking" of a controlled substance within the meaning of the CSA (21 U.S.C. § 841) or any other provision; or
 - Constitute the basis for criminal forfeiture under the CSA (21 U.S.C. § 881) or civil forfeiture under 18 U.S.C. § 981.
 - **Proceeds from transactions** involving marijuana-related activity in compliance with State law and the STATES Act shall not:
 - Be deemed the proceeds of an unlawful transaction under the MLCA or any other law.

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