

IN THE WEEDS: MOMENTUM BUILDS IN CONGRESS TO LIFT FEDERAL RESTRICTIONS ON MARIJUANA

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Forty-six states currently have marijuana legalization laws. Twenty-nine states and the District of Columbia have legalized medical marijuana, while seventeen states have allowed access to certain strains for some medical purposes. More recently, nine states and the District of Columbia have legalized it for recreational use. As states continue to move forward with efforts to legalize marijuana, momentum is building in Congress to lift related federal restrictions.

Given recent signs of support from President Donald Trump, Senate Majority Leader Mitch McConnell (R-KY), and Senate Minority Leader Chuck Schumer (D-NY), there is an opportunity to lift the federal ban on marijuana, which could significantly change the legal landscape for the marijuana industry and other key stakeholders. K&L Gates is ready to help you assess the opportunities and risks involved and engage with policymakers to impact policy outcomes.

ENFORCEMENT UNCERTAINTY REGARDING FEDERAL RESTRICTIONS ON MARIJUANA

Despite state laws providing for some form of legal use of marijuana, its manufacture, distribution, possession, and use are largely prohibited under federal law. Marijuana is currently classified as a Schedule I drug under the Controlled Substances Act (CSA), which places controlled substances into five schedules based on their potential for abuse, medical use, and safety or dependence liability. As a Schedule I drug, marijuana is considered to have a high potential for abuse and no accepted medical use, similar to heroin and LSD. Importantly, because of its classification as a Schedule I drug, marijuana is prohibited at the federal level and punishable by fines and/or imprisonment. Further, because marijuana is illegal under the CSA, depository institutions, which are required under banking laws to report activities that appear to be violations of federal law, are reluctant to accept deposits from marijuana businesses.

Given the conflict between state and federal law, the Department of Justice (DOJ) and federal banking agencies have issued guidance on the enforcement of these federal restrictions. In 2013, the DOJ issued a memo allowing for prosecutorial discretion in states that have legalized marijuana and implemented strong regulatory systems. Moreover, in 2014, the Department of the Treasury issued guidelines clarifying that financial institutions could provide services to marijuana businesses without being subject to liability for aiding and abetting a crime and money laundering under the CSA and federal banking laws in certain circumstances.

In January 2018, however, Attorney General Jeff Sessions rescinded the 2013 DOJ guidance and directed U.S. Attorneys to enforce federal law, calling the shift "a return to the rule of law." Although the guidelines issued by the Department of the Treasury have not been rescinded to date, there is uncertainty regarding the enforcement

of federal restrictions on marijuana and the ability of financial institutions to provide services to marijuana businesses without liability.

CURRENT EFFORTS IN CONGRESS TO LIFT FEDERAL RESTRICTIONS ON MARIJUANA

Policymakers in both chambers of Congress have responded to this enforcement uncertainty by introducing legislation that would lift federal restrictions on marijuana. On June 7, 2018, Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA), along with Representatives David Joyce (R-OH) and Earl Blumenauer (D-OR), introduced the bipartisan Strengthening the Tenth Amendment Through Entrusting States (STATES) Act (S.3032/H.R.6043), which would amend the CSA so it does not apply to persons or entities acting in compliance with state laws allowing for the manufacture, production, possession, distribution, and delivery of marijuana generally. In order to address concerns from the financial services industry, the STATES Act also provides that such compliant transactions will not amount to trafficking or an unlawful transaction.

Last year, Representatives Ed Perlmutter (D-CO) and Denny Heck (D-WA) introduced the Secure and Fair Enforcement (SAFE) Banking Act (H.R. 2215), which would allow marijuana businesses to access the banking system in states that allow the cultivation, production, manufacture, sale, transportation, distribution, or purchase of marijuana generally. Notably, a bipartisan group of senators introduced a companion bill (S. 1152) and, earlier this year, a group of 19 state attorneys general sent a letter to congressional leaders urging the passage of H.R. 2215.

Although more limited in scope, the Compassionate Access, Research Expansion, and Respect States (CARERS) Act (S.1764/H.R.2920) would ensure that the CSA does not apply to persons or entities that act in compliance with state laws permitting marijuana specifically for medical purposes. Other bills focused on medical marijuana include H.R. 2020, which would reclassify marijuana to a Schedule III drug under the CSA and facilitate research into its medical benefits.

STAKEHOLDER AND POLICYMAKER SUPPORT FOR LIFTING FEDERAL RESTRICTIONS

There is broad stakeholder and policymaker support for lifting federal restrictions on marijuana. Notably, a majority of Americans support the legalization of marijuana. According to a recent poll conducted by Quinnipiac University, approximately 63 percent of American voters support full legalization, while 93 percent support legalizing marijuana for medical purposes. The marijuana industry has also come out in strong support, along with financial services institutions that wish to provide services to marijuana businesses without fear of liability.

President Trump recently signaled that he would support Senator Gardner's STATES Act despite Attorney General Sessions' stance on the issue. President Trump has changed his position over time, pledging to respect state laws providing for the legalization of marijuana, while also criticizing its legalization during his campaign. However, his most recent position has been viewed as a compromise with Senator Gardner, who has held up several DOJ nominees since Attorney General Sessions announced that he would rescind the 2013 DOJ guidance.

Senate Majority Leader McConnell and Senate Minority Leader Schumer have also signaled possible support for lifting federal restrictions on marijuana. The Senate Majority Leader not only attended the Senate Agriculture

Committee mark-up of the Agriculture Improvement Act of 2018, but he also helped secure language from the Hemp Farming Act (S. 2667) as part of the bill, which the committee approved on June 13. The language would remove low-THC cannabis from marijuana regulation under the CSA. In addition, the Senate Minority Leader has recently announced plans to introduce legislation to decriminalize marijuana at the federal level.

Admittedly, there is concern that support from President Trump and Senate leaders may not be sufficient to get these efforts across the finish line. In particular, there is concern that there may not be enough support among House Republicans. House Majority Leader Kevin McCarthy (R-CA) and other key Republican policymakers have consistently opposed related measures. However, there is hope that former Speaker of the House John Boehner (R-OH) may help garner support. Former Speaker Boehner, who at one point claimed to be "unalterably opposed" to marijuana legalization, recently joined the board of one of the largest cannabis corporations in the country and has been outspoken about his evolving views on marijuana.

While the STATES Act may need a political lift, the SAFE Banking Act could be a candidate for enactment by the end of the year if it gains more bipartisan support. On June 13, the House Appropriations Committee rejected an amendment to the FY19 Financial Services funding bill that would have prevented the Department of the Treasury from taking action against financial institutions that provide services to marijuana businesses acting in compliance with state law. However, the SAFE Banking Act could gain support among House Republicans over time if they see similarities between the financial institutions that are trying to cater to the marijuana industry and the frustration with Operation Choke Point, an Obama administration initiative to crack down on fraud that drew criticism because of its negative impact on legal businesses.

In the meantime, appropriators in both chambers have inserted language in their FY19 Commerce-Justice-Science spending bills to prevent the DOJ from interfering with states that have legalized medical marijuana. The Senate Appropriations Committee included the protection as part of its initial measure, which the committee approved on June 14. Last month, the House Appropriations Committee included a similar measure as an amendment, which was approved by voice vote. A similar measure was included in the spending bill Congress passed in March, but the protections expire on September 30, 2018, and need to be renewed for FY19.

CONCLUSION

As states move forward with the legalization of marijuana, it will become increasingly important to address the conflict between marijuana-related state and federal laws. Given the broad bipartisan support in both chambers for lifting federal restrictions, along with President Trump's support of key measures, there is an opportunity to lift the federal ban on marijuana, which could change the legal landscape for the marijuana industry and other stakeholders.

K&L Gates will continue to monitor and provide updates on further developments in this area. Stakeholders involved in the development, distribution, and manufacturing of marijuana, along with the financial institutions that would like to provide services to marijuana businesses, should consider engaging with key policymakers to help impact policy outcomes. K&L Gates can facilitate engagement with Congress and help you assess the opportunities and risks involved.

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