

# Covington Covers Cannabis: Five Things To Watch



With a new Administration, new Congress, and new agency leadership, proponents of the U.S. cannabis industry approached 2021 with optimism. Yet despite several key states recently legalizing or loosening their laws regarding cannabis (e.g., New York, Virginia), the future is far more complicated. Cannabis companies seeking to enter the U.S. market — and those that interact with them, including financial institutions, food and drug companies, and investment funds, among others — will need to continue to analyze their activities and monitor related developments to prepare their businesses for success under all possible outcomes.

**Here are five key things to watch.**

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## **Federal decriminalization of marijuana is possible, but full federal legalization is still awhile away.**

Advocates for federal legalization point to the many states that have legalized cannabis in the last decade and even the last year. They cite how well this issue polls in key swing states and how historically conservative states have recently relaxed cannabis laws by referendum. Indeed, public sentiment in favor of cannabis continues to increase at a rapid pace.

Despite changes to state laws, the Controlled Substances Act (CSA) makes it illegal under federal law to manufacture, distribute, or dispense a controlled substance such as marijuana or tetrahydrocannabinol (THC), the primary psychoactive compound in cannabis. Under the Supremacy Clause of the U.S. Constitution, the CSA prevails over state law. And full federal legalization of marijuana or THC that would permit and regulate the sale of cannabis at a national level appears to be further off than some advocates believe, due largely to thorny public policy issues that cross industries and party lines. Moreover, President Biden has expressed reluctance towards cannabis legalization legislation, such as the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act), a bill that Vice President Harris led during her tenure in the Senate and which passed the Democratic House in December 2020.

To the extent there is general consensus on cannabis legislation, the consensus is around expungement of certain criminal cannabis convictions. This aligns with the focus of the Administration, key Congressional members and other policymakers on racial and socioeconomic justice issues. There is also a possibility that Congress would decriminalize marijuana or THC from the CSA at the federal level, such that the sale and use of cannabis would be governed only by other existing federal laws (e.g., those of the U.S. Food and Drug Administration (FDA)), as well as the laws and regulations of each state, leaving a messy patchwork for anyone seeking to market products in the U.S.

**Bottom line**, we do not expect broad-based cannabis legislation to pass in this Congress. But we do expect the introduction of comprehensive legislation spearheaded by Senate Majority Leader Schumer (D-NY) (who has publicly forecasted such a bill). We also expect continued efforts by the House Financial Services Committee and other House and Senate Committees to pass more targeted cannabis reform bills and for criminal cannabis convictions to be included in any larger criminal justice reform efforts.

**2****A “cannabis banking fix” remains possible.**

The House passed the Secure and Fair Enforcement Banking Act (SAFE Banking Act) on April 20, 2021, which would provide protections for financial institutions and service providers that interact with cannabis companies. The SAFE Banking Act was first introduced in 2014, and parallel legislation has been reintroduced in the Senate (and passed in the House) in prior sessions, with consistent bipartisan support. There are compelling policy arguments for a narrow “cannabis banking fix” (e.g., anti-money laundering risks associated with the largely cash-based industry) and some evidence to support those arguments, including from Canada and individual states that have passed similar “financial institution safe harbor” legislation.

But the ultimate driver will be Congressional priorities. For example, Senate Banking Chairman Brown (D-OH), who has expressed a preference for comprehensive cannabis reform, recently told reporters that his priorities are economic recovery and that he is not ready to move on cannabis reform in the near-term.

**3****FDA will continue its work on hemp-derived CBD regulation, but it would be surprising to see broad authorization for CBD-containing food or supplements in the near future.**

FDA has issued guidance, published FAQs, and conducted studies regarding CBD — and we expect that the FDA will continue its efforts, although the Agency has signaled significant questions about how such products are produced, tested, and marketed.

With respect to legislation, efforts in Congress to pass a bill specific to CBD in foods and/or supplements could be impacted by a number of regulatory and political questions, including around FDA’s ongoing safety assessment of various uses of CBD. We would expect key members of the authorizing committees to defer to FDA on scientific and safety decisions.

**4****Generally low CSA enforcement risk continues for state-law compliant cannabis sales.**

Though the federal legal status of cannabis remains unchanged, many entities have decided to proceed with at least some direct and indirect cannabis activities. This is due in part to an assessment that the risk of prosecution under the CSA is low for certain activities, given that the U.S. Department of Justice has generally not been enforcing the CSA against cannabis companies that comply with state law and licensing requirements in the jurisdictions in which they operate.

However, prosecutors have shown a willingness to pursue those that commit related crimes. For example, the Southern District of New York recently convicted two cannabis industry executives of bank fraud for allegedly tricking banks and other financial institutions into unwittingly extending financial services to their cannabis company.

**5****Activities need to be closely monitored to reduce risk.**

The legal landscape surrounding the U.S. cannabis industry is likely to remain murky for the foreseeable future. Cannabis companies — and third parties that provide services to, invest in,

or otherwise interact with the cannabis industry — will continue to face litigation, compliance, and enforcement risks that depend in large part on the particular facts and circumstances of their operations (e.g., scope of activities, location of the cannabis company, degree and nature of connection to the cannabis company, etc.)

A careful analysis of today's activities, which spans industries and geographies, as well as strategically planning for tomorrow's changes to this rapidly-evolving industry, remains critical.

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**Covington Covers Cannabis:** Covington advises clients on the broad range of legal and regulatory issues surrounding cannabis, and we have created a mailing list for clients and friends of the firm. If you are interested in receiving related communications, sign up [here](#).

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