

# A Green Wave: State Marijuana Initiatives Create Compliance Challenges for Financial Institutions and Impetus for Possible Federal Action

November 10, 2020

With ballots still being counted in many races, and threats of litigation in others, the 2020 election season may not be fully complete. Voters in red states and blue states displayed unity on few issues, but among these cannabis ranks high: New Jersey, Arizona, Montana and South Dakota voted to legalize recreational cannabis, and Mississippi and South Dakota voted to legalize use of medical marijuana. Oregon also became the first state to decriminalize small amounts of cocaine, heroin, methamphetamine and other drugs.<sup>1</sup>

These state-level actions will pose additional compliance challenges for financial institutions that already struggle with the conflict posed by divergent state and federal laws. There may be hope, however, for additional clarity on the federal level through either regulatory or legislative action. A Biden administration may be more likely to support a more targeted approach to federal enforcement of drug laws against those involved in the marijuana industry (which had been the Obama administration's posture), and the 117<sup>th</sup> Congress may face increased pressure to address these matters in the new year.

In this Debevoise InDepth, we first review the state election results with respect to marijuana; we then look to the possible federal steps.

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## Developments in the States

Eight years ago, Colorado and Washington became the first states to legalize recreational cannabis. As a result of the 2020 election, roughly a third of the country will live in a jurisdiction where cannabis is legal -- without a medical justification. What is notable is that the most recent set of ballot initiatives succeeded in almost every

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<sup>1</sup> Pursuant to the 2018 Farm Bill marijuana is no longer defined as including industrial hemp, effectively legalizing hemp's production and sale as a matter of federal law. For additional information on the 2018 Farm Bill, please see our related analysis [here](#). This client update is focused on marijuana and does not address state and federal developments impacting hemp and hemp-derived CBD.

geographic part of the country and regardless of whether the states are traditionally more conservative or progressive on other issues.

- **New Jersey:** More than two-thirds of N.J. voters supported Public Question 1, the Marijuana Legalization Amendment, which amends the N.J. constitution to legalize the possession and use of marijuana for persons age 21 and older and to legalize the manufacturing, preparing, packaging, transferring, retail purchasing and consumption of cannabis. The constitutional amendment will take effect on January 1, 2021.

To implement the amendment, the N.J. State Legislature and the five-member Cannabis Regulatory Commission, which was first established to oversee New Jersey's medical-marijuana program, will need to enact additional laws and regulations. A number of issues remain open and will need to be addressed. For example, will New Jersey's existing dispensaries be open to the public, will limits be imposed on growth or possession and will there be limits on where cannabis may be sold?

- **Arizona:** Approximately 60% of Arizona voters approved Proposition 207, the Marijuana Legalization Initiative, which legalized limited possession, use and cultivation of marijuana for adults, 21 years or older, in Arizona. Proposition 207 permits individuals to grow up to six marijuana plants in their residences and allows anyone convicted of certain marijuana-related crimes to petition for the expungement of their criminal record starting on July 12, 2021.

The Arizona Department of Health Services is responsible for implementing Proposition 207 by adopting rules to regulate marijuana, including the licensing of marijuana retail stores, cultivation facilities and production facilities. The ballot initiative also delegated authority to local governments to ban marijuana facilities and testing centers and authorized local control over elements of regulation, zoning and licensing.

- **Montana:** Almost 57% of Montana voters approved Initiative 190, the Marijuana Legalization Initiative, which legalized the possession and use of one ounce or less of marijuana or 8 grams or less of marijuana concentrate by persons over the age of 21 in Montana. Initiative 190 also allows individuals to grow no more than four marijuana plants and four seedlings for personal use in their residence, subject to certain restrictions. Montana residents are expected to be allowed to possess, use and grow marijuana on January 1, 2021.

Under the Marijuana Legalization Initiative, Montana's Department of Revenue is responsible for regulating the cultivation, manufacture, transport and sale of

marijuana. The Department of Revenue is expected to begin accepting marijuana provider and dispensary applications by January 1, 2022.

- **South Dakota:** Voters in South Dakota approved both recreational and medical use of marijuana.

Approximately 54% of South Dakota voters approved Constitutional Amendment A, the Marijuana Legalization Initiative, which legalized the recreational use of marijuana for individuals 21 years old and older and which allows individuals to possess or distribute up to one ounce of marijuana. The Department of Revenue must adopt rules and regulations -- including with respect to the issuance of licenses and health and safety requirements -- to implement the amendment. In addition, the amendment requires the South Dakota Legislature to pass laws providing for a program for medical marijuana and the sale of hemp by April 1, 2022.

More than two-thirds of South Dakota voters also approved Initiated Measure 26, the Medical Marijuana Initiative, which established a medical marijuana program in South Dakota for individuals who have physician-certified debilitating medical condition. To implement the measure, the South Dakota Department of Health must issue registration cards to patients and take other regulatory steps.

- **Mississippi:** With the choice of two different constitutional amendments that would have legalized a medical marijuana program in Mississippi for individuals with a debilitating medical condition, voters approved Initiative 65, which allows medical marijuana to be recommended for patients with at least one of 22 specified qualifying conditions.

The Mississippi Department of Health is expected to implement the amendment and issue regulations for the program by July 1, 2021. Initiative 65 set a deadline for the Department to issue identification cards and licenses for treatment centers by August 15, 2021.

- **Oregon:** Approximately 58% of Oregon voters approved Measure 110, the Drug Decriminalization and Addiction Treatment Initiative, which makes personal non-commercial possession of a controlled substance no more than a Class E violation, carrying a maximum fine of \$100 or a requirement to complete a health assessment by an addiction recovery center. Measure 110 mandates the establishment of drug addiction treatment and recovery centers to be funded in part by the state's marijuana tax revenue and state prison savings. The measure becomes effective on December 3, 2020.

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## The Federal Cannabis Landscape

Of course, these state actions do not change the federal legal landscape, as marijuana remains a Schedule 1 controlled substance and, thus, is illegal under federal law. The state developments are likely, however, to put additional pressure on federal action, and the incoming Biden administration is apt to be more interested in revising the federal posture than the Trump administration has been.

In the near term, federal changes could come through a return to the Obama-era approach to prosecuting cannabis-related activities, as described in former Deputy Attorney General James Cole's Memorandum of 2013 (the "Cole Memo"). Before its rescission by former Attorney General Jeff Sessions in 2018, the Cole Memo directed federal prosecutors operating in states that had legalized cannabis to focus enforcement efforts in certain priority areas (e.g., preventing distribution to minors) but otherwise to defer to state and local authorities in the administration of applicable drug laws; this effectively created a policy of forbearance at the federal level. Despite the conflict between state and federal laws regarding marijuana, the Cole Memo provided some comfort to industry participants that federal prosecution would not occur for marijuana-related activities undertaken in compliance with state law. That comfort diminished during the Trump administration, notwithstanding the continued advance of state-based legalization efforts. If the Biden Administration were to articulate an approach similar to the Cole Memo, it could relieve some of the uncertainty that has characterized recent years – both for marijuana-related businesses and financial institutions that seek to serve them.

Similarly, FinCEN last offered guidance regarding marijuana-related activities in 2014 when it released a specialized suspicious activity report ("SAR") framework that roughly tracked the Cole Memo. That guidance remains in effect, as it was never withdrawn when the Trump Justice Department withdrew the Cole Memo. Many industry participants and observers are hopeful that, under a Biden administration, there will be greater coordination and consistency among these federal law enforcement and regulatory authorities (including guidance from federal financial supervisory agencies).

At the other end of Pennsylvania Avenue, recent developments in the states also may herald changes at the federal level. Although the new Congress is likely to remain divided (with Democrats controlling the House and Republicans controlling the Senate), legislative efforts may find renewed momentum, with many in Congress representing jurisdictions that have legalized cannabis, in many cases by large margins.

As we reported in September 2019, a bi-partisan majority in the House passed legislation -- the Secure and Fair Enforcement Banking Act of 2019 (the "SAFE Banking Act") --

offering a “safe harbor” to banks, insurance companies and certain other financial institutions seeking to serve cannabis businesses in states where marijuana is legal.<sup>2</sup> The Senate did not take up the measure, in part due to reluctance from Senate Banking Committee Chairman Mike Crapo (R-Idaho).

We think that the House will remain open to passing a version of the SAFE Banking Act in the new Congress, and the prospects for such a bill in the new Senate may be improved. Although control of the Senate will not be decided until run-off elections in Georgia are complete, it is expected that the 117<sup>th</sup> Congress will have a new Senate Banking Committee Chairman: either Sen. Pat Toomey of Pennsylvania, who is expected to take the gavel if Republicans retain their majority, or Sen. Sherrod Brown of Ohio, if Democrats prevail. Because both come from states that have permitted the use of medical marijuana (whereas all uses of marijuana remain illegal in Idaho), both may be more open to legislative action (in a form akin to the SAFE Banking Act) than Sen. Crapo was.

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We will continue monitoring these developments and provide updates as appropriate. Please do not hesitate to contact us with any questions.

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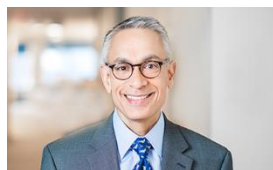


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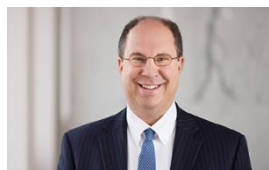


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<sup>2</sup> For additional information on the Safe Banking Act, please see our related analysis [here](#).