

Senators Release Draft Marijuana Reform Bill, Setting Stage for Potential Congressional Action

July 23, 2021

On July 14, 2021, Senate Majority Leader Chuck Schumer (D-NY), Senate Finance Committee Chairman Ron Wyden (D-OR) and Senator Cory Booker (D-NJ) released draft legislation that would end the federal prohibition on marijuana.¹ This long-anticipated bill, dubbed the “Cannabis Administration and Opportunity Act” (the “Bill”), goes further than many previous reform efforts by comprehensively addressing FDA regulatory issues along with social justice, public health and tax issues. Political sensitivities on both sides of the aisle make for a challenging road to enactment. However, considering the Bill’s comprehensive nature and high-profile sponsors, its provisions likely will serve as a basis for future negotiations regarding revisions to the federal regulatory framework. The Senate trio is accepting comments on the draft Bill until September 1, 2021, after which the Bill is expected to be formally introduced in the Senate.²

Summary of Bill

The 163-page Bill addresses a wide variety of topics. Below, we summarize its most consequential changes.

State-Federal Divide

The Bill removes marijuana from Schedule I of the Controlled Substances Act but leaves states the discretion to prohibit marijuana in their jurisdictions. The Bill would create a new category of federal crime, “cannabis diversion,” to punish persons who grow, manufacture, ship, transport, receive, possess, sell, distribute or purchase more than 10 pounds of marijuana: (1) in contravention of state or federal law; or (2) on which applicable taxes have not been paid.³ This provision is designed in part to stop the

¹ The text of the bill is available [here](#).

² A special thank you to Thomas Toman, Debevoise & Plimpton LLP Summer Associate, who contributed to this Debevoise In Depth.

³ Note that the bill defines “cannabis” as “(i) all parts of the plant *Cannabis sativa L.*, whether growing or not; (ii) the seeds thereof; (iii) the resin extracted from any part of such plant; and (iv) every compound, manufacture,

transport of marijuana from jurisdictions where it is legal to jurisdictions that have criminalized it. Despite the Bill's reforms, the current draft would permit federal agencies to continue to test their employees for marijuana use, a cause of continued debate in both the public and private sectors across the country.

In addition, the Bill would prevent states and Native American tribes from prohibiting the shipment of marijuana through their territory. The Bill would enable the full participation of marijuana-related businesses in interstate commerce, including giving them the ability to access capital markets and to avail themselves of other federal law benefits, such as deducting business expenses without application of 26 U.S.C. § 280E and intellectual property protections.

Research, Public Health and Public Safety

The Bill would establish a comprehensive federal framework for the regulation of marijuana, focusing in particular on safety and research matters. It would charge the Food and Drug Administration ("FDA") and a redesignated "Alcohol, Tobacco and Cannabis Tax and Trade Bureau" within the Treasury Department with implementing and overseeing the new federal regulatory framework. These agencies and a redesignated "Bureau of Alcohol, Tobacco, Cannabis, Firearms and Explosives" also would carry the Justice Department's existing enforcement authority with respect to marijuana.

The Bill contemplates a leading role for FDA with respect to "cannabis products," or "any product made or derived from [marijuana] that is intended for consumption or applied to the body of man or other animals, including any component of such product."⁴ In particular, the Bill would require FDA to create a Center for Cannabis Products responsible for regulation, including monitoring for misbranded and adulterated cannabis products and recalling those that cause serious adverse health consequences or death. The Bill also would require FDA to assemble a 12-member Cannabis Products Advisory Committee. Pursuant to the Bill, FDA would manage a nationwide registration system for cannabis product manufacturers and promulgate regulations regarding labeling, good manufacturing practices ("GMPs") and product standards, among other authorities. Further, FDA would be required to ban the production of flavored marijuana "e-cigarette" systems and cannabis products containing alcohol, caffeine or nicotine; limit individual purchases to 10 ounces; and prohibit cannabis products from being marketed or sold to individuals under 21.

salt, derivative, mixture, or preparation of such plant, its seeds or resin." See Cannabis Administration and Opportunity Act at Sec. 502(a)(4). However, the term excludes "hemp" as defined in the 2018 Farm Bill. See 7 U.S.C. § 1639o(1). In this Debevoise In Depth, we use the term "marijuana" rather than "cannabis" to avoid any confusion with hemp.

⁴ Cannabis Administration and Opportunity Act at Sec. 502(a)(4). The term does not include a "drug."

The Bill also addresses hemp-derived cannabidiol (“CBD”) by creating a legal pathway for it to be regulated as a dietary supplement. To date, FDA has indicated that it would be unlawful to include CBD in dietary supplements based upon operation of the “exclusionary clause” that prohibits drug ingredients from being included in dietary supplements. The Bill would exempt hemp-derived CBD from the “exclusionary clause” and would instead permit FDA to set a recommended daily serving level (dietary supplements containing a higher level of CBD would be deemed adulterated). The Bill also would require submission of New Dietary Ingredient (“NDI”) notifications for certain dietary supplements. Although the Bill generally does not otherwise address hemp-related issues, it would provide a pathway for cannabis plants breaching the 0.3% tetrahydrocannabinol (“THC”) percentage (distinguishing hemp from marijuana) to be delivered to tax-paying marijuana producers. This development would provide welcome relief to hemp growers who are required to dispose of such plants under existing Department of Agriculture regulations.

Beyond these authorities, the Bill’s de-scheduling of marijuana from the Controlled Substances Act would permit the federal government to conduct research using marijuana comparable to that which is currently for sale in states that have legalized its use. To make up for the relatively limited nature of current research endeavors, the Bill would mandate government-funded studies into the effects of marijuana use by adults, including the creation of standards that would help determine whether a driver is impermissibly under the influence of marijuana and regarding the efficacy of medicinal marijuana as a treatment for specific diseases and conditions. The Bill also would require FDA to establish a program to expedite development and review of applications for drugs that contain marijuana and are manufactured by small businesses that are owned and controlled by certain socially and economically disadvantaged individuals.

Taxation

The Bill would tax marijuana on a federal level in a manner similar to excise taxes that are currently applied to alcohol and tobacco. Accordingly, marijuana would be taxed when sold by marijuana producers. The tax rate would gradually increase over the first five years after the bill is enacted, up to a maximum of 25%. However, the first \$20 million in sales per producer would benefit from a 50% tax credit. To assist in the administration of this proposed taxation regime, the Bill would require all persons engaged in the business of cultivating, producing, manufacturing, packaging or warehousing marijuana to obtain a permit from the Treasury Department.

Restorative Justice

The Bill also would focus on restorative justice for marginalized communities that were primary targets of the war on drugs. Most notably, it would offer expansive opportunities for expungement and resentencing for individuals federally convicted of

marijuana-based crimes. Another important aspect of the Bill is the “Opportunity Trust Fund” it would establish, which would be administered by the Small Business Administration and financed by the new tax revenue noted above. This fund would provide liquidity to small businesses in the marijuana industry, provided they are operated by socially and economically disadvantaged individuals. It also would fund a community reinvestment grant program to provide eligible entities with financing to administer services for individuals adversely impacted by the war on drugs, such as legal aid and job training.

Prospects for Enactment

Although the federal legalization of marijuana enjoys broad popular support, challenges lie ahead. Senator Schumer has acknowledged that he does not currently have the votes to pass the Bill, as some centrist Democrats and Republicans are reticent to support comprehensive reform.⁵ In addition, President Biden remains opposed to federal legalization efforts.⁶ On the political right, senators could attempt to filibuster the Bill. These factors make it unlikely the Bill, as written, will become law.

There is also competition from a separate, competing bill that is generating significant support. Senator Chuck Grassley (R-IA) has claimed that more research is needed before comprehensive changes are made to federal marijuana policy. Instead, he supports the passage of a bill that would first encourage additional research, including by supporting development of FDA-approved drugs containing CBD and marijuana. This bill, the Cannabidiol and Marijuana Research Expansion Act, is widely supported and has previously passed the Senate.⁷

The most likely alternative to the Bill, the Secure and Fair Enforcement (“SAFE”) Banking Act, offers depository institutions, insurance companies, other financial institutions and related parties seeking to serve marijuana-related businesses in states where marijuana is legal a safe harbor from enforcement, adverse supervisory action and other adverse action under federal law.⁸ The House passed it with an overwhelming and bipartisan majority in April, in part due to concerns on both sides of the aisle that

⁵ See Sam Reisman, *Top Senate Dems Admit Pot Legalization Push A Long Shot*, LAW360 (July 14, 2021) (“We don’t have the votes necessary at this point, but we have a large majority of our caucus for it. ...We’re going to show it to the others and say, ‘What do you like? What don’t you like?’ And we’ll see if we can get the support.”), available [here](#).

⁶ See Maeve Sheehy, *Psaki: Biden unmoved on marijuana legalization despite Schumer legislation*, POLITICO (July 14, 2021), available [here](#).

⁷ The text of the Cannabidiol and Marijuana Research Expansion Act is available [here](#).

⁸ For more information, see our coverage of the House’s passage of the SAFE Banking Act of 2019 [here](#). The text of the SAFE Banking Act of 2021 is available [here](#).

forcing marijuana-related businesses to operate only in cash presents public safety issues. However, Senator Booker criticized the SAFE Banking Act for benefitting privileged political interests at the expense of the targets of the war on drugs.⁹ He has nonetheless since clarified his support for the proposed legislation, calling it “a necessary sweetener to get people to move along on the equitable justice elements that are really critical.”¹⁰ However, the SAFE Banking Act still is far from being passed into law: relatively few Republican Senators have come out in support of it, and Senate Banking Committee Chair Sherrod Brown (D-OH) opposes it.¹¹

A consensus has not yet arisen as to the country’s path forward for regulating marijuana. Until a resolution is reached, conflicting state and federal law will continue to pose compliance challenges for financial institutions, FDA-regulated companies and other marijuana industry stakeholders.

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⁹ See Sam Reisman, *Top Senate Dems Admit Pot Legalization Push A Long Shot*, LAW360 (July 14, 2021) (“I don’t know about other members of the Senate, but I will lay myself down to do everything I can to stop an easy banking bill that’s going to allow all these corporations to make a lot more money off of this, as opposed to focusing on the restorative justice aspect.”), available [here](#).

¹⁰ Zack Guzman, *Marijuana reform: Sen. Cory Booker Clarifies Stance on Key Banking Bill*, YAHOO NEWS (July 22, 2021), available [here](#).

¹¹ Sabrina Eaton, *Don’t hold your breath on passing marijuana banking legislation, says Senate banking chair Sherrod Brown*, CLEVELAND.COM (April 22, 2021), available [here](#).

We will continue to monitor developments in this fast-paced area and analyze them as they occur. Please do not hesitate to contact us with any questions.

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