



# Present and Future Federal Marijuana Policies and Interplay with State Regulatory Frameworks

FDLI, Legal and Practical Issues in the Evolving World of  
Cannabis Regulation  
December 2, 2021



# Background

- **Federal Prohibition**
  - 1937 - Marihuana Tax Act; 1952 – Boggs Act; 1956 Narcotics Control Act; 1970 - Controlled Substances Act
- **1996 - California legalizes medical marijuana**
  - 36 states follow : Alaska, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, DC, Florida, Guam, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia
- **2012 - Colorado and Washington legalizes recreational marijuana**
  - 18 States follow: Colorado, Washington, Alaska, Oregon, Washington, D.C., California, Maine, Massachusetts, Nevada, Michigan, Vermont, Guam, Illinois, Arizona, Montana, New Jersey, South Dakota, New York, Virginia, New Mexico, Connecticut
- **2014 – Legalize CBD-only products - 14 states**
- **2018 – Farm Bill redefining hemp and marijuana and legalizing many hemp extracts including CBD extracted from hemp**

# Federal Oversight

- Oversight by various federal agencies
  - DOJ, DEA, FDA, FTC, USDA, EPA, IRS, PTO, TTB
  - Future?
- Current Fed enforcement
  - Not good use of limited resources if complying with state law.
- Federal cannabis legislation
  - Safe Banking Act, More Act, HEMP Act, States Act, State Reform Act, Common Sense bill, etc.

# FDA and cannabis

- Four general categories of cannabis products each with their own risks
  1. FDA approved drugs – no risk. Get approval from FDA and DEA
    - THC – Marinol (dronabinol) and Cesamet (nabilone)
    - CBD – Epidiolex (cannabidiol)
  2. Medical marijuana – stay within state law and avoid FDA
    - Couldn't exist under FDA's current framework for drugs
  3. Recreational marijuana – stay within state law and avoid FDA
    - Couldn't exist under FDA's current framework for drugs, would need statutory fix like nicotine to avoid FDA issues.
  4. Hemp extracts in consumer and pet products (e.g., hemp-derived CBD)
    - FDA says CBD can't be in food and dietary supplements because previously were in IND for Epidiolex. Different for cosmetics

# Future

- Where will Federal and State cannabis law go?
- What would you hope to see?



# CANNABIS POLICY IN THE 117<sup>TH</sup> CONGRESS

FDLI DECEMBER 2021

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# What Do you Expect to See/Want to see

- Expect to See/Common Themes
  - Each of the three major de-scheduling bills share two themes:
    - Social equity reforms and the descheduling of cannabis
  - All cannabis bills share:
    - Partisan gridlock and turf battles
  - Will see the passage of SAFE
- Want to see
  - Real and lasting social equity and social justice reforms
  - Effective legal framework that considers:
    - the effects of any national regulations on public safety
    - cooperative Federalism approach that preserves the integrity of key state laws
  - Transition to interstate commerce and pause on the DCC
  - Role for FDA to protect the public health
  - Reasonable sales tax that has a chance of displacing the illicit market

# Want to see: Transition Period

- Numerous reasons for transition period prior to national market
- Preserve, protect and and accelerate critical social justice programs
  - Equitable wealth creation: Take time needed to get social equity programs up and running *and* to reap the benefits of existing state programs
  - Repair wrongs of the past: Develop a robust and comprehensive process to expunge criminal records
- Establish agency jurisdiction, promulgate rulemaking, set national standards
  - Get the regulatory structure in place to protect the public health
    - Learn from the rollout of Farm Bill: No FDA rules, untested, unregulated, intoxicating products, without age verification sold in gas stations
- Promulgate and implement GMPs and implement a national Track and Trace System
- Preserve and protect stable state markets (Google/Apple 99% control market share of operating systems and Amazon/Walmart control 50% e-commerce)
- Establish safety protocols for imports and manage international treaty obligations
- Complete critical research
- Bring sceptics on board now



# Want to see: Pause on the Dormant Commerce Clause

- States are purposefully and regularly imposing restrictions on interstate commerce, which is tolerated (at least for now) given the federal illegality of cannabis
  - That ends on day one of descheduling because of the DCC - leaving many state laws null and void
- The DCC is a bedrock Constitutional principle
  - Congress has the exclusive power to regulate commerce among the states
  - Ensures that states don't develop "**protectionist measures**" (laws/rules/regulations) that discriminate against Interstate Commerce
  - Without "unmistakably clear" action by Congress, the federal legalization of cannabis would immediately make many existing state laws and regulatory structures null and void
- This is an issue for a few reasons:
  - First, this would particularly/materially affect social equity license holders and small business (residency requirements)
  - Second, licensed businesses have made substantial investments in the current state-based systems
  - Third, it would create a regulatory vacuum - providing uncertainty about who is in charge, where regulatory responsibilities lie, inevitable litigation and mass confusion over all of it