



## Seeing Through the Haze: What will federal legalization of marijuana look like?

*A three-part series analyzing possible federal legalization structures and their potential effect on the marijuana industry.*

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California's legalization of medicinal marijuana in 1996 was the first legalization in the United States in any capacity and at any level. Since then, 33 states and the District of Columbia have legalized marijuana in some capacity. The "legalize it" movement has significant momentum. Nevertheless, marijuana remains a Schedule I controlled substance under the Controlled Substances Act and thus is still illegal at the federal level. Until that changes, every company operating within the various states that have legalized marijuana remains subject to possible enforcement by the federal government, even if that enforcement seems highly unlikely in the current environment.

In an effort to eliminate that uncertainty, members of both parties in both houses of the U.S. Congress are taking steps to legalize marijuana at the federal level. In what many view as a precursor to federally legal marijuana, Congress passed the Farm Bill in December 2018, removing hemp from the list of controlled substances and allowing for interstate commerce of legally produced hemp and hemp products. Hemp and marijuana are both members of the cannabis plant species, but hemp has significantly less tetrahydrocannabinol (THC), which is the part of the cannabis plant that can cause a psychoactive effect in certain concentrations. In other words, hemp cannot get you "high." But hemp has a higher concentration of cannabidiol (CBD), which makes it an ideal source for CBD products that have exploded in popularity since the passage of the Farm Bill. As we wrote about [here](#), Walgreens recently announced it will begin selling CBD products in certain stores. The increased visibility of CBD products, along with the perceived success of legalized marijuana at the state level, has many market insiders convinced that federally legalized marijuana is a matter of when, not if.

While federal legalization appears likely, the framework for that legalization (not to mention the timing) remains a mystery. This article will look at one proposal for federal legalization, the Strengthening the Tenth Amendment Through Entrusting States (STATES Act). The two subsequent articles will analyze other potential frameworks for federal legalization that Congress is debating.

### The STATES Act

A bipartisan group of senators led by Cory Gardner (R., Colo.) and Elizabeth Warren (D., Mass.) originally introduced the STATES Act in June 2018. The bill died in January 2019 at the conclusion of the 115th Congress, but Gardner and Warren just reintroduced a nearly identical bill last week.

### What the STATES Act would do

The STATES Act proposes to amend the Controlled Substances Act to not apply to marijuana in jurisdictions where companies are acting in compliance with state and local law. Specifically, it states:

Notwithstanding any other provision of law, the provisions of this title as applied to marihuana... shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.

In effect, the STATES Act eliminates the conflict between state and federal law by recognizing the states' rights to control marijuana within their state borders. Practically speaking, this means that federal agents could not arrest someone for marijuana possession or raid a marijuana dispensary in



a state like California where recreational marijuana is legal (as long as those persons or businesses were acting in compliance with California laws related to marijuana). However, this also means that distributing California marijuana in Wisconsin, where any kind of marijuana is still illegal, would remain a crime at the state (Wisconsin) and federal level.

Additionally, the STATES Act would clarify that financial institutions seeking to finance marijuana-related businesses would not be subject to prosecution at the federal level. The Act notes that proceeds from marijuana-related transactions in compliance with the STATES Act are not proceeds from “trafficking” and do not run afoul of federal drug laws. The STATES Act approach to financial institutions is similar to the stand-alone SAFE Act that we have written about [here](#).

The STATES Act would not transfer marijuana regulation entirely to state governments. Rather, federal law would continue to restrict marijuana-related businesses from hiring employees who are under the age of 18 to work in their marijuana operations. The Act would also prevent the sale of marijuana to those under the age of 21 other than for medical purposes. It would also prohibit distribution of marijuana at rest areas, truck stops, and other transportation-safety facilities.

#### ***What the STATES Act would not do***

The STATES Act would not remove marijuana from the list of controlled substances or authorize the sale of marijuana across state lines. As a result, certain issues that currently plague the marijuana industry are likely to remain. Marijuana-related businesses will continue to have to navigate a patchwork of state-level regulation and obtain licenses in each state in which they would like to do business. Additionally, the STATES Act will not resolve (1) certain banking hurdles because banks will need to assure themselves that any marijuana-related business complies with the various state laws where it operates; (2) critical tax hurdles, including the disallowance of normal business deductions; and (3) the disparate effect of marijuana-related arrests at the state level in states where marijuana remains illegal.

#### ***Will the STATES Act pass?***

There is bi-partisan support for taking some action to resolve the conflict between state-level legalization and federal prohibition, and the renewed STATES Act bill may offer a sufficient compromise. It could provide legislators in legalization states with tangible results to take back to their constituents and a modicum of cover for anti-legalization legislators who can continue to advocate for prohibition in the individual states. Further, President Trump has indicated he would sign the bill if it reaches his desk. The risk is that the STATES Act does not go far enough for some legislators, who hold out for complete legalization at the federal level. There is also a risk that some legislators may balk at allowing states to continue to tax legalized marijuana rather than diverting that income to the federal government.

#### ***If passed, how would the STATES Act affect the marijuana industry?***

Unlike other proposals being debated on Capitol Hill, the STATES Act maintains the individual state licensing structures and marketplaces that were created with state-level legalization. This means that the state licenses marijuana companies fought so hard to obtain would maintain their value even if Congress passed the STATES Act. It also means that the center of power with respect to marijuana taxation and regulation will remain in state capitals throughout the country.

This cuts both ways for many marijuana-related businesses. The current state-centric licensing and regulatory schemes are varied and often confusing. It is also expensive to obtain licenses in various jurisdictions and the ban on selling marijuana product across state lines limits a company’s growth. On the other hand, the state-centric system allows for more diversity in the industry, with the marijuana-related businesses operating in one state looking very different from those operating in another. It also allows states to experiment with different approaches to marijuana regulation and taxation, which provides valuable guidance to other states. For example, California’s experience with high taxation and lower-than-expected revenue will likely guide other states in crafting taxation schemes, as we wrote about [here](#) and [here](#). In addition, allowing the states to continue to experiment



with different regulatory schemes may eventually result in a better federal program informed by the states' best practices.

All told, the STATES Act appears to be the least disruptive approach to federal legalization that Congress will likely consider in the near future. But whether that is a good or bad thing depends on where you sit at the moment.

### **Next Up**

On April 20, 2019, we will evaluate the "420 Bills" sponsored by Sen. Ron Wyden and Rep. Earl Blumenauer (both of Oregon) that are currently moving through both houses of Congress. Both bills aim to legalize marijuana at the federal level and regulate it like alcohol.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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