

MORE Act's Possible Impact On State-Licensed Cannabis Cos.

By **Omar Figueroa, Andrew Kingsdale and Lauren Mendelsohn** (April 29, 2022)

On April 1, the U.S. House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement, or MORE, Act for the second time.[1]

The MORE Act would remove cannabis from the Controlled Substances Act — where it is currently listed in Schedule I, the most restrictive class — and would mandate automatic expungement of certain cannabis-related convictions.

From a criminal justice perspective, these changes are long overdue.

The MORE act would also benefit cannabis consumers through lower prices, more laboratory-tested product choices, and additional scientific research on the medical effects of cannabis.

To state-licensed cannabis businesses, the MORE Act is a mixed bag, celebrated by some and feared by others. One thing is for certain: It would dramatically alter the federal legal landscape for state-licensed cannabis businesses.

Business Impacts of the MORE Act

The MORE Act would not expressly preempt all state cannabis laws, but by virtue of the supremacy and dormant commerce clauses of the U.S. Constitution, its adoption would likely disrupt state cannabis regulatory systems. These systems are predicated on siloed, intrastate markets as a result of federal cannabis prohibition.

On the positive side, the MORE Act would create new opportunities for business growth and expansion by freeing up interstate and international transportation and sales.

No longer will plant-touching companies — i.e., companies that directly handle cannabis plants or products — be confined to operate within state borders only; they could instead market their product around the world, at least in those jurisdictions where cannabis is legal.

Descheduling cannabis also would open up new marketing avenues for cannabis businesses, such as advertising — including traditional and social media — and canna-tourism. Imagine innovative marketing campaigns advertising cannabis-friendly bars and hotels, as well as Super Bowl ads for cannabis alongside traditional beer ads.

Furthermore, federal trademark, service mark and certification mark protections would become available to cannabis brands, which presently lack those protections.

Federal intellectual property rights would also enhance protections available to registered appellations by setting the stage for IP enforcement in federal courts. In particular, this could help legacy, craft farmers specializing in small-batch, ultra-premium cannabis to reach



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luxury markets.

Legalization would also allow cannabis businesses to access traditional capital markets previously closed to them, such as banks, institutional investors and stock markets. This too would help businesses in this space grow and compete on a larger scale.

With a nod toward the disparate impacts of prohibition, the MORE Act would use new cannabis tax revenues to create an opportunity trust fund aimed at assisting smaller businesses and persons previously affected by the war on drugs.

According to a Congressional Budget Office estimate, over the span of 10 years, the U.S. Small Business Administration would grant \$1.4 billion to states and localities for business loans to cannabis-related small businesses, and for developing equitable cannabis licensing programs that minimize barriers to cannabis licensing and employment for individuals adversely affected by the war on drugs.[2]

This would be a welcome change after such aid has so far not been available to many cannabis businesses during the COVID-19 pandemic.

Among the possible negative impacts, where the MORE Act conflicts with state laws, established businesses could become collateral damage.

For example, the MORE Act does not distinguish between medical and adult-use cannabis users or businesses, possibly rendering medical-only or medical-focused cannabis companies economically obsolete, with detrimental impacts on patients.

Many states issue cannabis licenses to businesses based on whether the cannabis sold is intended for medical or adult use, and some businesses sell medical cannabis to certified patients only based on a physician's recommendation.

Medical cannabis products often will have higher dosages and may be subject to lower state and local taxes than adult-use cannabis products.

These distinctions do not appear in the MORE Act even though, ironically, the modern cannabis industry grew out of the medical cannabis movement, starting with California's Proposition 215 in 1996.

Unless medical cannabis products are recognized at the federal level, state medical cannabis programs will probably be eroded or phased out as states conform their cannabis laws to federal uniform standards for interstate cannabis commerce and products.

The MORE Act's failure to distinguish between medical and adult-use cannabis is a lost opportunity to provide much-needed tax relief to medical cannabis patients at the federal level.

Additionally, with a new layer of regulatory oversight, existing businesses would face new compliance costs.

For example, Section 3 of the MORE Act expressly authorizes the commissioner of food and drugs and the secretary of health and human services "to promulgate Federal regulations and guidelines that relate to products containing cannabis or cannabis-derived compounds under the Act."

New federal permits would be required of cannabis businesses with proposed Internal Revenue Code Section 5923, and new rules would be promulgated about packaging, labeling, reporting and advertising with proposed IRC Sections 5931-32.[3]

Taxation

With descheduling, IRC Section 280E no longer would apply to cannabis businesses. Section 280E prohibits illegal businesses from deducting most ordinary and usual business expenses, aside from the costs of goods sold, on tax returns.

This tax relief alone would dramatically improve the bottom lines of many cannabis businesses that have been paying effective tax rates close to 70%, as opposed to 30% for noncannabis businesses, because of Section 280E.[4]

At the same time, the MORE Act, and other proposed federal legalization measures, would introduce new sets of taxes. The MORE Act would add occupational taxes, as well as an excise tax on cannabis products produced in or imported into the U.S., starting at 5% for the first two calendar years, and then increasing 1% a year until it reaches 8%.

These new federal taxes, on top of existing state taxes and, in many cases, local taxes on cannabis, could result in a significant financial burden felt by both businesses and consumers. In particular, smaller businesses and individuals of limited resources would have a harder time paying these taxes.

The economic incentives for an illicit market would likely be amplified by heavy taxation.

Likelihood of Passage

The MORE Act is now before the Senate Finance Committee, but it faces numerous hurdles and slim odds of becoming law in the near future.

First and foremost, it is unlikely that a critical mass within the Republican Party will support federal cannabis legalization in its current form. Without bipartisan support, any legalization bill is a tall order given the extremely narrow margin that Democrats currently hold in the Senate.

Democrats share responsibility for the lack of even incremental progress.

For example, Sen. Cory Booker, D-N.J., and Senate Majority Leader Chuck Schumer, D-N.Y., have led Senate opposition to the Secure and Fair Enforcement Banking, or SAFE Banking, Act, which would create a safe harbor for financial institutions to provide banking services to state-licensed cannabis-related businesses.

The SAFE Banking Act has passed the House six times, either as a stand-alone measure or as part of a broader bill, and it most recently passed the House in February as part of the America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength, or America Competes Act, though not included in the Senate's version.[5]

This act would protect cannabis businesses that have become targets of theft. Many such businesses are forced to handle large quantities of cash because federal banking laws have disincentivized banks and other financial institutions from accepting their money.[6]

Nevertheless, Booker and Schumer have opposed the SAFE Banking Act for want of broader criminal justice reform measures.[7] Booker and Schumer prefer their own legalization bill, the Cannabis Administration and Opportunity Act, or CAO, which was released in draft form last year.[8]

The next version of the CAO was anticipated this month, but will not be released until sometime before the August recess.[9] While this delay was disheartening to many, it could bode well for the SAFE Banking Act passing on its own, as that bill has more support among Republicans than broader legalization bills like the CAO.

Another obstacle has been the Biden administration's lack of solid support for any adult-use legalization bill, despite the president's promises on the campaign trail to decriminalize cannabis and expunge cannabis-related convictions.

The state-led Cannabis Regulators Association has also expressed concerns that federal legislation would upend carefully developed state regulations related to cannabis product testing, tracking, packaging, labeling and other safety-related issues.

The association would prefer that the federal government create a floor, not a ceiling, for such standards.[10] The MORE Act does not address this concern.

There is one more important source of opposition to federal legalization: existing state-licensed cannabis businesses. Increasingly, these companies openly oppose federal legalization without some grace period from interstate competition.

Many of these businesses are still in relative infancy, and could be crushed by an inflow of products and marketing dollars from more developed out-of-state markets, or from states with more fertile growing conditions.

They've also spent significant funds and effort to create structures based on an intrastate-only model and are concerned that new, post-legalization competitors would not have to jump through all of the same hoops.

What We Can Expect in the Future

As noted above, the MORE Act is one of several cannabis-related bills circulating in U.S. Congress, including the States Reform Act, sponsored by Rep. Nancy Mace, R-S.C.,[11] and the forthcoming CAO, which is co-sponsored by Sens. Booker, Schumer and Ron Wyden, D-Ore.

Furthermore, earlier this month a bipartisan group of legislators — Reps. Dave Joyce, R-Ohio, Hakeem Jeffries, D-N.Y., and Brian Mast, R-Fla. — introduced a bill in the House of Representatives called the Preparing Regulators Effectively for a Post-Prohibition Adult-Use Regulated Environment, or Prepare, Act, which would direct the attorney general to create a commission on the federal regulation of cannabis to advise the federal government on how to create a regulatory structure for cannabis similar to that used for alcohol.[12]

These bills likely mean more debate — and more delay — before federal legalization becomes a reality.

Yet, there is hope in growing support from Republicans who recognize that it is better to tax and regulate the cannabis industry than to prohibit it altogether.[13]

As for businesses looking toward the future, many have good reason to be optimistic about federal legalization, including larger multistate cannabis operators, as well as established companies in consumer packaged goods industries, such as tobacco, alcohol and pharmaceuticals.

Many of these companies have the advantages of scale, national and international experience, and the capital resilience to survive variable profitability.

Smaller operators would be wise to develop strategies now to adapt to the eventuality of federal legalization, and to be able to differentiate themselves in a global cannabis marketplace.

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[1] See H.R. 3671 – MORE Act, available at <https://www.congress.gov/bill/117th-congress/house-bill/3617/text>.

[2] See <https://www.cbo.gov/publication/57958>.

[3] See MORE Act - proposed IRC Sections 5923, 5931, 5932.

[4] See https://thecannabisindustry.org/wp-content/uploads/2017/10/NCIA-IRC-Section-280E-white-paper_web.pdf.

[5] See <https://news.cuna.org/articles/120815-cuna-supports-safe-banking-inclusion-in-final-competes-act>.

[6] See <https://perlmutter.house.gov/safe-banking-act/>.

[7] See https://www.washingtonpost.com/politics/marijuana-democrats-legalize/2021/11/17/61dd37b4-47b3-11ec-95dc-5f2a96e00fa3_story.html.

[8] See <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf>.

[9] See <https://thehill.com/news/senate/3269145-timeline-for-marijuana-legalization-bill-slips-in-senate/>.

[10] See <https://www.cann-ra.org/news-events/cannra-issues-letter-to-congress-highlighting-regulatory-issues-which-impact-state-and-federal-priorities-2tk8l>.

[11] See <https://www.congress.gov/bill/117th-congress/house-bill/5977/>.

[12] See <https://joyce.house.gov/posts/joyce-jeffries-mast-introduce-bipartisan-legislation-to-prepare-for-inevitable-end-to-federal-cannabis-prohibition>.

[13] See <https://www.counton2.com/news/local-news/rep-nancy-mace-votes-against-house-marijuana-bill/>.