

Into the Weeds on Sen. Schumer's Cannabis Bill

The Bottom Line

- *The cannabis industry has been hoping for action on the federal level to resolve the significant divide between state and federal law.*
- *While the proposed Cannabis Administration and Opportunity Act would resolve the conflict favorably for the industry and legalize recreational marijuana throughout the United States, its chances of becoming law appear slim at this time.*

The Cannabis Administration and Opportunity Act was introduced in the Senate earlier this month by Senator Chuck Schumer (D-NY). The bill would remove federal prohibitions on the manufacture, sale and possession of marijuana, and would also dramatically alter the current regulatory scheme for cannabidiol (CBD).

Although recreational marijuana is now legal in 19 states and Washington, D.C., marijuana is still a Schedule 1 controlled substance under the United States Controlled Substances Act (CSA), no different than cocaine, and it is therefore a federal crime to sell and possess marijuana even where legal under state law.

Hurdles for the Marijuana Industry

Beginning with the Obama administration, the federal government has declined to enforce the CSA for marijuana that is sold in compliance with state law, but the CSA has nonetheless been a drag on the legitimate marijuana industry. Due to money laundering concerns, major financial institutions have refused to process payments for or take deposits from marijuana companies, and many media platforms have refused to advertise for marijuana companies in light of the risk. Congress has previously tried, to no avail, to remedy the financial aspect of the industry through the SAFE Banking Act. However, this bill died in the Senate.

The Cannabis Administration and Opportunity Act

The bill would remove marijuana from Schedule 1, eliminating the federal prohibition on marijuana, and create a new regulatory framework for marijuana. The Food and Drug Administration (FDA) would be the primary federal regulatory authority with respect to the manufacture and marketing of marijuana, and the Alcohol and Tobacco Tax and Trade Bureau — the agency currently responsible for collecting excise taxes on tobacco and alcohol — would be responsible for collecting a newly imposed tax on marijuana.

The bill would also alter the current regulatory scheme with respect to CBD, marijuana's non-intoxicating cousin. CBD that is derived from hemp is currently legal on the federal level due to the 2018 Farm Bill, so long as it contains less than 0.3% THC, and is legal and widely sold in virtually every state. However, due to the inclusion of CBD in Epidiolex, a prescription anti-epilepsy drug, the FDA considers CBD to be a drug

and requires prior approval for it to be marketed and sold in food and dietary supplements. The FDA has not approved CBD for any such use, and therefore considers any food and dietary supplement product containing CBD to be misbranded.

Though the FDA has not been able to keep up with the booming CBD industry — save for products sold using aggressive and clearly misleading health claims — this prohibition has left CBD manufacturers in legal limbo as well.

The bill would require the FDA to immediately create a pathway for regulatory approval of CBD as a dietary supplement, though the bill as drafted does not include any language requiring approval for CBD to be used in food. It would also require the FDA to create an upper limit on daily consumption of CBD, in order to provide guidelines on the appropriate dosage of CBD to manufacturers.

The bill faces a tough road ahead. Although the House passed a similar bill last year, Republicans are largely opposed to marijuana legalization, and with Democrats holding a slim majority in the Senate, the bill may not pass without at least some GOP support. The White House has also continued to oppose federal legalization of marijuana. Nonetheless, Senator Schumer has stated that cannabis legalization is “one of the highest priorities” for Democrats, and the marijuana and CBD industries will no doubt be closely watching as the bill progresses in the Senate.

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may legalize or decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

Related People

Gary Kibel

Partner

212 468 4918

gkibel@dglaw.com

Louis P. DiLorenzo

Partner

212 468 4805

ldilorenzo@dglaw.com