

BANK ACCESS FOR MARIJUANA COMPANIES
(BANNED AT FEDERAL LEVEL EVEN THOUGH MARIJUANA IS
INCREASINGLY LEGAL AT U.S. STATE LEVEL)

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Currently, no field of law is giving rise to as many issues as marijuana legislation, with its conflict between the increasing legalization of marijuana by U.S. states, on the one hand, and the strict prohibition of marijuana-related activities under federal law, on the other. Despite the need for change, there is no comparable study that explores the entire legal situation, giving an overview of all the essential facts with a focus on marijuana companies' access to banks, and proposing a solution within this tightly restricted space. Access to banks is critical, both for companies in general and for marijuana businesses specifically, because it is vital for a company's profitability and the management of its cash flow. Due to the federal ban on marijuana, banks fear being held criminally and civilly liable as a result of anti-money laundering laws. Furthermore, the illegality defense complicates the contractual side of things significantly. Consequently, companies are not granted access to banks, and, in turn, they deal with transactions in cash, are ineligible for tax deductions, and suffer from issues with bookkeeping and accounting.

This legal situation is not acceptable: states are more qualified to decide whether the risks of marijuana abuse and dependence outweigh having more indirect control over illicit markets and generating benefits for public health. This paper contends that bank access, at least, should

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be granted to marijuana companies in states that have legalized marijuana. Banking legislation is not the only area of law to suffer from this conflict, with other fields such as insurance law, intellectual property law, and advocacy being negatively impacted as well. As a result, a more comprehensive solution is proposed. This article deems the best approach to be one that enables states to decide whether to legalize marijuana and suggests how a potential bill should be structured.

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I. INTRODUCTION

The increasing legalization of marijuana at the state level in the U.S. appeals to businesspeople looking for promising business ventures and is turning legal marijuana into a multibillion-dollar industry.¹ Currently, limited marijuana-related activities (at least) are permitted in all but four states,² and the marijuana market is booming. Scores of new companies are being founded, existing companies are developing new branches, and state administrations issuing licenses are swamped due to the large number of applications³ and partial restrictions on the number of licenses.⁴ The fast-developing marijuana market is becoming ever more important, so it is worth taking a closer look at the legal situation for marijuana companies.

Having access to banks is essential for companies because it is vital for their profitability and enables them to manage their cash flow by making daily deposits, issuing payments to vendors, and using online banking.⁵ Alongside cash management and credit card payments, payroll, insurance, lending services, e.g., lines of credit or equipment leasing, are of great importance to companies and highly dependent on access to banks.⁶

¹ See, e.g., Lori Lang, “*The Great Pot Experiment*”: *A Budding Industry Wouldn’t it Be Better if it Was a Legal Billion-Dollar Industry?*, 20 HOUS. BUS. & TAX L.J. 82 (2020); see also Rebecca Beitsch, *Licensing Medical Marijuana Stirs Up Trouble for States*, PEWTRUSTS (Dec. 22, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/22/licensing-medical-marijuana-stirs-up-trouble-for-states>; see also Kellie Pantekoek, *Can Marijuana Dispensaries Use Traditional Banks?*, FIND LAW (2020), [HTTPS://PUBLIC.FINDLAW.COM/CANNABIS-LAW/STARTING-A-CANNABIS-BUSINESS/CAN-MARIJUANA-DISPENSARIES-USE-TRADITIONAL-BANKS-.HTML](https://PUBLIC.FINDLAW.COM/CANNABIS-LAW/STARTING-A-CANNABIS-BUSINESS/CAN-MARIJUANA-DISPENSARIES-USE-TRADITIONAL-BANKS-.HTML).

² State-by-State Marijuana Policies, National Cannabis Industry Association, <https://the-cannabisindustry.org/ncia-news-resources/state-by-state-policies/> (last visited Aug. 15th, 2020); see *Marijuana Timeline*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Aug. 15th, 2020).

³ See Lang, *supra* note 1.

⁴ See Beitsch, *supra* note 1.

⁵ See, e.g., Deborah L. Dickson, *Bank on Marijuana: A Legitimate Industry Warranting Banking Access*, 2 SAVANNAH L. REV. 459 (2015).

⁶ See generally *id.*; see also Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U. L. REV. 977, 984-86 (2012).

Consequently, it is near-unbelievable that marijuana companies are denied this valuable access to banks due to strict federal legislation that views marijuana as highly illegal. On the one hand, banks are reluctant to accept clients in the marijuana industry because there is a significant risk that contracts will be rendered void due to the illegality of the business at the federal level, which could result in financial losses for the banks.⁷ On the other hand, banks involved with such clients are always at risk of indictments and fines on account of aiding and abetting a federal crime or money laundering.⁸ This means that most marijuana companies keep large amounts of cash on-site, making security a constant concern. Furthermore, the lack of a bank account greatly complicates bookkeeping and accounting,⁹ renders marijuana companies ineligible for federal tax deductions, and can contribute to marijuana companies struggling to obtain protection from the bankruptcy courts.¹⁰ Plus, marijuana businesses, which are acting legally at the state level, live with the constant fear of criminal prosecution by the federal government.¹¹

This paper shows that the problems caused by the federal marijuana ban are extensive and have additional legal ramifications than merely the lack of bank access. Consequently, it proposes a solution that covers every sector affected by the contradictions between state and federal law. Given that this paper considers the mere non-enforcement of federal legislation within specific areas of law to be insufficient, it tackles the origin of the ban itself. It argues that the only opportunity to implement a comprehensive solution and prevent subsequent issues, such as banks'

⁷ Abby Ellin, *\$500,000 Medical Marijuana Loan Up in Smoke*, ABC NEWS (May 12, 2012), <https://abcnews.go.com/Business/500000-medical-marijuana-lawsuit-smoke/story?id=16322793>.

⁸ See generally Kamin, *supra* note 6; Pantekoek, *supra* note 1.

⁹ See, e.g., Dickson, *supra* note 5.

¹⁰ See JOANNA R. LAMPE, CONG. RESEARCH SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 116TH CONGRESS, 28-29 (2019).

¹¹ See Dickson, *supra* note 5.

criminal liability, lies in making marijuana accessible to the public by federal law. The decision as to whether to legalize marijuana should be left to each state, enabling them to strike a balance between the risk of abuse and the formation of black markets as well as the benefits to the public health, based on the individual needs of their state residents.

Part I of this paper gives an overview of the history of marijuana in the U.S. and depicts the federal legislation on it, as well as programs instituted by states that have legalized marijuana. Next, it illustrates the contrast between state law and federal law and demonstrates their contradictions, both in terms of the legal landscape and bank access for marijuana companies. The second part introduces various concepts for resolving these issues, whether by limiting enforcement or partly legalizing marijuana. The discussion in Part III weighs the different options and concludes that the best option would be to shift the decision about legalizing marijuana to the states. A proposal suggests the areas that a hypothetical bill should consider.

II. THE DEVELOPMENT OF CANNABIS LAW AND THE CURRENT LEGAL SITUATION

The conflict between the increasing legalization of marijuana by U.S. states, on the one hand, and the traditional strict prohibition of marijuana-related activities under federal law, on the other, causes a legal situation with many issues. Due to the federal ban on marijuana, banks fear being held criminally and civilly liable as a result of anti-money laundering laws. Furthermore, the illegality defense complicates the contractual side of things significantly. Moreover, banking legislation is not the only area of law to suffer from this conflict, with other fields such as insurance law, intellectual property law, and advocacy being negatively impacted as well.

A. *Historical Overview and Current Law*

Even though U.S. legislation on marijuana was initially driven by racist motives,¹² the importation, manufacture, distribution, possession, and use of marijuana are still prohibited by the federal Controlled Substances Act (CSA).¹³ Despite the federal prohibition, an increasing number of states have legalized marijuana, and not just for medical use. Various concepts have been developed for this, which frequently take social equity or the regulation of vertical integration into account.

1. How Racism Affected the War on Drugs

Although the U.S. encouraged and supported cultivation of the cannabis plant from which marijuana is obtained for much of history and during World War Two,¹⁴ the connection between immigrants and marijuana led to the criminalization of the latter.¹⁵ Immigrants introduced the recreational use of marijuana and were increasingly feared due to a rise in unemployment caused by the Great Depression in the 1930s.¹⁶ This was exploited by Harry Anslinger, a racist man who sat at the helm of the Federal Bureau of Narcotics for decades.¹⁷ Because he was not satisfied by the number of arrests for cocaine and heroin, Anslinger set his sights on a marijuana ban and accomplished the criminalization in the form of the Marijuana Tax Act in 1937¹⁸ by citing the opinion of one expert against twenty-nine others.¹⁹ This enabled him to rule with an iron fist and

¹² Laura Smith, *How a racist hate-monger masterminded America's War on Drugs*, TIMELINE (Feb. 27, 2018); *See Marijuana Timeline*, *supra* note 2.

¹³ 21 U.S.C. § 841(a) (2018).

¹⁴ *See, e.g.*, Logan Yonavja, *Industrial Hemp: A Win-Win for the Economy and the Environment*, FORBES (May 29, 2013).

¹⁵ *See Marijuana Timeline*, *supra* note 2.

¹⁶ *See* Smith, *supra* note 12.

¹⁷ *Id.*; *see also Marijuana Timeline*, *supra* note 2.

¹⁸ The Marijuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551(1937).

¹⁹ *See* Smith, *supra* note 12.

to arrest a slew of black people and anti-racist jazz musicians who were also associated with marijuana use.²⁰

The “war on drugs” started in the 1970s. The consequence of this “war” is that the U.S. still has more detainees than any other country in the world,²¹ with most of these detainees considered to belong to minority groups.²² After the Marijuana Tax Act was struck down as a violation of the Fifth Amendment, the CSA²³ was adopted in 1970, listing marijuana in the strictest category.²⁴ Nixon declared his intention to wage the “war on drugs” in 1971²⁵ and rejected calls to decriminalize marijuana, despite strong recommendations²⁶ and the protest of eleven states.²⁷ The “war on drugs” continued due to a powerful parent lobby and was supported by President Reagan’s “just say no” campaign.²⁸ President Bush declared “war on drugs” again and President Clinton also lent the battle his support,²⁹ with the number of drug offenders in U.S. prisons multiplying twelvefold.³⁰ Even though President Obama began to commute offenders’ sentences and pardon them,³¹ black people are still arrested nearly four times more often than white people for violations concerning marijuana related activities, despite the fact that they are involved no more frequently

²⁰ See generally, JOHN C. MCWILLIAMS, *THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS, 1930-1962* (1990).

²¹ See, e.g., A Brief History of the Drug War, DRUG POLICY ALLIANCE, <https://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Aug. 15th, 2020).

²² See, e.g., Smith, *supra* note 12.

²³ 21 U.S.C. §§ 801-904.

²⁴ See LAMPE, *supra* note 10, at 5.

²⁵ See, e.g., *Marijuana Timeline*, *supra* note 2.

²⁶ See Eric Sterling, *Shafer Commission Report on Marijuana and Drugs, Issued 40 Years Ago Today, Was Ahead of its Time*, HUFF POST (May 21, 2013).

²⁷ See, e.g., *Marijuana Timeline*, *supra* note 2.

²⁸ Michael McGrath, *Nancy Reagan and the Negative Impact of the ‘Just Say No’ Anti-drug Campaign*, THE GUARDIAN (Mar. 8, 2016).

²⁹ See Smith, *supra* note 12.; *Marijuana Timeline*, *supra* note 2.

³⁰ *Id.*; A Brief History of the Drug War, *supra* note 21.

³¹ *Id.*

with marijuana.³² Donald Trump's appointment of Attorney General Jeff Sessions provoked a restart of the "war" on marijuana. However, this presaged "war" wasn't excessively waged due to Sessions' retirement in 2018, the COVID-19 pandemic, and the election of Joe Biden in 2020.³³

2. Banned at Federal Level: The Controlled Substances Act

The CSA is enforced by the Drug Enforcement Administration (DEA), part of the Department of Justice (DOJ),³⁴ and regulates drugs deemed to pose a risk of abuse and dependence.³⁵ It hopes to protect the public, as the estimated number of deaths due to drug overdoses was 70,000 in 2019,³⁶ while also controlling and regulating the production of drugs that the public relies on,³⁷ such as prescription painkillers.³⁸ Furthermore, the CSA plays an important role in keeping black markets under control by regulating and controlling legal drugs.³⁹

The CSA is not the only law of relevance for the illegality of cannabis-related activities. The Farm Bill of 2018⁴⁰ needs to be considered, and substances are also subject to the Federal Food, Drug and Cosmetic Act (FD&C Act),⁴¹ which is enforced by the U.S. Food and Drug Administration, or FDA.⁴² The FD&C Act prohibits the introduction or delivery into interstate

³² See *The War on Marijuana in Black and White*, AM. CIV. LIBERTIES UNION (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf; see also Tina Sfondeles, *Kelly Cassidy – 'in the game' to win*, Chicago Sun Times (July 2, 2019).

³³ See Memorandum from Attorney Gen. Jefferson B. Sessions, III to all U.S. Attorneys, (Jan. 4, 2018) (on file with U.S. Dep't of Justice); see generally James Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 Willamette J. Int'l L. & Dispute Res. 234 (2018).

³⁴ 21 U.S.C. § 811 (2012); 28 C.F.R. § 0.100(b) (2000).

³⁵ See LAMPE, *supra* note 10, at 1.

³⁶ CENTERS FOR DISEASE CONTROL AND PREVENTION, Provisional Drug Overdose Death Counts, <https://www.cdc.gov/nchs/nvss/vsr/drug-overdose-data.htm> (last visited Aug. 15th, 2020).

³⁷ See CENTERS FOR DISEASE CONTROL AND PREVENTION, Health, United States, 2017: With Special Feature on Morality, Table 79, [https://www.cdc.gov/nchs/data/17.pdf](https://www.cdc.gov/nchs/data/hus/17.pdf) (last visited).

³⁸ 21 U.S.C. § 801(1) (2012).

³⁹ See LAMPE, *supra* note 10, at 1 et seq.

⁴⁰ See USPTO, EXAMINATION GUIDE 1-19: EXAMINATION OF MARKS FOR CANNABIS AND CANNABIS-RELATED GOODS AND SERVICES AFTER ENACTMENT OF THE 2018 FARM BILL (2019).

⁴¹ 21 U.S.C. §§ 301-399.

⁴² See LAMPE, *supra* note 10, at 3.

commerce of any drug that is adulterated or misbranded.⁴³ The distinction between hemp that is of value for industry, and the mixture of dried shredded flowers known as marijuana, both of which originate from the cannabis plant, is of critical importance.⁴⁴ The Farm Bill removes hemp, a cannabis derivative which by definition contains less than 0.3% tetrahydrocannabinol (THC) and consequently only has a smaller negative effect on public health than the more than 0.3 % THC containing marijuana,⁴⁵ from the CSA.⁴⁶ The FDA has authority over hemp products and is committed to following a sound, science-based policy.⁴⁷

The CSA classifies drugs into five schedules⁴⁸ depending on their potential to harm public health and safety⁴⁹ and places marijuana in the highest schedule.⁵⁰ The two overlapping legal schemes of DEA registration provisions for entities working with controlled substances⁵¹ and trafficking provisions⁵² are created by the CSA.⁵³ The registration scheme requires people who produce, distribute, or dispense controlled substances to register, keep records, and report with the DEA.⁵⁴ Violations result in criminal prosecutions, fines, and short prison sentences, at the most.⁵⁵ The registration scheme for trafficking provisions penalizes the production, distribution, and

⁴³ 21 U.S.C. § 331(a) (2010).

⁴⁴ See, e.g., Yonavja, *supra* note 14.

⁴⁵ 7 U.S.C. § 1639o(1) (2014).

⁴⁶ 21 U.S.C. § 802(16)(B)(i) (1970); see also Amy Abernethy, Lowell Schiller, *FDA is Committed to Sound, Science-based Policy on CBD*, U.S. Food & Drug Admin. (2019); see also *Hemp Production and the 2018 Farm Bill: Hearing Before the U.S. Senate Committee on Agric. Nutrition & Forestry* (July 17, 2019) (statement of Amy Abernethy, Principal Deputy Commissioner - Office of the Commissioner).

⁴⁷ See *id.*

⁴⁸ 21 U.S.C. § 812(a) (1970).

⁴⁹ See LAMPE, *supra* note 10, at 9; 21 U.S.C. § 812 (1970).

⁵⁰ 21 U.S.C. § 812(c) Schedule I(c)(10) (1970).

⁵¹ See *id.* §§ 821-832.

⁵² See *id.* §§ 841-865.

⁵³ See LAMPE, *supra* note 10, at 2.

⁵⁴ 21 U.S.C. § 822 (1970).

⁵⁵ See *id.* § 842(c)(1) (1970).

possession of controlled substances outside the scope of the registration system⁵⁶ and makes some of these acts criminal offenses.⁵⁷ Marijuana is listed in Schedule I, and is therefore subject to the most severe restrictions:⁵⁸ the importation, manufacture, distribution, possession, and use of recreational and medical marijuana alike⁵⁹ (marijuana-related activities) are prohibited.⁶⁰ Congress, or the Attorney General respectively, has the power to schedule substances, or reschedule them.⁶¹

3. How States Legalize Marijuana: The Concept followed by Illinois

Despite federal law, increasing numbers of states are legalizing marijuana. The recreational use of marijuana has been permitted in Illinois since 2020, which serves to illustrate the implementation and concept of social equity and the regulation of vertical integration.

a. *Facts*

The legalization trend began when California became the first state to legalize marijuana for medical use in 1996, and the first state, along with Washington, to permit its recreational use in 2012.⁶² While 35 states have now legalized marijuana for medical use,⁶³ and it is predicted that the number will reach 40 by the end of 2020,⁶⁴ 11 states currently permit the drug to be used recreationally.⁶⁵ States control their programs differently, from having one single department of public health to distributing control between different regulatory agencies, such as financial and

⁵⁶ See *id.* § 842(a).

⁵⁷ See *id.* § 842(c)(2).

⁵⁸ See *id.* § 812(c) Schedule I (c)(10).

⁵⁹ See *id.* § 812(b)(1)(B).

⁶⁰ See *id.* § 841(a).

⁶¹ See *id.* § 801, § 811(a).

⁶² See Smith, *supra* note 12.; see also *Marijuana Timeline*, *supra* note 2.

⁶³ See LAMPE, *supra* note 10, at 24.

⁶⁴ Mona Zhang, *Marijuana legalization may hit 40 states. Now what?*, POLITICO (Jan. 20, 2020).

⁶⁵ See, e.g., State-by-State Marijuana Policies, *supra* note 2.; *Marijuana Timeline*, *supra* note 2.

agricultural departments.⁶⁶ COVID-19 has strengthened the situation further. While sales of marijuana products have increased,⁶⁷ various states such as Illinois,⁶⁸ New York and California, as well as several city and state health departments,⁶⁹ consider the sale of medical marijuana to be essential, with dispensaries allowed to remain open during lockdown, just like pharmacies or grocery stores.⁷⁰

State implementation regulates licensing systems, employment, vertical integration, and taxation, while social equity is regularly guaranteed.⁷¹ The relationship between Illinois' Cannabis Regulation and Tax Act⁷² and the Compassionate Use of Medical Cannabis Program Act⁷³ shows how permitting adults over 21 to purchase limited amounts of marijuana from licensed dispensaries for recreational use does not usually affect existing acts that permit its medical use. In general, sustainability becomes more important and environmental guidance is developed.⁷⁴ Marijuana companies have to meet various requirements, e.g., concerning pesticide use or product components.⁷⁵ Still, it is difficult for states to run medical marijuana programs as they remain at risk of being targeted by the federal government.⁷⁶

⁶⁶ See State-by-State Marijuana Policies, *supra* note 2.

⁶⁷ See, e.g., Alicia Cohn, *Marijuana Sales Surge Amid Coronavirus Outbreak*, THE HILL (Mar. 20, 2020).

⁶⁸ See ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION ANNOUNCES COVID-19 GUIDANCE FOR CANNABIS DISPENSARIES (Mar. 17, 2020).

⁶⁹ See Anna Dana, Jaelyn Gross, *Marijuana Dispensaries – Are They Essential Services?*, THE BLUNT TRUTH (Mar. 18, 2020), <https://www.blunttruthlaw.com/2020/03/marijuana-dispensaries-are-they-essential-services/>.

⁷⁰ See, e.g., ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, COVID-19 MEDICAL CANNABIS GUIDANCE (March 16, 2020).

⁷¹ See, e.g., The Cannabis Regulation and Tax Act, 410 ILCS 705/.

⁷² See *Id.*

⁷³ Compassionate Use of Medical Cannabis Program Act, 410 ILCS 130/.

⁷⁴ See, e.g., DENVER DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT, BEST MANAGEMENT PRACTICE GUIDE (2018).

⁷⁵ See, e.g., ENVIRONMENTAL LAW INSTITUTE, A HISTORY OF EPA'S REGULATION OF PESTICIDE USE ON CANNABIS (2019).

⁷⁶ See Jeff Smith, *What medical cannabis firms might learn from Harvest's compliance conundrums*, MARIJUANA BUSINESS DAILY (Aug. 12, 2019), <https://mjbizdaily.com/what-medical-cannabis-firms-can-learn-harvests-compliance-issues/>.

b. *Social Equity*

Various states have implemented social equity concepts to establish a legal cannabis industry that is equitable and accessible to the people who were most adversely impacted by the enforcement of drug-related laws in the past.⁷⁷ These concepts aim to compensate for the injustice suffered by people who have been adversely affected by discrimination or other issues.⁷⁸ The aim of social equity is to undo the past and create opportunities for the future by removing harmful marijuana offenses from people's criminal records and helping people who have suffered the most through the injustice of the war on drugs to obtain a license so that they may profit from the legal market.⁷⁹ By having marijuana-related activities expunged from their criminal records, they now have the opportunity to be involved with marijuana.⁸⁰

To obtain a license in Illinois, an applicant is judged on a 250-point scale.⁸¹ The social equity concept was adopted,⁸² and social equity applicants are now granted a 50-point boost. Moreover, participation in the marijuana industry is supported by financial assistance, with an opportunity for the future created through this support.⁸³ Additionally, the head of Illinois' recreational cannabis program is tasked with drafting a study about discrimination in the cannabis industry, with the aim of avoiding injustice.⁸⁴ The licensing systems require a variety of criteria to

⁷⁷ See, e.g., The Cannabis Regulation and Tax Act, *supra* note 71.

⁷⁸ John O'Connor, *Illinois marijuana law aims to undo harm of war on the drug*, US NEWS (Nov. 2, 2019).

⁷⁹ See *New Illinois Legalization Bill Means Unprecedented Social and Criminal Justice Reform*, MARIJUANA POLICY PROJECT (2020), <https://www.mpp.org/states/illinois/new-illinois-legalization-bill-means-unprecedented-social-and-criminal-justice-reform/>.

⁸⁰ 21 C.F.R. § 1301.76(a).

⁸¹ See John O'Connor, *supra* note 78.

⁸² See, e.g., Tina Sfondeles, *supra* note 32.

⁸³ See The Cannabis Regulation and Tax Act, *supra* note 71.

⁸⁴ Tom Schuba, *State Sen. Toi Hutchinson appointed as Illinois' pot czar*, CHICAGO SUN TIMES, (Sep. 26, 2019).

be fulfilled⁸⁵ and vary from state to state, with some even awarding their limited number of licenses through a lottery.⁸⁶

c. *Vertical Integration*

Vertical integration occurs where multiple points in the supply chain,⁸⁷ from manufacturing to distribution, are controlled by a single corporation, and is often state-regulated.⁸⁸ Supporters of vertical integration state that companies can cut costs and guarantee quality through exerting management control on every production pathway. Moreover, having a limited number of large companies makes the situation more straightforward, which minimizes the chances of incurring any federal tax problems and enables increased market monitoring.⁸⁹ However, facilitating the existence of huge businesses creates monopolies that stifle the market, takes opportunities away from companies with less capital, and decreases product quality due to the lack of competition.⁹⁰ Additionally, corporate flexibility is reduced by vertical integration, and the costs of expanding businesses increases.

The fact that states variously require, permit, and prohibit vertical integration shows that the advantages and disadvantages of this are balanced.⁹¹ Most states are horizontally integrated⁹² and Illinois also chose to prohibit vertical integration by introducing a three-tier structure,⁹³ copied

⁸⁵ See, e.g., ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, ADULT USE CANNABIS PROGRAM (last visited June 25, 2020).

⁸⁶ See Beitsch, *supra* note 1.

⁸⁷ Sara Brittany Somerset, *Florida Court Rules Vertical Integration Is Unconstitutional – Are Big Changes Coming To The Sunshine State’s Cannabis Industry Or Will Big Marijuana Prevail?*, FORBES (Jul. 26, 2019).

⁸⁸ See Lang, *supra* note 1.

⁸⁹ See *id.*; see also Anne van Leynseele, *Vertical Integration: What It is and Why It Matters to Cannabis*, CANNABIS LAW JOURNAL, [HTTPS://JOURNAL.CANNABISLAW.REPORT/WASHINGTON-VERTICAL-INTEGRATION-WHAT-IT-IS-AND-WHY-IT-MATTERS-TO-CANNABIS/](https://journal.cannabislaw.report/washington-vertical-integration-what-it-is-and-why-it-matters-to-cannabis/).

⁹⁰ See *id.*

⁹¹ See generally Ryan B. Stoa, *Marijuana Agriculture Law: Regulation at the Root of an Industry*, 69 FLA. L. REV. 297 (2017).

⁹² See, e.g., Brittany, *supra* note 87.

⁹³ See Leynseele, *supra* note 89.

from regulations often found in the alcohol industry.⁹⁴ This means that manufacturers may only sell to licensed wholesalers, importers and distributors may only sell to licensed outlets or retailers, and outlets or retailers may only sell to consumers.⁹⁵

B. *Impact of the Legal Situation*

Federal law prohibiting any marijuana-related activities takes precedence over state law that partly permits even the recreational use of marijuana, giving rise to an unsatisfactory legal situation. Anti-money laundering laws prevent banks from accepting clients from the marijuana industry; in turn, these clients are denied valuable access to banks.⁹⁶ Companies are highly dependent on this access because of the liquidity of capital and the ease of transferring capital within the financial system is necessary for running a sustainable, profitable business.⁹⁷ Furthermore, there is always a risk that a contract might be invalidated, although courts tend to find ways around the illegality defense. Moreover, other fields such as advocacy or intellectual property law are negatively impacted by the marijuana ban.

1. The Supremacy Clause and Constitutional Considerations

In principle, federal law takes precedence over state law and there are no constitutional doubts as to the primacy of federal law. The supremacy clause enshrined in the Constitution⁹⁸ specifically mentions a conflict of law⁹⁹ and establishes the rule that certain national acts take priority over any state act that conflicts with national law.¹⁰⁰ As a result, federal law, or the CSA,

⁹⁴ See, e.g., Lang, *supra* note 1.

⁹⁵ See Stoa, *supra* note 91.

⁹⁶ See generally Suzanne K. Daigle, *Legal Impediments to Banking Services for Recreational Cannabis Businesses: Comparing Oregon to Canada*, 21 Or. Rev. Int'l L. 215 (2020).

⁹⁷ See generally, Dickson, *supra* note 5.

⁹⁸ U.S. CONST. art. VI.

⁹⁹ The Heritage Guide to The Constitution, HERITAGE FOUNDATION, <https://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause> (last visited Aug. 15th, 2020).

¹⁰⁰ U.S. CONST. art. VI.

takes precedence over state law.¹⁰¹ This means that all marijuana-related activities are illegal, though they might be legal under state law, due to the prohibition of marijuana within the CSA and the primacy of federal law.¹⁰²

The courts have affirmed the constitutionality of the prohibition of marijuana in the CSA. The first case to address the conflict between state law and federal law was *Gonzales v. Raich*¹⁰³ in 2005. DEA agents had seized and destroyed all of the respondents' cannabis plants, although their marijuana-related activities were legal under state law. However, the court did not grant the reliefs that the claimants sought. It stated that Congress had acted with authority to regulate marijuana, thereby relying on the commerce clause,¹⁰⁴ as the marijuana-related activities had a substantial economic effect on interstate commerce. The court viewed the scheduling of marijuana as a part of a larger regulatory scheme that validates federal law and enables it to apply in this case.¹⁰⁵

In *Wilson v. Lynch*,¹⁰⁶ it was held that the Second Amendment right to purchase and own guns¹⁰⁷ does not apply to marijuana users even though the use of the drug is permitted by state law and they have a license to do so. The individuals are still considered to be unlawful drug users and are thus prohibited from buying guns.¹⁰⁸ In *Washington v. Sessions*,¹⁰⁹ the plaintiffs filed a constitutional challenge to the CSA's grading of marijuana in Schedule I in 2018. The court held

¹⁰¹ See generally William Burnham, Introduction to the Law and Legal System of the United States (6th ed. 2016).

¹⁰² See, e.g., Joseph A. Goldstein, *Taxing Legalized Marijuana: How Courts Should Treat Drug Tax Statutes in Light of the Fifth Amendment's Self-incrimination Clause and Executive Non-enforcement of the Controlled Substances Act*, 37 CDZLR 793 (2015).

¹⁰³ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁰⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁵ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁰⁶ *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016).

¹⁰⁷ U.S. CONST. amend. II.

¹⁰⁸ 18 U.S.C. § 922(g)(3) (2015).

¹⁰⁹ *Washington v. Sessions*, No. 17 CIV. 5625 (AKH), 2018 WL 1114758, at *1 (S.D.N.Y. Feb. 26, 2018)

that the current scheduling does not violate due process because of a lack of rational basis, and granted a motion to dismiss.¹¹⁰

2. No Bank Access for Marijuana Companies due to Anti-Money Laundering Laws

The risks of criminal liability, fines, and charges prevent banks from entering into business with marijuana-related ventures.¹¹¹ Various anti-money laundering laws go hand-in-hand with the CSA's prohibition of marijuana, with the aim of supporting the war on drugs. These laws apply to all kinds of financial institutions: they obstruct the flow of money and prevent marijuana companies from accessing financial services.¹¹² The Money Laundering Control Act of 1986¹¹³ classifies money laundering itself as a crime and prohibits illegal proceeds from entering the stream of commerce through financial institutions. In turn, it also impacts banks' granting services to marijuana companies.¹¹⁴ Given that all the profits a company generates through marijuana-related activities are viewed as illegal proceeds from a specified unlawful activity,¹¹⁵ the bank is implicated in money laundering by default.¹¹⁶

The Bank Secrecy Act¹¹⁷ requires financial institutions to assist government agencies with detecting and preventing money laundering, denying criminal enterprises access to banks with the aim of uncovering them and harming their profitability.¹¹⁸ This means that banks are subject to

¹¹⁰ *Id.*

¹¹¹ See Kellie Pantekoek, *Can Marijuana Dispensaries Use Traditional Banks?*, FIND LAW (2020).

¹¹² See Dickson, *supra* note 5.

¹¹³ 18 U.S.C. §§ 1956-1957 (2012).

¹¹⁴ 18 U.S.C. §§ 1956-1957 (2012).

¹¹⁵ 18 U.S.C. § 1956(c)(7)(B)(i) (2012).

¹¹⁶ See Dickson, *supra* note 5; DAVID H. CARPENTER, CONG. RESEARCH SERV., IF11373, FINANCIAL SERVICES FOR MARIJUANA BUSINESSES (2019).

¹¹⁷ 31 U.S.C. §§ 5311-5332 (2012).

¹¹⁸ See generally Donald Waack, *XX. Bank Secrecy Act & Anti-Money Laundering Regulation*, 26 ANNRBFL 183 (2007).

specific ‘know your customer’ policies requiring them to record financial transactions¹¹⁹ and verify the identity of account holders who conduct transactions by filing currency transaction reports,¹²⁰ suspicious activity reports, or both.¹²¹ Banks are required to detect money laundering by establishing various measures, e.g. appointing a compliance officer, developing an anti-money laundering employee training program, or regularly carrying out independent tests of the banks’ effectiveness at detection.¹²² The standard for detection involves determining the client’s identity, checking that customers’ funds come from a lawful source, and undertaking monitoring to ensure that the funds are used for lawful activity.¹²³ In response to their reports, banks are instructed by the federal authorities to exclude or refuse the suspicious business in question.¹²⁴

If banks do not comply, they face consequences (namely, criminal¹²⁵ and civil penalties¹²⁶) that can also apply to their directors¹²⁷ and employees. Banks are prosecuted for accepting deposits, lending money, or conducting routine transactions if they knew that the money in question was the proceeds of the customer’s unlawful activity.¹²⁸ Moreover, each incident of money laundering is viewed as a separate offense with serious penalties, while banks run the risk of having their banking charter revoked and even losing full insurance.¹²⁹

3. The Illegality Defense

¹¹⁹ 31 U.S.C. § 5325 (2012).

¹²⁰ 31 U.S.C. § 5331 (2012).

¹²¹ 31 U.S.C. § 5313 (2012); 31 C.F.R. § 1010.410(a)-(d) (2013).

¹²² 31 U.S.C. § 5318(h) (2012).

¹²³ 31 U.S.C. § 5318 (2012).

¹²⁴ *See, e.g., Dickson, supra* note 5.

¹²⁵ *See, e.g.,* 18 U.S.C. §§ 1956-1957, 3351-3585 (2012).

¹²⁶ *See, e.g.,* 12 U.S.C. §§ 501a-506 (2012); 12 U.S.C. § 1833a (2012).

¹²⁷ *See, e.g.,* 12 U.S.C. § 93 (2012).

¹²⁸ *See generally* Waack, *supra* note 118.

¹²⁹ *See* Dickson, *supra* note 5.

Besides anti-money laundering laws, the illegality defense also prevents banks from accepting clients from the marijuana industry. This legal doctrine states that a plaintiff will be unable to pursue a legal remedy if it arises in connection with their illegal act.¹³⁰ In terms of marijuana, this has an impact on two parties concluding a contract that would be enforceable by state law. As soon as one party has to fulfill its contractual obligations, it can raise the illegality defense and claim that the contract is invalid as marijuana is illegal. In 2012, a court decided that marijuana plants are not insurable if the plaintiff's insured marijuana plants were stolen.¹³¹ By statute, insurance contracts are only enforceable if there is a lawful and substantial economic interest in the safety or preservation of the subject.¹³²

In 2016, however, the courts started to prevent the invalidation of contracts outside the field of insurance law when a court ruled that the damages to a marijuana company caused by a wildfire needed to be covered by their insurance because the insurers knew the risks involved when entering into the policy.¹³³ Although a contract must have a lawful object to be valid,¹³⁴ the court did not invalidate a merger agreement because the businesses sold were participating in other areas of the market alongside the marijuana sector. It ruled that the court is allowed to enforce the contract in a way that does not require illegal conduct, even when contracts concern illegal objects.¹³⁵ Indeed, the lawful parts of contracts containing clear violations of federal law can still be enforced.¹³⁶

¹³⁰ See generally Luke Scheuer, *Are "Legal" Marijuana Contracts "Illegal"?*, 16 UCDBLJ 31 (2015).

¹³¹ *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487 LEK-KSC, 2012 WL 928186 (D. Haw. March 16, 2012).

¹³² Haw. Rev. Stat. Ann. § 431:10E-101 (West).

¹³³ *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Company*, 163 F.Supp.3d 821 (D. Colo. 2016).

¹³⁴ Cal. Civ. Code § 1550(3).

¹³⁵ *Mann v. Gullickson*, No. 15-ocv-03630-MEJ, 2016 WL 6473215 (N.D. Cal. Nov. 2, 2016).

¹³⁶ *Bart Street III v. ACC Enterprises, LLC*, No. 2017-cv-0083-GMN-VCF, 2018 WL 4682318 (D. Nev. Sept. 27, 2018).

Furthermore, a defendant who was involved in the marijuana industry had to pay back a loan even though the contract was for an illegal purpose and should have been invalidated.¹³⁷ The standard for the proposed motion to dismiss was not met, given that the sole argument was the illegality of purpose.¹³⁸ Courts enforce contracts as long as there are no direct violations of the CSA.¹³⁹

4. The Negative Impact on Other Areas of Law

As the case study shows, the illegality defense impacts various areas of law. Despite the courts' approach, this defense is always a risk. That said, other areas of law, such as advocacy and intellectual property law, are suffering as a result of marijuana being illegal. Although there is a greater need for legal advice due to the administrative complexity of starting a marijuana business,¹⁴⁰ lawyers are not supposed to counsel a client to engage in conduct that the lawyer knows to be criminal.¹⁴¹ However, the good-faith exception enables lawyers to give legal advice¹⁴² if they believe that they are providing competent and diligent representation to each affected client.¹⁴³ The consequences depend on the state¹⁴⁴, ranging from being charged with a felony¹⁴⁵ to the example of Illinois, in which there is no violation when the action is expressly permitted by Illinois state law.¹⁴⁶

¹³⁷ Fed. R. Civ. P. 12(b)(6).

¹³⁸ Ginsburg v. ICC Holdings, LLC, No. 3:16-CV-2311-D, 2017 WL 5467688 (N.D. Tex. Nov. 13, 2017).

¹³⁹ See Tarr v. USF Reddaway, Inc., No. 3:15-cv-02243-PK, 2018 WL 659859 (D. Or. Feb. 1, 2018); see also Greenwood v. Green Leaf Lab LLC, No. 3:17-cv-00415-PK, 2017 WL 3391671 (D. Or. July 13, 2017).

¹⁴⁰ See Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One toké over the line?"*, AMERICAN BAR ASSOCIATION (2019).

¹⁴¹ MODEL RULES OF PROF'L CONDUCT r. 1.2(d.) (AM. BAR ASS'N 1983).

¹⁴² Rendleman, *supra* note 140.

¹⁴³ MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1) (AM. BAR ASS'N 1983).

¹⁴⁴ See, e.g., Diana Novak Jones, *How Attys Skirt the Rules to Get in the Cannabis Game*, LAW 360 (2020).

¹⁴⁵ See Sam Reisman, *Cannabis Corner: The Pot Lawyer Who Faced Felony Charges*, LAW 360 (2019).

¹⁴⁶ See, e.g., Jones, *supra* note 144.

Unlike in the E.U. or Canada,¹⁴⁷ under U.S. intellectual property law, marijuana companies are not granted protection for trademarks covering goods and services that violate federal law.¹⁴⁸ Marijuana companies cannot raise the prior use defense under trademark law because use, in connection with cannabis products, is not cognizable by federal law.¹⁴⁹ Conversely, it is easier for marijuana companies to use other companies' trademarks because it is difficult to meet the requirements¹⁵⁰ of the other claim, namely, misrepresentation.¹⁵¹ It is also probable that the likelihood of confusion test will fail due to the unlikely expansion of a company into the illegal marijuana business.¹⁵² However, inventions in the cannabis industry are not deemed unpatentable.¹⁵³

III. DIFFERENT APPROACHES TO SOLVING THE PROBLEM

The legal situation caused by the federal marijuana ban gives rise to unacceptable negative consequences that must be resolved by either limiting federal enforcement or rescheduling marijuana within the CSA. As marijuana companies are denied valuable access to banks due to anti-money laundering laws and the illegality of marijuana itself, the sector faces unprecedented challenges and even more areas of law are negatively impacted. While enforcement is already somewhat limited, and a pending act is attempting to grapple with this, other acts proposed to Congress demand a more comprehensive solution.

¹⁴⁷ See Ben Natter, Jessica Sblendorio, *Global Developments and Considerations for Registering Cannabis and Cannabis-Related Trademarks*, HAUG PARTNERS LLP (2020).

¹⁴⁸ See 37 C.F.R. § 2.69 (2014).

¹⁴⁹ Hailey Konnath, *Pot Edibles Maker's Prior-Use Defense Tossed in TM Suit*, LAW 360 (2020).

¹⁵⁰ 15 U.S.C. § 1125 (2012).

¹⁵¹ See, e.g., Alison Malsbury, *Girl Scouts Allege Misappropriation by Cannabis Edibles Company*, HARRIS BRICKEN (2020).

¹⁵² See *Woodstock Ventures LC v. Woodstock Roots, LLC*, 387 F.Supp.3d 306 (S.D.N.Y. 2019).

¹⁵³ See *United Cannabis Corporation v. Pure Hemp Collective Inc.*, No. 18-cv-1922-WJM-NYW, 2019 WL 1651846 (D. Colo. April 17, 2019).

A. *Limiting Enforcement*

The concept that enforcement limitations may resolve the issue is not new: The Attorney General regularly gives guidance on enforcement and the Rohrabacher-Farr Amendment limits it.¹⁵⁴ The CSA is enforced by federal agencies,¹⁵⁵ which means that state agents who are only subject to state law do not enforce the CSA's marijuana ban when the marijuana-related activity is legal under state law.¹⁵⁶ The Secure and Fair Enforcement Banking Act of 2019 (SAFE Banking Act) would limit federal enforcement within banking law and similar pending acts would do the same in other areas of law.

1. The Development of Approaches to Resolving the Issue through Enforcement Limitations

The Attorney General has the power to enforce rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his authorities conferred by the CSA¹⁵⁷ and regularly gives guidance on enforcing violations concerning marijuana-related activities permitted by state law, as shown by the Cole Memorandum of 2013, written by Deputy Attorney General James Cole.¹⁵⁸ It continued and updated the approach that was already being taken, under which federal agents were not to enforce the CSA for violations concerning marijuana as long as the activities were legal in the state where the violation occurred.¹⁵⁹ The Cole Memorandum suggested that intervention should only take place when one of seven points is fulfilled, protecting against the sale to and employment of minors, violence, and firearms, driving

¹⁵⁴ Pub.L. No. 113–235, 128 Stat 2130 (2014); Consolidated and Further Continuing Appropriations Act, H.R. 83, 113th Cong. (2014) (enacted); *see, e.g.*, Diana Novak Jones, *supra* note 144.

¹⁵⁵ *See generally* JOANNA R. LAMPE, *supra* note 10.

¹⁵⁶ *See, e.g., id.*; *see also* Dickson, *supra* note 5.

¹⁵⁷ 21 U.S.C. § 871(b) (2011); 21 U.S.C. § 811 (2011).

¹⁵⁸ Memorandum from James M. Cole, Dep. Attorney Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enforcement to all United States Attorneys (Aug. 29, 2013).

¹⁵⁹ *See id.*

under the influence of drugs, and environmental dangers, while also undermining criminal enterprises and support for black markets.¹⁶⁰ State and local agencies can enforce their laws alongside this and the authority to enforce federal law is not altered.¹⁶¹

Businesses acting within the scope of state law and their contracting parties need legal certainty, too, leading to different approaches to the illegality defense. Some states adopt statutes guaranteeing the enforceability of insurance contracts, but the illegality defense is not prevented from arising as the federal prohibition of marijuana takes precedence.¹⁶² The Cole Memorandum changes the situation because there is now an insurable interest, marijuana is deemed legal, and the illegality defense is waived, due to the legal certainty that the CSA will not be enforced.¹⁶³ The Rohrabacher-Farr Amendment of 2014, acknowledged by the courts, marked a big step towards legal certainty.¹⁶⁴ This amendment passed the U.S. House of Representatives (House) after six failed attempts and became law in 2014.¹⁶⁵ It states that no DOJ funds may be used to stop states from implementing laws authorizing marijuana-related activities.¹⁶⁶ In *USA v. Marin Alliance*,¹⁶⁷ the court denied the motion to dissolve a permanent injunction against the respondent because the court was not able to override Congress' policy. Eventually, the CSA was fully enforced by the court, but the court acknowledged that enforcement must be consistent with the

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² Haw. Rev. Stat. § 329-124; *see generally* Stephen Pate, *No Longer Stuck in the Weeds: Marijuana Insurance Moves Into the Mainstream*, BUSINESS INSURANCE (2017).

¹⁶³ *See* Pate, *supra* note 162.

¹⁶⁴ Pub.L. No. 113–235, 128 Stat 2130 (2014).

¹⁶⁵ *See generally*, Florence Shu-Acquaye, *Rohrabacher-Blumenauer Amendment, Case Law and the Department of Justice: Who Prevails in the Medical Marijuana Legalization Debate?*, 54 Gonz. L. Rev. 127 (2018, 2019).

¹⁶⁶ Pub.L. No. 113–235, 128 Stat 2130 (2014).

¹⁶⁷ *United States of America v. Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (N.D. Cal. 2015).

Appropriations Act of 2015.¹⁶⁸ Thus, as long as the DOJ is precluded from spending its funds, the permanent injunction is only enforced if state law is violated.

In 2018, Attorney General Jefferson Sessions created ambiguity with his Sessions Memorandum, which rescinded all the existing guidelines on marijuana, including the Cole Memorandum.¹⁶⁹ Further, he emphasized the scope of the illegality of marijuana-related activities under the CSA, affecting the prosecution of crimes and the Bank Secrecy Act.¹⁷⁰ He also prompted federal prosecutors to follow well-established principles, specifically, by weighing up relevant issues such as enforcement priorities, the severity of the crime, the effect of the prosecution, and the impact on the community.¹⁷¹

2. The Secure and Fair Enforcement Banking Act of 2019

The SAFE Banking Act aims to resolve most of the above issues within banking law by protecting depository institutions providing services to cannabis-related businesses.¹⁷² The bill was introduced in the House in March 2019 and passed the legislative process of committees in April.¹⁷³ The bill was passed in the House in September 2019¹⁷⁴ and was included in the HEROES Act Covid-19 relief bill, passed in May 2020.¹⁷⁵ To become binding law, the bill now has to be

¹⁶⁸ Consolidated and Further Continuing Appropriations Act, H.R. 83, 113th Cong. (2014) (enacted).

¹⁶⁹ Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, on Marijuana Enforcement to all United States Attorneys (Jan. 4, 2018).

¹⁷⁰ *See id.*; *see generally* Waack, *supra* note 118; 31 U.S.C. §§ 5311 et seq. (2012).

¹⁷¹ Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, on Marijuana Enforcement to all United States Attorneys (Jan. 4, 2018).

¹⁷² Secure and Fair Enforcement Banking Act, S. 1152, 115th Cong. (2017).

¹⁷³ *See* Matt Reynolds, *Canny Decisions*, 106-MAY ABAJ 61 (2020).

¹⁷⁴ Secure and Fair Enforcement Banking Act, S. 1152, 115th Cong. (2017); *see also* Jason Schott, *Marijuana Industry Scored Big Win as House Passes SAFE Banking Act*, FOX BUSINESS (2019).

¹⁷⁵ *See generally*, Aaron G. Biros, *SAFE Banking Act Included in COVID-19 Legislation*, CANNABIS INDUSTRY JOURNAL (2020); Sean Williams, *Surprise! There's Cannabis Reform Legislation in the Latest COVID-19 Relief Bill*, THE MOTLEY FOOL (2020).

passed by the Senate before being signed by the President. Even if the President vetoes the bill, it still could be overridden by a two-thirds majority in the House and the Senate.¹⁷⁶

The SAFE Banking Act revises federal statutes such as anti-money laundering laws and creates safe harbors for depository institutions by forbidding federal banking regulators from prohibiting, penalizing, or discouraging banks from providing financial services solely on the basis of cannabis-related activities.¹⁷⁷ Most importantly, it protects banks from any federal liability.¹⁷⁸ Further, deposit insurance may not be terminated or limited for this reason and no adverse or corrective supervisory actions may be undertaken.¹⁷⁹ The proceeds from transactions made by cannabis-related companies are not deemed to be proceeds from unlawful activity and, consequently, these actions are not criminalized or prohibited by anti-money laundering legislation.¹⁸⁰ That said, banks are not obliged to provide services to such businesses. The Act also requires supplementary suspicious activity reports to be filed, and it does not reduce the amount of monitoring.¹⁸¹ The resulting guidance has to be consistent with the purpose and intent of the SAFE Banking Act of 2019.¹⁸² Although many restrictions and penalties would be removed, with increased protection being provided as a result, marijuana would not be legalized.

¹⁷⁶ See generally Vetoes, UNITED STATES SENATE, https://www.senate.gov/reference/reference_index_subjects/Vetoes_vrd.htm (last visited Aug. 15th, 2020).

¹⁷⁷ Secure and Fair Enforcement Banking Act, S. 1152, 115th Cong., § 3 (2017).

¹⁷⁸ See generally Gabriel J. Greenbaum, *What to Do With All This Green: Using Casino Regulations as a Model for Cannabis Industry Banking*, 58 WBNLJ 217 (2019).

¹⁷⁹ Secure and Fair Enforcement Banking Act, S. 1152, 115th Cong. (2017); see generally Satish M. Kini, et al., *House Financial Services Committee Puts Spotlight on Cannabis Banking Restrictions*, 38 No. 3 BNKFSR 11 (2019).

¹⁸⁰ 18 U.S.C. §§ 1956-1957 (2012).

¹⁸¹ See generally Rachel Zender, *Bud, Bongs & Banks: The Impact of State Legalized Marijuana on Financial Institutions*, 87 UMKCLR 997 (2019).

¹⁸² Secure and Fair Enforcement Banking Act, S. 1152, 115th Cong. (2017).

The SAFE Banking Act only looks at the major consequences facing banks when they provide services to marijuana companies, but other acts such as the Clarifying Law Around Insurance of Marijuana Act (CLAIM Act) are also pending, aiming to deal with issues in specific sectors, such as insurance law. The problems caused by the federal prohibition of marijuana are far-reaching and affect many areas of law, not just access to banks. The CLAIM Act¹⁸³ would allow insurers to cover cannabis-related businesses without the fear of federal criminal sanction or federal interference as long as the company's activities were legal under state law. The CLAIM Act, which is still pending in Congress, also aims to help create a strong insurance market for the cannabis industry, similar to the SAFE Banking Act.

B. *Other Acts Proposed to Congress*

The Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act) and the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act) differ from the acts presented thus far as they cover every area of law.¹⁸⁴ The STATES Act was proposed in 2018 and practically preceded the SAFE Banking Act because its provisions were reintroduced in the latter.¹⁸⁵ The STATES Act would ensure that each state can determine its own approach to marijuana as long as this is safe and takes the impact on other states into account.¹⁸⁶ This purpose would be achieved by amending the CSA so that its provisions would neither apply to, nor be enforced against, anyone exercising marijuana-related activities under state law, as long as states

¹⁸³ H.R. 4074, 116th Cong. (2019); S. 2201, 116th Cong. (2019).

¹⁸⁴ H.R. 2093, 116th Cong. (2019); Strengthening the Tenth Amendment Through Entrusting States Act, S. 1028, 116th Cong. (2019); *see also* Elisabeth Warren, Cory Gardner, *The States Act*, ELISABETH WARREN, <https://www.warren.senate.gov/imo/media/doc/STATES%20Act%20One%20Pager.pdf> (last visited Aug. 15th, 2020).

¹⁸⁵ Kevin Young, Jack Jacobson, *STATES Act Reintroduced in Congress to Harmonize Federal, State Cannabis Law*, THOMPSON COBURN (2019).

¹⁸⁶ H.R. 2093, 116th Cong. (2019); Strengthening the Tenth Amendment Through Entrusting States Act, S. 1028, 116th Cong. (2019).

comply with basic protections. These protections would maintain the prohibitions on endangering human life, employing individuals under the age of 18 or selling to individuals under 21, and distributing within specific areas.¹⁸⁷ Moreover, it would introduce a requirement to conduct a study on the effects of the legalization on the trafficking system. Finally, the bill states that compliant transactions are not trafficking and do not result in an unlawful transaction, which is important in terms of banking.¹⁸⁸

The MORE Act¹⁸⁹ would go one step further by decriminalizing and de-scheduling cannabis.¹⁹⁰ It also proposes a social equity concept, demanding the expungement of criminal offenses and reinvestment in individuals negatively impacted by the war on drugs. Specifically, the act would amend the CSA by striking out marijuana and THC, thereby removing marijuana from Schedule I. Companies would be taxed on cannabis products and the Act also requires that data on individuals connected to the cannabis industry be compiled, updated, and published regularly.¹⁹¹ It combats discrimination resulting from cannabis-related activities, e.g. by preventing public benefits from being removed, prohibiting adverse impact in terms of immigration law, or forbidding Small Business Development Centers, which give free marketing, financing, and business-related assistance to local entrepreneurs, from declining businesses solely because they are involved with cannabis.¹⁹²

IV. PROPOSAL

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ H.R. 3884, 116th Cong. (2019); Marijuana Opportunity Reinvestment and Expungement Act, S. 2227, 116th Cong. (2019).

¹⁹⁰ *See generally* Daigle, *supra* note 96.

¹⁹¹ H.R. 3884, 116th Cong. (2019); Marijuana Opportunity Reinvestment and Expungement Act, S. 2227, 116th Cong. (2019).

¹⁹² *Id.*

To resolve these issues, the legal situation has to be clarified by Congress. Companies are suffering as a result of the ambiguity caused by the federal prohibition of marijuana and states' legalization of it, as well as the Sessions Memorandum.¹⁹³ A comparison and analysis of the approaches that have been introduced helps to determine the best way forward, which can then be complemented by tried-and-trusted rules and concepts to find the best solution that Congress should adopt.

A. *Determining the Best Approach*

While the SAFE Banking Act creates safe harbors to prevent enforcement from being carried out against depository institutions in breach of federal provisions due to marijuana-related activities, the STATES Act and the MORE Act amend the CSA to either enable states to find the best approach for their individual needs or simply legalize marijuana. The quickest solution to resolving many of the issues concerning bank access for marijuana companies would be to enact the SAFE Banking Act, although the SAFE Banking Act only applies to depository institutions.¹⁹⁴ As a result, many more acts would have to be enacted and implemented to cover all the issues caused by the federal ban. This could be outweighed by the advantage of tailoring these different acts to ensure that the individual needs of different sectors are covered. However, this would require a major effort and run a huge risk of contradictions with federal law, state law, or other safe harbors. A more comprehensive solution would be ideal, but implementing the SAFE Banking Act would be a good first step.

The STATES Act provides the best approach because it leaves the responsibility to the states. Both the STATES Act and the MORE Act aim for a solution that does not only improve

¹⁹³ See generally Dickson, *supra* note 5.

¹⁹⁴ See Secure and Fair Enforcement Banking Act, S. 1152, 115th Cong. (2017).

the situation for banks. Rather, no company at all would have to be worried about providing services to, or entering into contracts with, marijuana companies because their activities would no longer be considered unlawful, and any federal liability would vanish as a result. The biggest difference between the approaches is that the MORE Act legalizes marijuana in general while the STATES Act transfers responsibility to the states but basically considers it to be illegal. Legalizing marijuana on a federal level would trigger huge risks because of the unpredictability of its consequences. Moreover, due to the size of the U.S. and its residents' different needs, the situation varies state by state in terms of the risks of abuse and dependence, the need for public health and self-fulfillment, and the threat of black markets.¹⁹⁵ Thus, federal legalization could also harm people and would force states where marijuana continued to be illegal to respond to these new issues. By permitting marijuana-related activities if legalized by the state, the individual needs of state residents are covered.

B. *Improving the Approach*

The Acts provide unique, helpful suggestions: these suggestions serve as the aim for a bill to propose, supplemented by basic protections. Alongside a general approach to transferring responsibility, the bill should prohibit the employment of people under 18 and sale to people under 21. Given that the exact consequences are not easily predictable, statistics on the impact on public health, trafficking, and black markets should be compiled. Of course, human life must not be put at risk, stringent requirements should be met before a license can be obtained, and the type and places of sale should be highly regulated. To avoid a rise in other drugs, suspicious activity reports should only be filed when there is an assumption that the marijuana-related activities are going

¹⁹⁵ See, e.g., Provisional Drug Overdose Death Counts, CENTER FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last visited Aug. 15th, 2020).

beyond those permitted by the law and the license, or that the business is merely a cover for illicit activities involving other drugs. It is important to convey a definite approach and clearly communicate that there should not be any negative consequences for banks or other businesses if they are involved with marijuana companies. As a result, it should not be necessary to require marijuana-related businesses to be accepted over other, equally suitable businesses. Of course, marijuana companies should be subject to taxation.

Establishing social equity concepts, as the MORE Act does, is a just approach to compensating for the past, when minority groups were victims of discrimination, and vertical integration should be prohibited. Criminal records still impact people who were discriminated against previously, and so they need to be expunged, with people negatively impacted by this receiving support to offset it. Furthermore, it is important to set out a basic protection framework to prevent the sale of marijuana to people under 21, driving under the influence of drugs, and so on. None of the acts regulates vertical integration: instead, they leave the decision to states.¹⁹⁶ However, this should be directly addressed in the act because the risk of monopolies, big companies ruling over large swathes of the U.S. market, is too high. Although they can control the quality of each production pathway, quality is likely to decrease due to limited competition, prices are likely to increase, the economy, customers, and other companies become dependent on this huge company, and small companies are unable to compete. As the disadvantages of monopolies in the marijuana industry clearly outweigh the possible benefits, vertical integration should be prohibited on a federal level.

V. CONCLUSION

¹⁹⁶ See generally U.S. CONST. amend. X.

Although states permit an enormous marijuana market to exist, many marijuana companies do not have the necessary access to banks, despite complying with state law. Under the CSA, any marijuana-related activities are unlawful. This gives rise to far-reaching consequences, such as the risk of void contracts or civil and criminal liability for banks. Although former Attorney General Sessions muddied the legal waters, enforcement is still limited, and different acts have tried to resolve these issues. While the pending SAFE Banking Act would solve the problem of bank access for marijuana companies, a more general approach, enabling states to legalize marijuana (or not) based on their residents' needs, should be put into practice, encompassing a range of protection measures, a social equity concept, and the prohibition of vertical integration.

However, the chance that a bill of this nature would be passed is dependent on politics. Unfortunately, it is unlikely that even the SAFE Banking Act will pass the current Senate, and President Trump used to have a strict anti-drug policy that precluded the legalization of marijuana. However, President Joe Biden, has a more liberal, marijuana-friendly approach but also excludes legalization.¹⁹⁷ It just has to be hoped that the presented issues will be addressed soon.

¹⁹⁷ See, e.g., Michael Tesler, *Why Joe Biden Could Swing Votes by Campaigning to Legalize Marijuana*, The WASHINGTON POST (2020).