

# CLIENT ALERTS

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## Bipartisan Bill Could Allay Federal Liability Concerns for Cannabis Industry Players

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Despite the passage of laws in Michigan and 45 other states that have permitted or decriminalized the use of cannabis-related products for medical or recreational use or both<sup>[1]</sup>, there remains an 800-pound gorilla known as the federal government that makes it a crime to manufacture, sell or possess marijuana. Marijuana is considered a “controlled substance” under the federal Controlled Substances Act (“CSA”), 21 U.S.C. §801 *et. seq.* This means is that irrespective of one’s full compliance with state marijuana laws and regulations, making, selling or possessing pot is a crime as a matter of federal law.

In August of 2013, the Department of Justice (“DOJ”) issued a policy memorandum, commonly known as the Cole Memorandum, to all United States Attorneys that provided guidance regarding marijuana-related financial crimes. In substance, the DOJ directed US Attorneys to refrain from prosecuting marijuana businesses that are complying with state law and, instead, to prioritize the government’s limited investigative and prosecutorial resources on:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal to other states where it remains illegal;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

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7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.

However, in December 2017, just days after California legalized recreational marijuana, Attorney General Jeff Sessions rescinded the Cole Memorandum and left it with the US Attorneys to decide how to deal with the conflict between federal and state law. The effect of Session's actions created confusion, legal uncertainty, and public health and safety issues in states where the use of marijuana is permitted.

In response to Sessions' action, on June 7, 2018, Senators Elizabeth Warren (D-Mass) and Cory Gardner (R-Colo) introduced a bipartisan bill titled the "Strengthening the Tenth Amendment Through Entrusting States Act"; for short, the "STATES Act" (S. 3032). The Tenth Amendment of the US Constitution basically says that any power that is not given to the federal government is reserved to the states. The States Act seeks to recognize and ensure each state's right to determine the best approach to regulating marijuana within its borders. It would also extend protections to Washington, D.C., U.S. territories and federally-recognized tribes.

Specifically, the STATES Act would amend the CSA to render it inapplicable to any person acting in compliance with state law relating to the manufacture, production, possession, distribution, dispensation, administration or delivery of marijuana. So long as a marijuana-related transaction complies with state law and regulation, it would not constitute trafficking in a controlled substance or the basis for forfeiture of property under the CSA; nor would the proceeds generated from any marijuana-related transaction that is compliant with state law be deemed proceeds of an unlawful transaction under the CSA.

The significance of exempting legal marijuana transaction proceeds from the application of the CSA can hardly be overstated. The CSA designates marijuana as a Schedule I drug, making it illegal for federally-regulated national banks to accept legal marijuana-related businesses as customers. The broad concern is that anyone whose fingerprints are found on marijuana transaction proceeds could be subject to prosecution as a co-conspirator or aider and abettor to a crime despite compliance of the transaction with state law. As a consequence, the current cannabis industry is a cash business with no real opportunity to use the banking system to deposit one's money or pay expenses or taxes other than in cash; an unwieldy and unsafe business environment at best.

Aside from exempting state-compliant marijuana businesses from federal prosecution, the STATES Act would remove industrial hemp from the list of controlled substances under the CSA, continue CSA's prohibition on endangering human life while manufacturing marijuana, and prohibit: (i) the distribution or sale of marijuana to persons under the age of 21 other than for medical purposes, (ii) the employment of persons under the age of 18 in marijuana operations and (iii) the distribution of marijuana at transport safety facilities such as rest areas and truck stops.

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If the STATES Act becomes law, it will promote a burgeoning cannabis industry and allay concerns about potential prosecution by the federal government. It also will induce financial institutions to finally do business with the legal marijuana industry players and give their cash the safe passage it deserves.

President Donald Trump has said he could support the STATES ACT and, with Sessions now out as Attorney General and the Democrats poised to take control of the US House of Representative in 2019, the prospects for passage of the STATES Act would appear more promising. . What is clear is that the people of 46 states have spoken to permit or decriminalize the use of marijuana and the tax revenue being generated from this multi-billion dollar industry is a boon to state governments. Logic would suggest that Washington should not only get in line with its constituents and pass the STATES Act but, at some point in the future, permanently eliminate the tension between federal and state law by excluding marijuana as a controlled substance under the CSA. For the time being, more Americans will demand that as long as legal marijuana businesses don't run afoul of state law, they should be safe from federal prosecution or interference.

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<http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>