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Hemp, CBD & Marijuana with a Perspective on Banking

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Federal Cannabis Laws

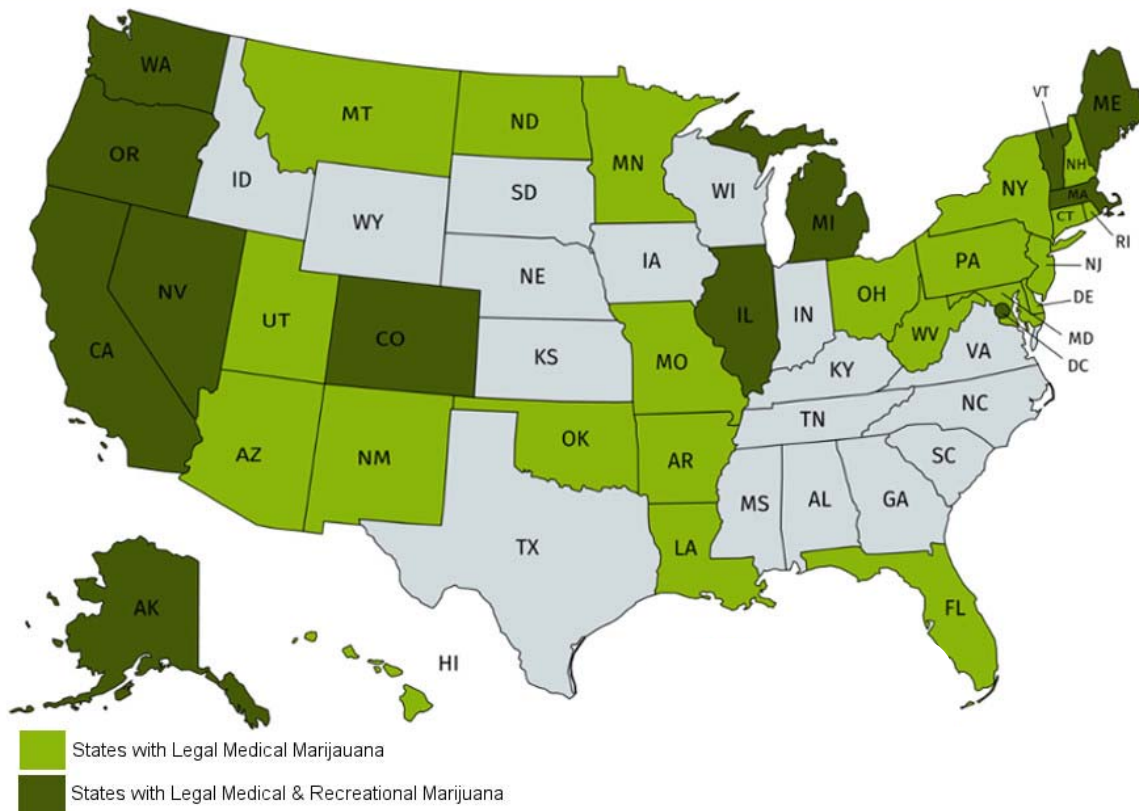


The Controlled Substances Act

- Section 841 of the Controlled Substances Act states that it “shall be unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C.A. § 841(a)(1).
- Section 841 applies to marijuana, a Schedule 1 controlled substance (21 U.S.C.A. § 812), regardless of whether it is legal under state law. *See Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

State Legalization of Marijuana

33 Legal Medical Marijuana States & DC
11 Legal Recreational Marijuana States & DC



Recreational States

Alaska
California
Colorado
Illinois* 1/1/2020
Maine
Michigan
Massachusetts
Nevada
Oregon
Vermont
Washington
and Washington D.C.

Rohrabacher-Farr Amendment



- In December 2014, Congress enacted the Rohrabacher-Farr Amendment (“RFA”), as part of an omnibus appropriations bill. *See Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).*
- U.S. Department of Justice may not use funds to prevent “States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”
- The amendment has been temporarily extended eight times. Extended through September 2019.
- Has been successfully used to prohibit the U.S. Department of Justice from prosecuting defendants for violating the C.S.A. in the context of medical marijuana. *See U.S. v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).
- On June 20th, 2019, the U.S. House of Representatives voted (267 - 65) to expand the RFA to cover adult-use cannabis regimes in addition to medical cannabis programs for the fiscal year ending September 30, 2020. The RFA requires annual renewal because it’s an amendment to the federal budget.

Consequences of Federal Illegality

Lack of Federal Law Protections / “Punitive” Tax Implications

- Claims Under Federal Law Generally Inapplicable
 - protections for individuals under the Federal Fair Housing Act and Americans with Disabilities Act generally don’t apply.
- No Federal Bankruptcy Protections
- Heightened Federal Tax Liabilities (I.R.C. 280E)

Banking Challenges

- Limited Access to Financial Institutions
 - Most financial institutions do not provide services to cannabis businesses.
 - *Why?* Because “the possession, distribution or sale of marijuana remains illegal under federal law, which means any contact with money that can be traced back to state marijuana operations could be considered money laundering and expose a bank to significant legal, operational and regulatory risk.” American Bankers Association’s Position, *Cannabis: Bridging the Gap between State and Federal Law*, <https://www.aba.com/advocacy/our-issues/cannabis>.

A Solution? The “SAFE Banking Act of 2019” (HR 1595 / S 1200)

- **Purpose:** “To increase public safety by expanding financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses.”
- **The Act:**
- Creates a safe harbor for depository institutions
- Prohibits adverse action against those institutions solely because they provide – or have provided – services to a “cannabis-related legitimate business or service providers” in states or territories where cannabis has been legalized
- Transactions shall not be considered as proceeds from unlawful activity solely because they are from a cannabis-related legitimate business or service providers
- Institutions will not be compelled to bank cannabis-related businesses

Status of the “SAFE Banking Act of 2019”

- The “SAFE Banking Act of 2019” has passed the House Committee on Financial Services, and House Leadership has announced that they intend to bring it to the House floor for a vote as early as the week of September 23rd (next week).
- On the Senate side, a companion bill is in development before the Senate Banking Committee. It’s Chair - Senator Mike Crapo (R) of Idaho – has indicated that he will likely address banking later this fall.
- President has offered assurances that he will sign the bill into law if presented to him.

Florida Cannabis Laws



Florida's Medical Marijuana Laws

- **November 8, 2016:** Amendment 2 passed by 71% and is now embedded in Florida's Constitution. Art. X, § 29, Fla. Const. (the "Medical Marijuana Amendment")
 - Allows medical use of marijuana for individuals with debilitating medical conditions as determined by a licensed Florida physician.
 - "Medical use of marijuana by a qualifying patient or caregiver in compliance with [the Medical Marijuana Amendment] is not subject to criminal or civil liability or sanctions under Florida law." Art. X, § 29(a)(1), Fla. Const.
- **June 2017:** Senate Bill 8-A signed into law, implementing the Medical Marijuana Amendment. (Codified in Chapter 381.986, Florida Statutes.)



Florida's Medical Marijuana Program: Qualifying Patients

Provides access to medical marijuana use for patients suffering from the following conditions (known as qualifying conditions):

- Cancer
- Epilepsy
- Glaucoma
- Positive status for human immunodeficiency virus (HIV)
- Acquired immune deficiency syndrome (AIDS)
- **Post-traumatic stress disorder (PTSD)**
- Amyotrophic lateral sclerosis (ALS)
- Crohn's disease
- Parkinson's disease
- Multiple sclerosis (MS)
- **Medical conditions of the same kind or class as or comparable to a qualifying condition**
- A terminal condition
- **Chronic nonmalignant pain** (caused by or originates from another qualifying condition)

Types of Products Available to Patients Under SB-8A



Capsules



Vape Pens



Oils



Lotions



Tincture



Shatter

Lawsuit Challenging Patients' Right to Smoke Medical Marijuana

- ***People United for Medical Marijuana v. Florida Dept. of Health***: Plaintiffs challenged the constitutionality of Florida's statute banning smoking.
- **Trial Court**: "Qualifying patients have the right to use the form of medical marijuana for treatment of their debilitating medical conditions as recommended by their certified physicians, including the use of smokable marijuana in private places." *People United for Medical Marijuana v. Florida Dept. of Health*, No. 2017CA001394, 2018 WL 2447102, at *6 (Fla.Cir.Ct. May 25, 2018).
- **Legislative Fix**: On March 18, 2019, Governor DeSantis Signs SB 182 – lifted the ban on smokable marijuana.

March 21, 2019:

First Sale of Smokable Medical Marijuana in Florida



Photo: tallahassee.com



Florida's Medical Marijuana Program: Status Update

Statistics as of September 13, 2019

Patients:

- 362,318 Registered Patients / 264,454 Active Patients
- Growth: Approx. 11,000 Active Patients added to program each month

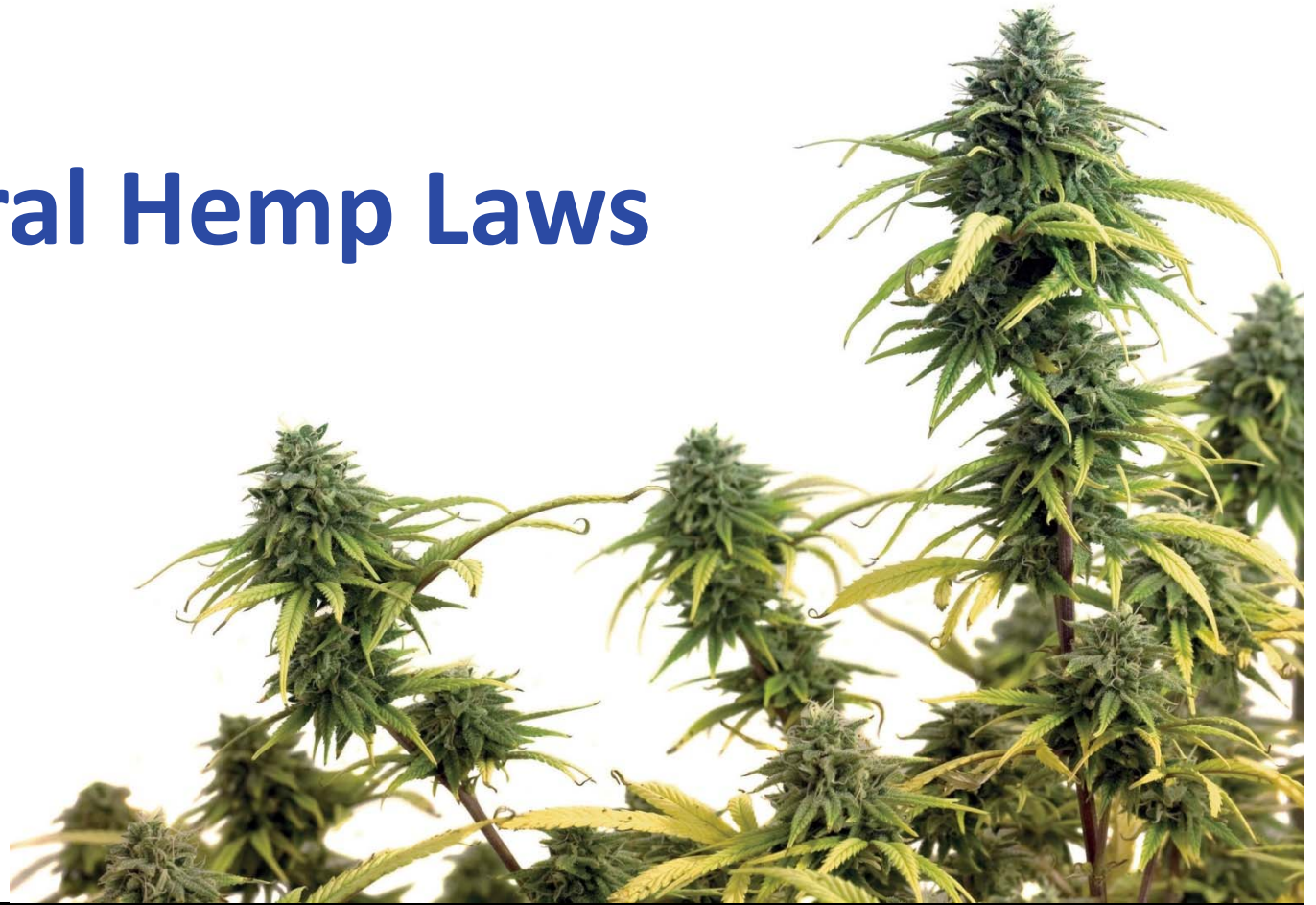
Licensed Cannabis Companies:

- 22 Vertically Integrated Licenses Issued (called “Medical Marijuana Treatment Centers” or “MMTCs”) / 13 Operational
- 166 Dispensaries Opened Throughout Florida
- Approx. \$500 Million in Projected Sales for 2019

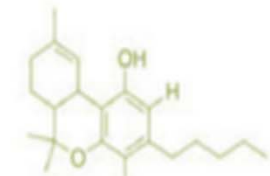
Potential Changes to Florida's Market Structure?

- Lawsuit challenging Florida's current law creating (a) mandatory vertical integration for licensees (MMTCs), and (b) caps of the number of MMTCs.
- Florida 1st District Court of Appeal ruled in favor of Plaintiff finding vertical integration and caps on licenses (as applied) unconstitutional and certified the following question to the Florida Supreme Court:
- "Whether the plaintiffs have demonstrated a substantial likelihood of success on the merits of their claims that the statutory requirements of vertical integration and caps on the number of medical marijuana treatment center licenses as set forth in section 381.986(8), Florida Statutes, are in direct conflict with Article X, Section 29, of the Florida Constitution?"
- Potential Outcome: More business opportunities in the State.

Federal Hemp Laws



Marijuana vs. Hemp

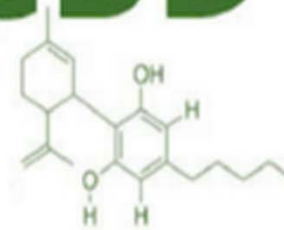


THC



Industrial Hemp
- No more than
0.3% THC

CBD



Marijuana:
- Over 0.3%
THC

Legal History of Hemp in the United States



Summary of the 2018 Farm Bill

Big Changes:

- Broadens definition of “hemp” to include all of its derivatives, including CBD.
- Excludes “hemp” from the definition of “marijuana” in the Controlled Substances Act. (Hemp and its derivatives are no longer considered federally illegal controlled substances.)
- Treats “hemp” like an agricultural commodity.
- Allows state to submit to the Secretary of Agriculture a plan under which the state intends to regulate the production of hemp.
- Creates protections for interstate commerce.

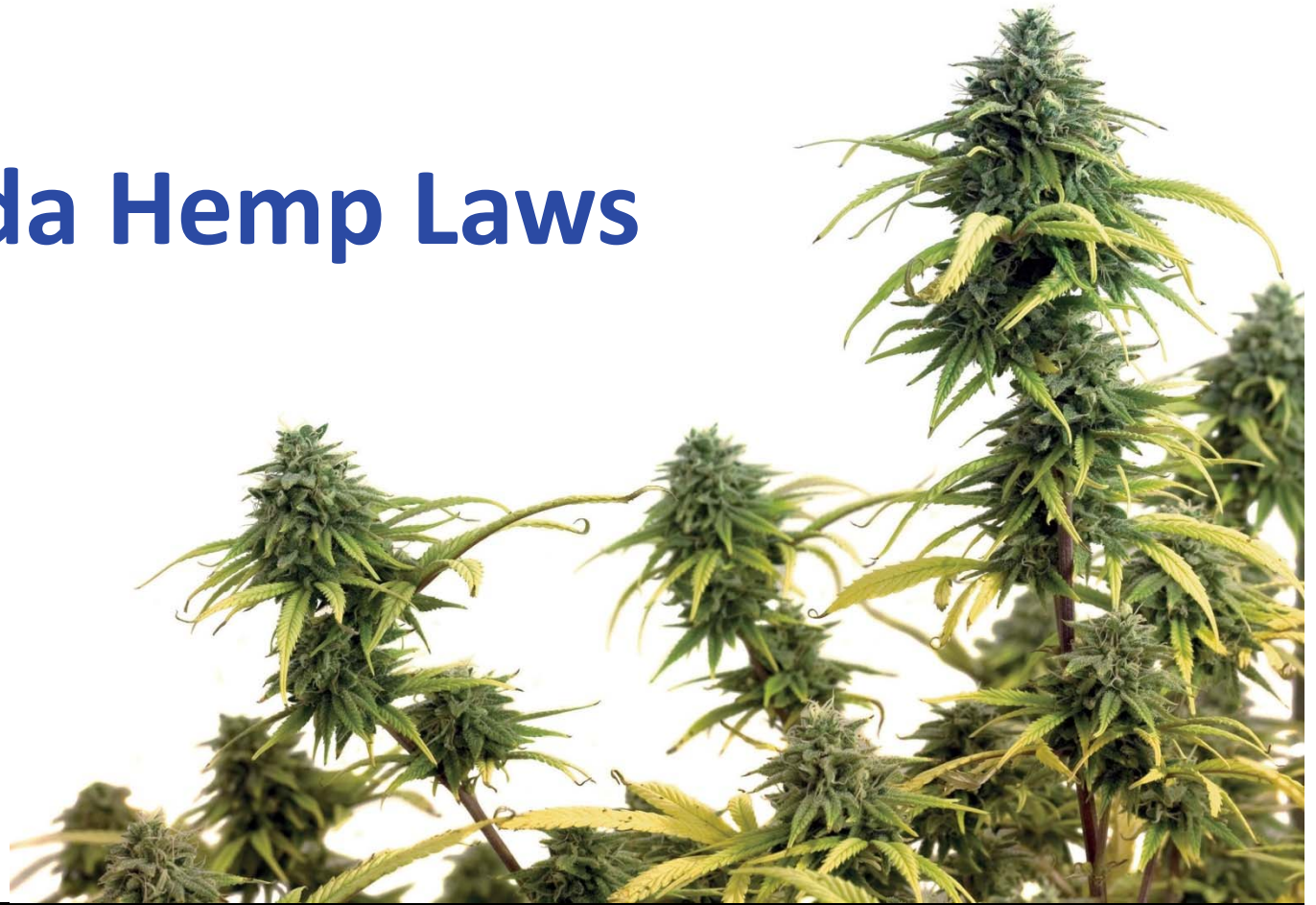
Challenges Remain for CBD:

- On the same day the 2018 Farm Bill was signed into law, the FDA Commissioner issued a press release reiterating that “it’s unlawful under the FD&C Act to introduce food containing CBD... into interstate commerce, or to market CBD...products as, or in, dietary supplements, regardless of whether the substances are hemp-derived.”

Status of the 2018 Farm Bill

- The 2018 Farm Bill has not been implemented. Hemp companies are currently operating pursuant to the 2014 Farm Bill.
- USDA is tasked with issuing implementing regulations. Draft regulations have been sent to the White House for review.
- USDA's goal is to have regulations in effect by the fall of 2019 to accommodate the 2020 planting season.
- Once USDA's regulations are effective, states can submit their plans to the USDA for approval in order to regulate their own state hemp program.

Florida Hemp Laws



Florida's Hemp Law (SB 1020)

On June 25, 2019, Governor DeSantis signed Senate Bill 1020 and on July 1, 2019, the bill became law.

- Hemp is no longer considered a controlled substance under Florida law. Rather, it is considered an agricultural commodity.

Florida's Hemp Bill Creates a Robust Commercial Industry

- Allows for:
 - Cultivation of hemp with a license (no limits on the number of licenses- est. 8,000 applications for cultivation licenses)
 - Manufacturing, distribution, and sale of hemp derived products. (requirements, such as permits, testing, and labeling/packaging)
 - Hemp derived CBD products are permitted under Florida law. *Note that Florida's law will not supersede federal laws and regulations governing hemp-derived CBD products.

Status of Florida's Hemp Laws

- Florida's commercial hemp program has not been implemented.
- Florida's Department of Agriculture and Consumer Services (FDACS) is tasked with issuing implementing rules.
- FDACS is currently in the rule-making process.
- FDACS estimates that Florida's new hemp program will be operational before the end of 2019. However, it could be longer.



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Matthew Ginder, Esq. is senior counsel in the Cannabis Law practice group at Greenspoon Marder. Mr. Ginder represents various cannabis and hemp related businesses where he assists in many areas of the industry, including licensing, regulatory and compliance, and business transactions. He also represents ancillary businesses who provide products or services to the cannabis industry and advises individuals, investors, lenders, startups, and large corporations on direct and indirect participation in state-legal cannabis markets.

GreenspoonMarder

Who We Are

Greenspoon Marder LLP is a national full-service Am Law 200 and NLJ 500 business law firm with over 200 attorneys across 26 offices throughout the United States. Our firm was founded with the goal of providing the highest quality legal services at the highest value for our clients. Each of our clients are unique and so are their legal needs. We believe, no one size fits all for professional services. Our lawyers offer flexible and creative solutions to meet our clients individual needs.

What We Do

Our team has the experience to understand our clients' challenges and to address those challenges with individualized strategies. As valued legal and business advisors, we provide comprehensive and tailored client services which our clients expect and deserve. We serve Fortune 500, middle-market public and private companies, start-ups, emerging businesses, individuals and entrepreneurs across the United States and internationally.

