

Practice Update

117th Congress Outlook for Cannabis

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As we start the year, with a new Administration and the Democrats in (slim) control of both Houses of Congress, some in the cannabis business are tempted to cheer in anticipation of a very successful year on cannabis legislation. After all, President Biden spoke of decriminalization of cannabis during the election, Vice President Harris supported the MORE (Marijuana Opportunity, Reinvestment and Expungement) Act last year, which passed the House, and the new Senate Majority Leader, Senator Schumer (D-New York), introduced the Marijuana Freedom and Opportunity Act last year. What could go wrong?

But as Lee Corso says on College Game Day when he disagrees on a prediction, “not so fast my friend!”

The stars may seem to be lining up, but it will still be a difficult path to get any cannabis legislation through Congress. There are three reasons for that.

First, the Democrats don’t yet have a unified position. President Biden favored decriminalization during the 2020 campaign. Others in Congress want to go much further. Some want to focus on allowing the cannabis industry to have access to the federal banking system. A bill to do this, called the Secure and Fair Enforcement (SAFE) Banking Act, was introduced during the last session of Congress. Others feel that passage of only the SAFE Act would send the wrong message—protecting the

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cannabis firms while ignoring the consequences of decades of criminal prosecutions of harmless drug use. The MORE Act, which passed the House, was basically a messaging bill as it did not include any regulatory mechanisms to guide the cannabis industry. Senator Wyden (D-Oregon), who takes over as the Chair of the Senate Finance Committee, wants to pass a bill that establishes a taxing and regulatory framework. But as we all know, once anyone starts talking about a new federal tax on an industry, controversies arise. Senator Schumer gave an interview recently to former NBA star Al Harrington where he said he would make passage of a cannabis reform bill a high priority. He said he would move beyond his Marijuana Freedom and Opportunity and would combine elements of other bills.

Second, getting a bill out of the Senate, with the current filibuster rules, requires 60 votes which means picking all 50 Democratic votes as well as 10 Republicans. The cannabis industry lost a key Republican Senate supporter in the election when Colorado Senator Cory Gardner was defeated. His Democratic opponent, John Hickenlooper, may be just as passionate as Senator Gardner on cannabis issues, but Senator Gardner could work the Senate Republicans from inside the caucus. The Republican Senate Leader, Senator McConnell, has never favored cannabis legislation. Further, he uses the cannabis issue as a tool in the culture wars, stressing that Democrats want to focus on marijuana reform at the expense of more important issues. Next year, in 2022, the control of the Senate will definitely be in play. Many voters in the Republican base do not support legalization of marijuana. While the polls show that the majority of Americans favor cannabis reform, the Republicans will be focusing on getting out their base (as will the Democrats). So, it may be hard to get the needed 10 Republican votes for cannabis legislation. And, in fact, we do not know if all the Democrats in the Senate support a comprehensive bill. There has not been a direct vote in the Senate on the issues involved. We know where a number of outspoken members are, but what about

the 25-30 Democratic Senators that have not been vocal about their position?

Third, passage of a comprehensive bill in the House is also no sure thing. The MORE Act did pass the House last year, but only in December when it was clear the bill wouldn't get through the Senate so the vote was basically a "free vote" and does not reflect how the vote will go when it really counts. Also, the vote was 228-164 with only five Republicans voting for the bill and six Democrats voting against the bill. This shows that a comprehensive cannabis bill is still very partisan. There were 38 members that didn't vote, and 34 of them were Republicans. And after the election, the Republicans picked up seats in the House. As of today, the Democrats only control the majority by a small handful of votes. If the Republicans unite against a comprehensive bill, and the six Democratic votes also go against the bill, it would be defeated.

What does this mean? Of course, the cannabis industry should support efforts to get a comprehensive bill passed. If the Democrats can agree on a bill, and they can obtain the 10 Senate Republican votes they need, it can happen. The industry should focus on getting the Democrats on one page on a compromise bill that has a chance of passage. Then they should work to convince Republican senators to join the effort.

But at the same time the industry should focus on getting piecemeal provisions passed. The cannabis provision that has been successfully enacted several times is a section of an appropriations bill, originally the Rohrabacher-Farr amendment. Always remember that Congress does not need to pass a comprehensive cannabis bill, but it always must pass, every year, the annual appropriations bills. Smaller cannabis provisions could be added to a number of other appropriations bills. Thus, while comprehensive cannabis bills are caught up in procedural hurdles, the spending bills can slip through the cracks.

Like everyone in the cannabis industry, we hope that Congress will pass comprehensive cannabis legislation this year. We will do all we can to see that happens. But we will also work to make sure that even if comprehensive legislation is not enacted, that some important reforms will get done. Do not underestimate the value of incremental cannabis reforms. They will give the industry more room to operate as well as set the stage for bigger reforms in the future.

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