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Generations Winter 2021 - How Will Legal Landscape Around Cannabis Evolve Under New Administration?

With the change of administrations, attention has refocused on the evolving legal landscape surrounding cannabis. The Biden administration is likely to be more interested in accelerating the already rapid movement toward federal recognition of the trend seen in many states to decriminalize or legalize cannabis for medical and/or recreational use.

As a preliminary matter, it is critical to recognize that the legal status of cannabis remains complex. With the exception of the "industrial hemp category," cannabis remains a Schedule I drug, the possession, sale or distribution of which remains illegal under federal law. Under the U.S. Constitution's "supremacy clause," federal law prevails despite state laws to the contrary that may decriminalize or legalize cannabis. However, while the federal law remains in place, in practice, the federal government has largely abandoned prosecutions of cannabis-related offenses except in specific, egregious circumstances.

Despite the federal prohibition, there is clearly increasing momentum at the state level for legalization. Thirty-five states have legalized cannabis, either for medical or recreational use or both. The Biden administration has indicated it is interested in at least exploring the legalization of cannabis, either through administrative action or legislation. Administrative action would more likely affect medical use and would likely require a shift in the stance of the Drug Enforcement Administration (DEA), which has to date been very rigid in its anti-cannabis posture. That policy may change with a new DEA administrator, who will be appointed by President Biden. In short, we will likely see a shift toward legalization from the executive branch of the federal government and a decreasing interest in discretionary enforcement involving cannabis.

When the 2018 Agriculture Improvement Act, or "Farm Bill," was enacted in December 2018, it legalized a defined subset of cannabis called "industrial hemp." Industrial hemp is a form of cannabis (cannabis sativa) that is marked by a lower concentration of THC (tetrahydrocannabinol), the psychoactive element in cannabis. The Farm Bill allows for the growing and selling of industrial hemp under state-imposed regulations (or in some cases, U.S. Department of Agriculture regulations).

As of this writing, it remains unclear how fast either the Biden administration or Congress will move toward the legalization of cannabis and precisely in what way. Despite the growing acceptance of the concept of legalization, there are a number of factors that may delay the process. First, there is an increasing interest in combining legalization of cannabis with various "social equity" initiatives, which promise to complicate the situation. Such initiatives look to address issues related to mass incarceration, disadvantaged populations and criminal justice reform. Second, although the basic concept of legalization is simple, implementation and regulation are not so simple and involve some difficult trade-offs. There are a host of stakeholders who agree on the idea of legalization but have divergent scientific, economic, social and policy views on implementation. Finally, the simplicity of legalization will conflict with the inherent difficulty in crafting an accompanying regulatory scheme, particularly if (as is likely) the federal and state governments will be developing these regulations in parallel.

The bottom line is that while it is likely there will be increased investment opportunities in the cannabis (and adjacent) markets in the coming years, the transition from illegality to a regulated market will be complex and difficult and will not happen overnight.

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Authors



Stanley A. Twardy, Jr.

Of Counsel

Stamford, CT | (203) 977-7368

satwardy@daypitney.com