

# **Will The Grass Be Greener?: Highlights in Cannabis Banking and an Inside Look Into What 2021 Will Bring**

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# Presenters

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- Under federal law, the Controlled Substances Act (CSA) defines “marihuana” to mean “all parts of the plant **Cannabis sativa L.**, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.” 21 USC § 802(16)

**THC** = tetrahydrocannabinol

**CBD** = cannabidiol

# Cannabis

(Genus)

Marijuana Strain  
(5-25% THC)

Industrial Hemp Strain  
(0.3% THC)

**Psychological Impact**

**auto parts, soap, concrete**



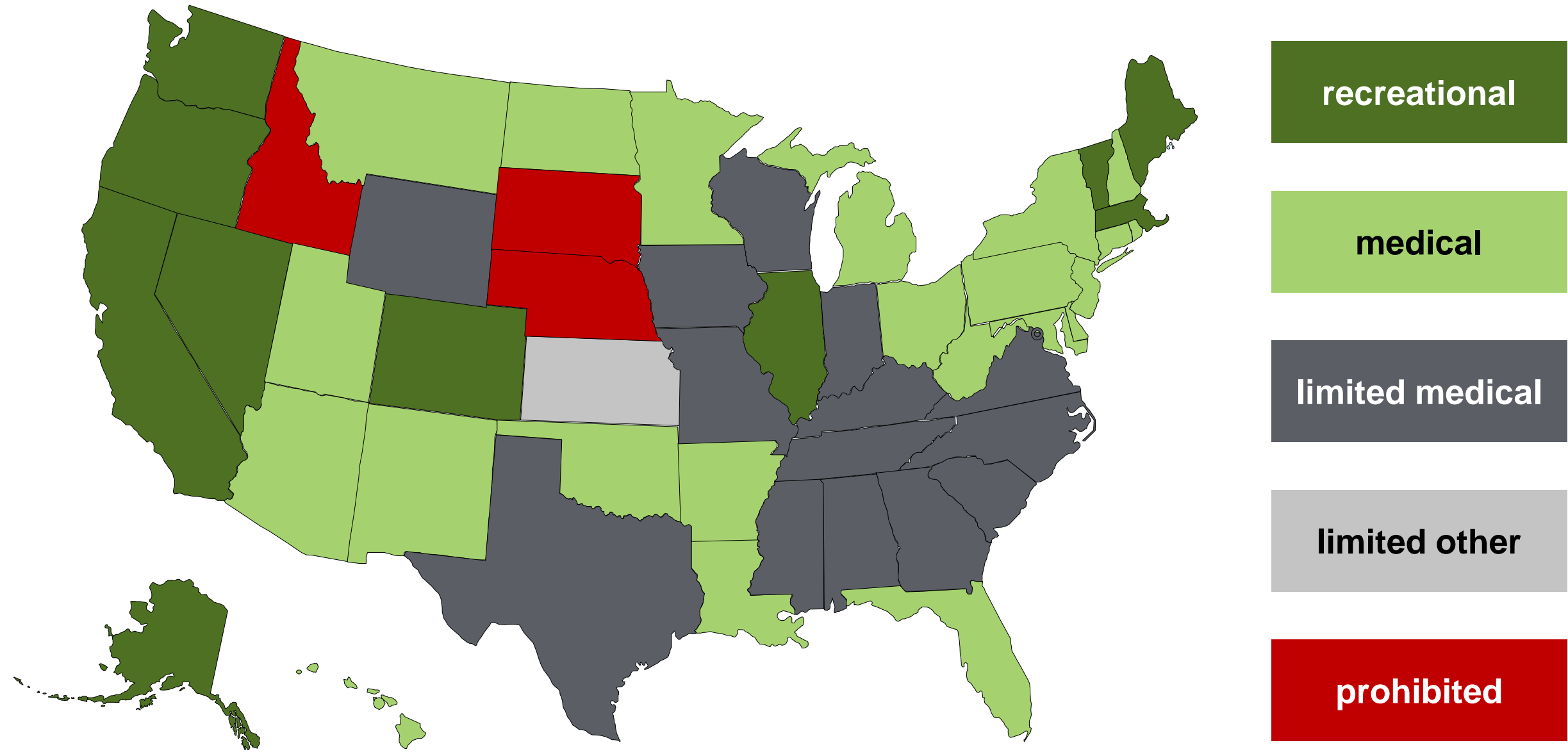
# Current Size of the Legal Market

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- BDS Analytics estimated approximately \$9.1B in U.S. legal cannabis spending in 2018 and \$12.2B in U.S. legal cannabis spending in 2019
- BDS Analytics estimates \$31.1B in U.S. legal cannabis spending in 2024
- Brightfield Group estimates \$16.8B in U.S. legal CBD spending in 2025

Modern Movement to  
Decriminalize or Legalize  
Medical Cannabis

# Legality of Cannabis in the U.S.





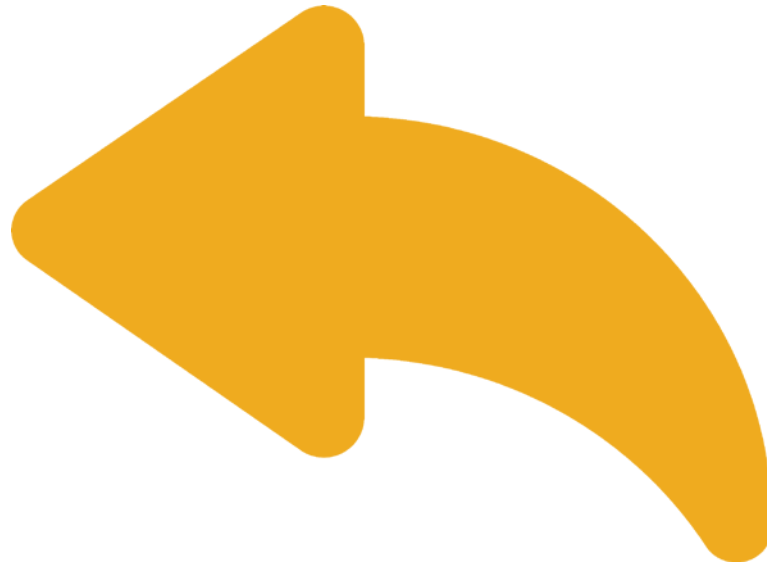
- Rohrabacher–Blumenauer amendment to Federal Spending Bill
- Only applies to medical marijuana operations in compliance with state laws
- Must be renewed each fiscal year
- Last renewed through September 30, 2020

- 2018 Farm Bill
  - Signed into law on December 20, 2018
  - Removes "industrial hemp" from the definition of marijuana under the CSA
  - Federally legalizes interstate sales of "industrial hemp" and derived products, subject to applicable state laws
- FDA has jurisdiction over CBD if food or dietary supplement
- Epidiolex is the only cannabis-containing product that has been approved
- FDA Statement on Research to Prove Safe and Effective Medical Uses (June 25, 2018 press release)
- FDA Statement Regarding 2018 Farm Bill and FDA's Regulation of Cannabis-Containing Products (December 20, 2018)
- FDA Statement Regarding Regulatory Pathways for CBD Products (April 2, 2019)
- FDA hearing regarding products containing cannabis and cannabis-derived compounds (May 31, 2019)

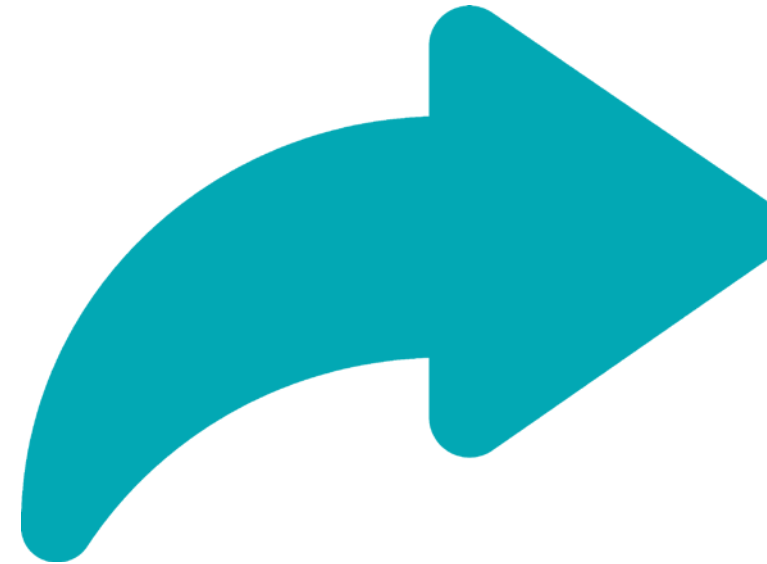
- Because cannabis is a Schedule 1 drug under the Controlled Substances Act, the proceeds from cannabis related activities are subject to U.S. AML laws (BSA and Money Laundering Control Act)
  - Financial institutions (FIs) may directly or indirectly receive proceeds from cannabis-related activity
  - May be aiding and abetting illegal activity
  - Results in risk of federal prosecution and regulatory enforcement actions
- Federal law has resulted in marijuana businesses, even where legal under state law, having little to no access to banking services
- Secondary, indirect providers of goods or services to marijuana businesses also impacted

- Guidance to United States Attorneys on marijuana enforcement issued in August 2013
- Identifies eight enforcement priorities focused upon “in recent years”
- Distribution to minors; sale by criminal enterprises, gangs and cartels; preventing diversion from legal states to other states; use of state authorized marijuana activity from being used as a cover for other illegal activity; violence and use of firearms; drugged driving and other adverse public health consequences; growing on public lands; possession/use on federal property
- “These priorities will continue to guide the Department’s enforcement of the CSA against marijuana related conduct.”
- Expectation that states legalizing marijuana will implement “strong and effective regulatory and enforcement systems”
- Rescinded in January 2018

## State efforts to provide cannabis banking solutions



**Where have we come from?**



**Where are we going?**



- What has California looked at?
- What efforts have been considered on the local level?
- What is the dynamic between state and federal regulators?



What is going on  
in **New York**?



What is going on  
in **Arizona**?



Other state efforts.  
**Washington.**



- What has California looked at?
- What efforts have been considered on the local level?
- What is the dynamic between state and federal regulators?



- BSA Expectations Regarding Marijuana-Related Businesses (FIN-2014-G001; issued 2/14/2014)
  - Purpose was to clarify expectations for banks in light of state legalization initiatives and related DOJ guidance (Cole Memorandum)
  - Issued in conjunction with the Cole Memorandum
  - Each FI must decide for itself whether to open, close or refuse any particular account or relationship based on factors specific to that institution
    - Financial institution must conduct substantial due diligence on customer and its business during onboarding and ongoing to assess risks
    - Standards for due diligence are very high
  - Guidance only shows FIs how to act consistent with their obligations under Bank Secrecy Act

- SAR filings required
  - SAR filing obligation not affected by state legalization
  - SARs must be filed for standard reasons: if FI knows or has reason to know that transaction by or through it involves funds from illegal activity, lacks apparent legal purpose, is an attempt to disguise funds from illegal activity
  - SARs intended to be useful to law enforcement in criminal investigations and proceedings
  - Three marijuana designated SARs created

- Guidance enumerates red flags that implicate Cole memo priorities
  - Guidance lists several potential red flags
  - These can be incorporated into the FI's AML compliance program
- Guidance reiterates currency transaction reporting obligations
- Guidance states that FinCEN's enforcement priorities relate to systemic or significant failures, not isolated lapses in technical compliance

- FinCen issues regular updates on SARs filed by banks and credit unions
  - Steady increase in SAR filings year over year for the last 3 years
- But what does this mean?
  - Are more FIs and credit unions willing to provide banking services, or
  - Are more SARs being filed defensively?

- Most effective solution to give cannabis businesses access to banking services is to amend the CSA to decriminalize marijuana
- Bills have been going up and down in Congress but nothing substantive has passed yet
- We have seen the:
  - SAFE Act (received in Senate and sits now with committee; included in COVID legislation from House but did not make its way through Senate)
  - STATES Act (still sits in committee)
  - MORE Act (Marijuana Opportunity Reinvestment and Expungement Act (pending))

- Secure and Fair Enforcement Banking Act (SAFE Banking Act) (H.R. 1595); Introduced by Rep. E. Perlmutter and others (3/19)
  - Focuses on banking sector; no direct relief to cannabis businesses
  - Safe Harbor: prohibits federal bank regulators from taking adverse action against an FI that provides services to cannabis-related legal business, or a service provider to a legal cannabis business
  - Exempts depository institutions from liability under any federal law solely for providing financial services pursuant to state law
  - Protects FI from forfeiture provisions with respect to any interest in collateral
  - Protects “ancillary businesses”: proceeds of transactions by a legitimate cannabis business/service provider are not proceeds of illegal activity under federal law

- Removes marijuana from the list of scheduled substances under the Controlled Substances Act and eliminates criminal penalties for an individual who manufactures, distributes, or possesses marijuana.
- The bill also:
  - replaces statutory references to marijuana and marihuana with cannabis,
  - imposes a 5% tax on cannabis products and requires revenues to be deposited into the trust fund,
  - makes Small Business Administration loans and services available to entities that are cannabis-related legitimate businesses or service providers,
  - prohibits the denial of federal public benefits to a person on the basis of certain cannabis-related conduct or convictions,
  - prohibits the denial of benefits and protections under immigration laws on the basis of a cannabis-related event (e.g., conduct or a conviction), and
  - establishes a process to expunge convictions and conduct sentencing review hearings related to federal cannabis offenses.





- Calls for legislative reform are widespread
  - **Attorney General:** “I am not going to go after companies that have relied on the Cole Memorandum”
  - **Secretary of Treasury:** “I too share your concern”
  - **Comptroller of Currency:** “Congress is going to have to act at the national level”
  - **CUNA:** “The lack of guidance on banking for legitimate cannabis business has created a dangerous and costly environment for all...”
  - **ABA:** “The time has come for Congress to provide greater legal clarity for banks in marijuana legal states”
  - **Attorneys General of 38 states:** “Open doors to the banking system for the legal marijuana industry”
  - **Governors of 12 states**
  - **Presidents of 3 Federal Reserve Banks**

## Enforcement Trends

- Almost three years after the rescission of the Cole Memorandum, not much has changed.
- Priority cases remain the same and primarily involve criminal enterprises, gangs, cartels, violent traffickers, cross border importation, diversion and public lands cases
- DOJ resources are finite

## FinCEN Guidance Remains in Place

- FI's decide whether to bank legitimate cannabis related businesses
- Must conduct customer due diligence and file SARs in accordance with guidance
- Shift toward quality, not quantity

## DOJ's Corporate Compliance Guidance

- Issued April 30, 2019 (updated on June 1, 2020)
- Asks three questions:
  1. Well designed?
  2. Applied earnestly and in good faith?
  3. Does it actually work in practice?
- Compliance is a sword and shield; individuals can be held accountable

- COVID-19 Impact
- Risks for financial institutions
  - Enforcement risk appears low
  - Administrative actions are often a byproduct of a criminal investigation
  - Reputation risk still exists
  - So what are financial institutions doing?
  - No bankruptcy protection for debtors





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