
Current State of Federal and State Law Regarding Cannabis Banking

Mid-America Lenders Conference
Corpus Christi, Texas
April 8-10, 2019

Erin Fonte
Hunton Andrews Kurth LLP
111 Congress Avenue, Suite 510
Austin, Texas 78701
(512) 542-5011
efonte@HuntonAK.com

Brenna McGee
Hunton Andrews Kurth LLP
111 Congress Avenue, Suite 510
Austin, Texas 78701
(512) 542-5009
bmcgee@HuntonAK.com

Where Are We Now?

Marijuana vs. Hemp

Federal Law and Guidance

State Laws

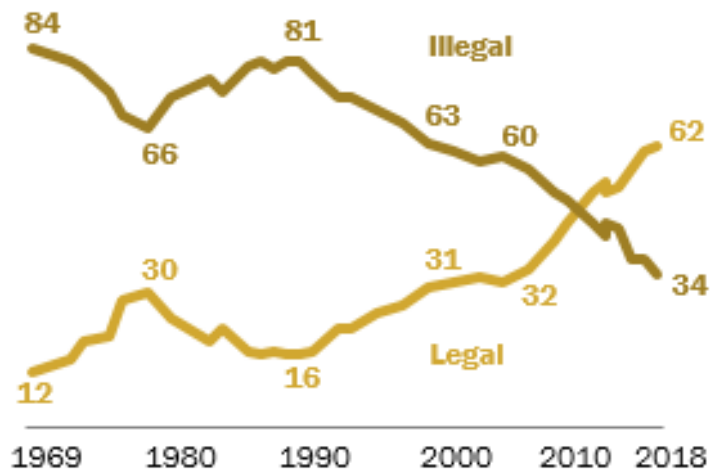
SBA's Standard Operating Procedure

Banking Cannabis

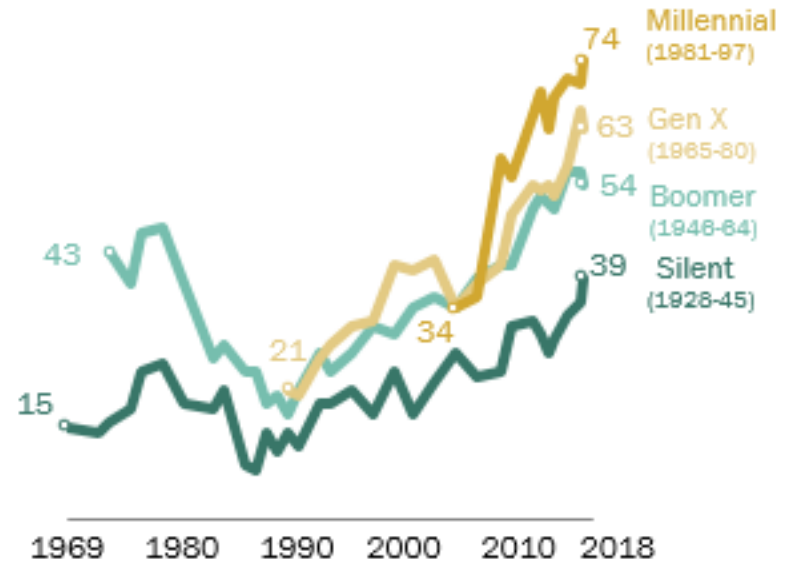
Public Opinion Has Shifted on Legalizing Marijuana

U.S. public opinion on legalizing marijuana, 1969-2018

Do you think the use of marijuana should be made legal, or not? (%)



% who say marijuana should be made legal

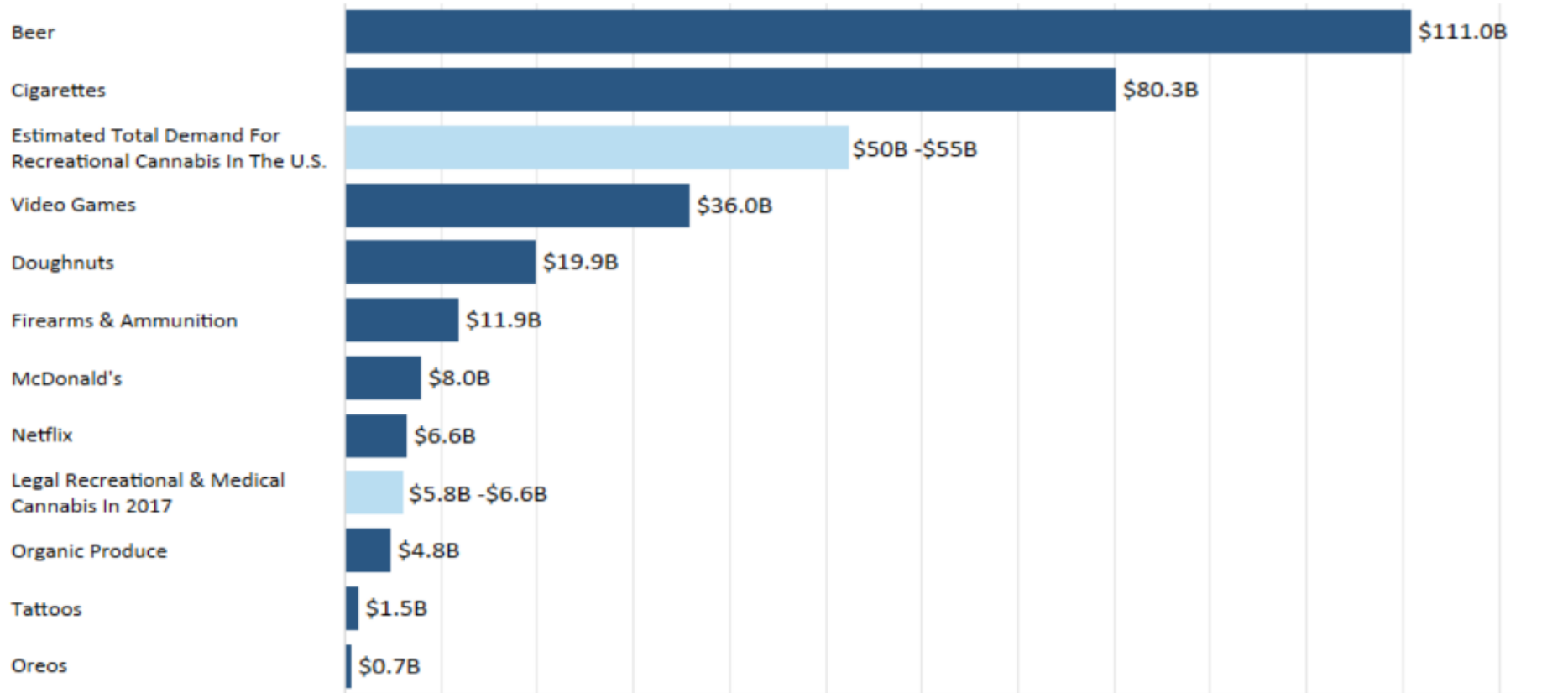


Note: Don't know responses not shown.

Source: Survey of U.S. adults conducted Sept. 18-24, 2018.

PEW RESEARCH CENTER

Annual U.S. Cannabis Sales vs. Other Industries and Goods



Source: Brewers Association, Alcohol & Tobacco Tax & Trade Bureau, Entertainment Software Association, Goldstein Research, IBIS World, Netflix, Nielsen, Nabisco
Copyright 2018 Marijuana Business Daily, a division of Anne Holland Ventures Inc. All rights reserved.

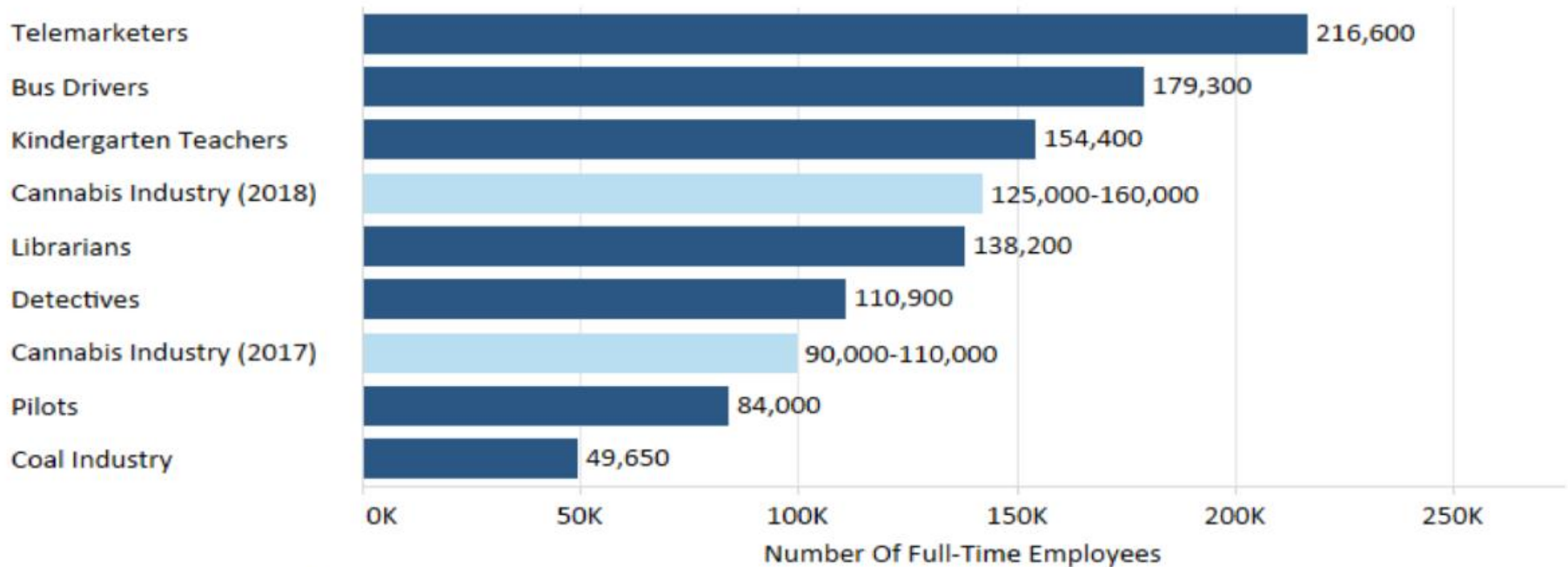
Cannabis Employment



Chart of the Week

Marijuana Business Daily[®]

**Number Of Full-Time Workers In The Cannabis Industry:
Employment Comparisons To Other Mainstream Professions & Industries**



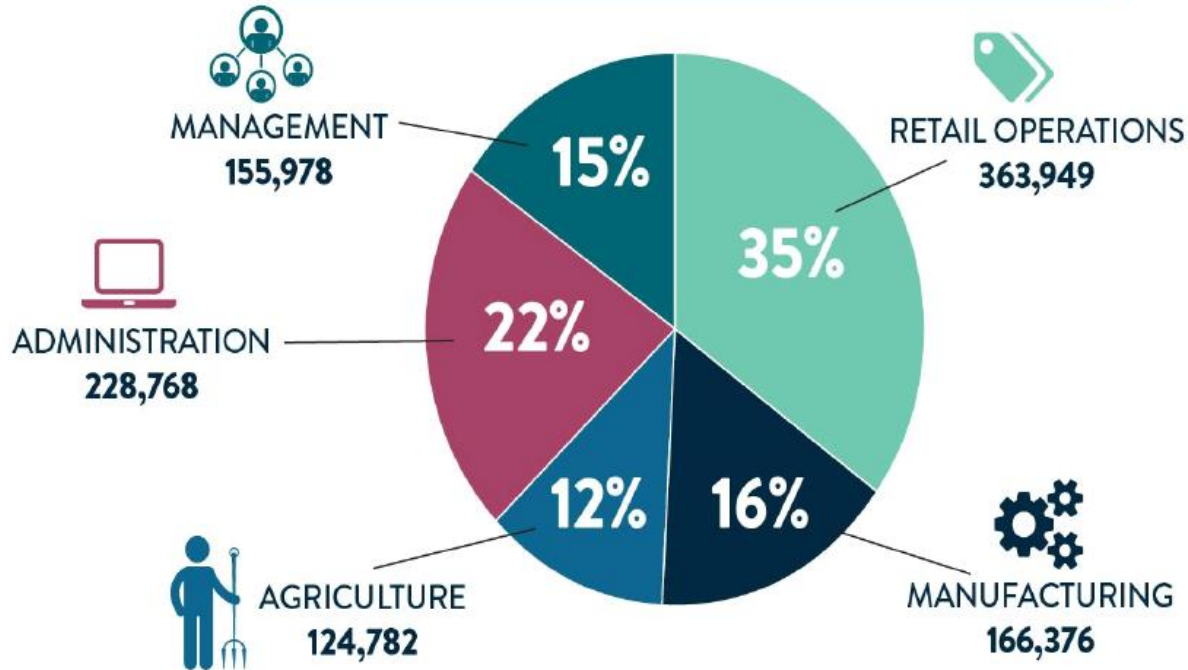
Note: Cannabis industry employment figures calculated using number of full-time equivalent workers that support the marijuana industry.
Source: MJBizDaily, U.S. Bureau Of Labor Statistics Employment Projections: 2016-2026. BLS projections includes both full- and part-time workers.
Copyright 2018 Marijuana Business Daily, a division of Anne Holland Ventures Inc. All rights reserved.

Potentially Huge Impact on the U.S. Economy

CannaBit®

JOB CREATION WITH FEDERAL CANNABIS LEGALIZATION

FOR MORE INSIGHTS
LIKE THIS VISIT:
NEWFRONTIERDATA.COM



**1.04
MILLION
JOBS**

POTENTIAL TOTAL OF
CANNABIS JOBS BY 2025

BREAKDOWN OF PROJECTED CANNABIS JOBS BY SECTOR



© 2018 Frontier Financial Group, Inc., dba New Frontier Data | Note: 2025 theoretical projections assumes full legalization minus 25% residual illicit market.

Cannabis: Marijuana vs. Hemp

Marijuana	Hemp
Marijuana is abundant in THC with concentrations between 15% to 40%	Hemp contains a very low concentration of THC (0.3% or less)
Marijuana is grown for recreational and medicinal purposes	Hemp is grown primarily for industrial purposes
Marijuana can be smoked, inhaled, ingested or injected directly into the body. THC is also commonly extracted from the plant and used in a variety of methods including vaporizers, capsules, edibles and more	Hemp's rapid growth and strong fibers make it ideal for crafting durable rope, clothing, sail, and paper. With the fast-growing popularity of CBD, hemp is also used to produce a wide variety of THC-free CBD products
Still a schedule I drug under the federal Controlled Substances Act	<u>No longer</u> a Schedule I drug under the federal Controlled Substances Act as of December 20, 2018

Federal Law and Guidance: Current Landscape

Marijuana:

- Still a schedule I drug under the federal Controlled Substances Act
- Cole Memos (rescinded in 2018)
- FinCEN Guidance on Marijuana SARs
- Rohrabacher-Farr (a/k/a Rohrabacher-Blumenauer) Amendment
- Multiple bills working through Congress

Hemp:

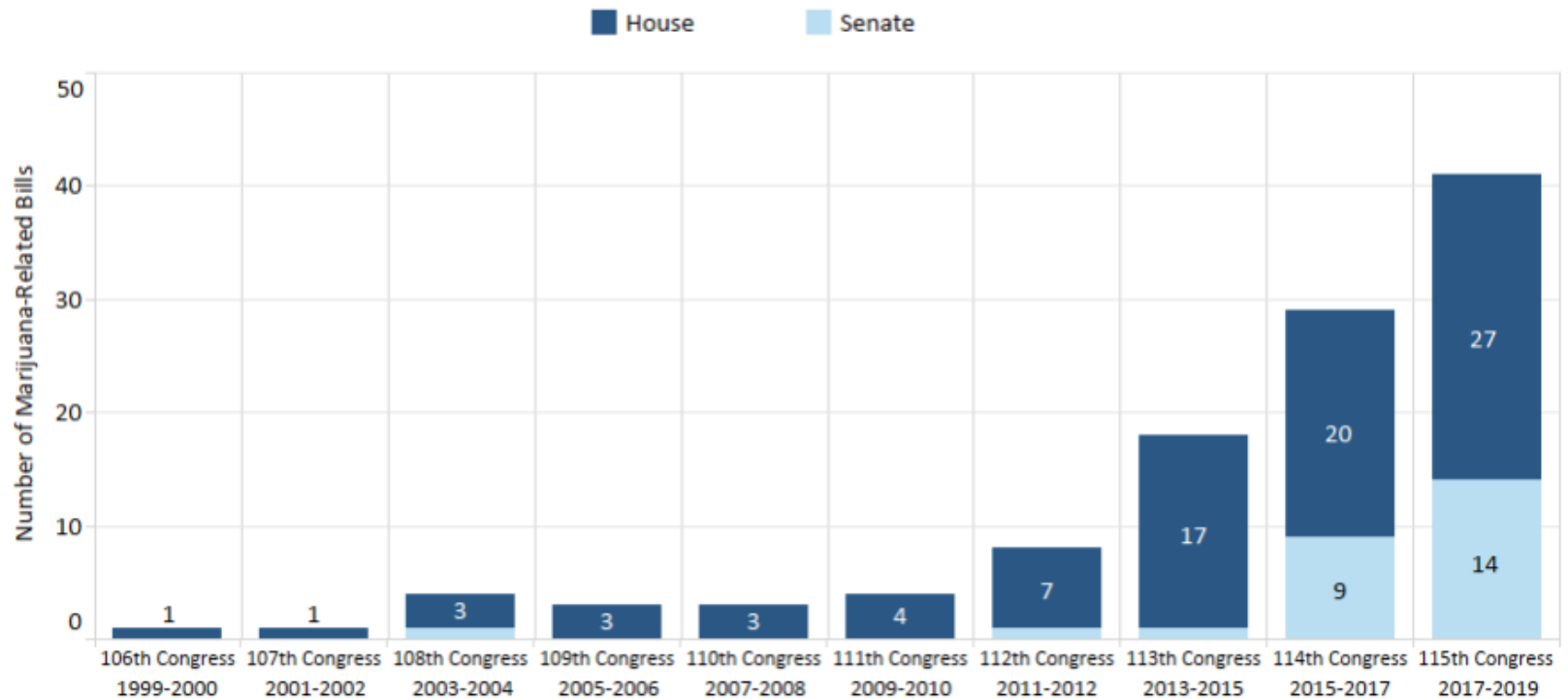
- NOT a schedule I drug under the federal Controlled Substances Act
- 2018 Farm Bill removes hemp (hemp cannot contain more than 0.3 percent of THC) from the Controlled Substances Act

Marijuana Legalization Continues to be a Hot Topic in Congress

Chart of the Week

Marijuana Business Daily®

Number of Marijuana-Related Bills Before the U.S. Congress: 1999-2018



Source: GovTrack

Copyright 2018 Marijuana Business Daily, a division of Anne Holland Ventures Inc. All rights reserved.

Arkansas Law: Current Landscape

Marijuana:

- Medical marijuana is legal in Arkansas under the Arkansas Medical Marijuana Amendment of 2016; currently 32 licensed dispensaries
- Regulated by the Arkansas Medical Marijuana Commission, which is tasked with administering and regulating the issuance of licenses to operate medical marijuana dispensaries and cultivation facilities, and works with Alcoholic Beverage Control to implement and enforce the requirements of the amendment

Hemp:

- As of January 2019, the Arkansas State Plant Board has issued industrial hemp cultivation licenses to four companies, processor licenses to three companies, and seed dealer/labeler licenses to two companies
- Arkansas issued the licenses under the 2014 Farm Bill and a 2017 Arkansas law, which allow for research cultivation of hemp. Mary Smith, director of the seed division of the Arkansas State Plant Board, said the Board has not yet discussed with the U.S. Agriculture Department whether its regulatory setup will pass muster with the 2018 Farm Bill

Louisiana Law: Current Landscape

Marijuana:

- Medical marijuana has been legal in Louisiana since 2015, although patients still do not have access to it; medical marijuana is expected to be available for patients by May 2019
- LSU and Southern University are the only authorized cultivators and do not have marijuana available for patients yet. In addition to the two cultivators, there will only be nine dispensing pharmacies throughout the state

Hemp:

- Louisiana does not allow the cultivation of hemp
- The Louisiana legislative session just started on April 6th and Representative Schexnayder is planning legislation that, if approved, will create the opportunity for agricultural producers in Louisiana to produce industrial hemp. However, the bill would have to get through the Agriculture Committee and Senator Thompson – the chairman of the Senate Agriculture Committee – has said he can't support such a bill

New Mexico Law: Current Landscape

Marijuana:

- Medical marijuana has been legal in New Mexico since 2007
- Last week Gov. Michelle Lujan Grisham signed legislation that will reduce penalties for marijuana from a criminal to civil violation

Hemp:

- New Mexico lawmakers authorized hemp production in 2017, but Gov. Susana Martinez vetoed the bill. Her veto was overturned on procedural grounds in spring 2018
- Also last week Gov. Michelle Lujan Grisham signed a bill making it legal for businesses to manufacture industrial hemp
- The new legislation is expected to generate about \$145,000 over the next three years in fees paid by the hemp growers; it is estimated, however, that it will cost the state more than \$1.1 million over the next three years to regulate hemp under the new law

Oklahoma Law: Current Landscape

Marijuana:

- Medical marijuana became legal in Oklahoma in 2018; Oklahoma voters legalized medical marijuana by a decisive 15-point margin at the polls
- As of February 25, 2019, the Oklahoma Medical Marijuana Authority has licensed 54,253 patients, 331 caregivers, 1,041 dispensaries, 1,836 growers and 508 processors

Hemp:

- The Oklahoma legislature passed the Oklahoma Agricultural Industrial Hemp Pilot Program in April of 2018 and the temporary rules to govern the program were adopted by the Department in May of 2018
- In 2018, ODAFF licensed 28 growers that are contracted with colleges in Oklahoma's higher levels of education
- In April 2015, Governor Mary Fallin signed into law a bill which allowed clinical trials of CBD oil

Texas Law: Current Landscape

Marijuana:

- Still a schedule I drug under the Texas Controlled Substances Act
- Multiple bills working through the Texas Legislature in 2019

Hemp:

- NOT a schedule I drug under the Texas Controlled Substances Act as of Friday, April 5, 2019
- The Texas Department of State Health Services has removed hemp from the Texas schedules of controlled substances to be consistent with federal law and the 2018 Farm Bill
- CBD is legal in Texas in a very limited circumstance. The Compassionate Use Act of 2015 allows “low-THC cannabis” (having 0.5% THC) to be prescribed ONLY to certain epileptic patients. CBD can only be cultivated, processed and dispensed by DPS-licensed dispensaries, of which there are only three (Cansortium Texas, Compassionate Cultivation, and Surterra Texas).

USDA: Hemp Production Program

- The Agriculture Improvement Act of 2018 (2018 Farm Bill, Section 10113) directs the U.S. Department of Agriculture to issue regulations and guidance to implement a program for the commercial production of industrial hemp in the United States
- The USDA has begun the process to gather information for rulemaking. Once complete, this information will be used to formulate regulations that will include specific details for both federally regulated hemp production and a process for the submission of state and Indian tribal plans to the USDA
- For the 2019 planting season, the 2018 Farm Bill provides that states, tribes, and institutions of higher education can continue operating under authorities of the 2014 Farm Bill
- The USDA is also required to establish a plan to monitor and regulate the production of hemp in those states or tribal lands that do not have an approved state or tribal plan. It is the USDA's intention to issue regulations in the fall of 2019 to accommodate the 2020 planting season

SBA: Standard Operating Procedure

Can you make SBA loans for marijuana-related businesses?

- No... but also sometimes Yes
- Standard Operating Procedure 50 10 5(K), *Lender and Development Company Loan Programs*, **effective April 1, 2019**
- Ineligible Types of Businesses
 - The Lender must determine whether the Applicant is one of the types of businesses listed as ineligible in SBA regulations (13 CFR § 120.110). Certain business types appearing on this list may be eligible under limited circumstances.
- Businesses Engaged in any Illegal Activity (13 CFR § 120.110 (h))
 - SBA must not approve loans to Applicants that are engaged in illegal activity under federal, state, or local law. This includes Applicants that make, sell, service, or distribute products or services used in connection with illegal activity, unless such use can be shown to be completely outside of the Applicant's intended market.

SBA: Standard Operating Procedure

- Marijuana-Related Businesses: Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, businesses that derive revenue from marijuana-related activities or that support the end-use of marijuana may be ineligible for SBA financial assistance.
- Whether a business is eligible is determined by the nature of the business's specific operations. The following businesses are ineligible:
 - “Direct Marijuana Business” -- a business that grows, produces, processes, distributes, or sells marijuana or marijuana products, edibles, or derivatives, regardless of the amount of such activity. This applies to recreational use and medical use even if the business is legal under local or state law where the applicant business is or will be located.

SBA: Standard Operating Procedure

- “Indirect Marijuana Business” -- a business that derived any of its gross revenue for the previous year (or, if a start-up, projects to derive any of its gross revenue for the next year) from sales to Direct Marijuana Businesses of products or services that could reasonably be determined to aid in the use, growth, enhancement or other development of marijuana. Examples of Indirect Marijuana Businesses include businesses that provide testing services, or sell or install grow lights, hydroponic or other specialized equipment, to one or more Direct Marijuana Businesses; and businesses that advise or counsel Direct Marijuana Businesses on the specific legal, financial/accounting, policy, regulatory or other issues associated with establishing, promoting, or operating a Direct Marijuana Business. However, for purposes of illustration, SBA does not consider a plumber who fixes a sink for a Direct Marijuana Business or a tech support company that repairs a laptop for such a business to be aiding in the use, growth, enhancement or other development of marijuana.
- Indirect Marijuana Businesses also include businesses that sell smoking devices, pipes, bongs, inhalants, or other products if the products are primarily intended or designed for marijuana use or if the business markets the products for such use.

SBA: Standard Operating Procedure

- Hemp:
 - Consistent with the Agriculture Improvement Act of 2018 (Public Law No. 115-334), a business that grows, produces, processes, distributes or sells products made from hemp (as defined in section 297A of the Agricultural Marketing Act of 1946) **is eligible**.
- Note that this is a change from the SBA's Standard Operating Procedure 50 10 5(J), *Lender and Development Company Loan Programs*, which became effective on January 1, 2018 and expired on April 1, 2019
- The SBA's previous position on "Hemp-Related Business" was that "a business that grows, produces, processes, distributes or sells products purportedly made from "hemp" is ineligible unless the business can demonstrate that its business activities and products are legal under federal and state law. Examples of legal hemp products include paper, clothing and rope."

What about those CBD stores I see?



What about CBD Oil and other CBD Products?

- CBD oil is extracted from cannabis and has health benefits (epilepsy treatment, pain relief, inflammatory relief, anxiety control, etc.) without the psychoactive marijuana effect.
- One big myth that exists about the Farm Bill is that CBD is legalized. Although Section 12619 of the Farm Bill removes hemp-derived products from its Schedule I status under the Controlled Substances Act, the Farm Bill **does not legalize CBD generally**. CBD generally remains a Schedule I substance under federal law. The Farm Bill creates exceptions to this Schedule I status in certain situations. CBD that is derived from hemp will be legal, **if and only if** that hemp is produced in a manner consistent with the Farm Bill, associated federal regulations, associated state regulations, and by a licensed grower. All other CBD, produced in any other setting, remains a Schedule I substance under federal law and thus illegal.

Banking Cannabis

Depository Institutions (by type) Providing Banking Services to Marijuana Related Businesses¹
(Data ending 30 September 2018)



Banking Marijuana

- Definitely not an option in states where marijuana is illegal
- In states where marijuana is legal, financial institutions continue banking marijuana customers at their own risk
 - Banks should implement robust due diligence programs, ensure management is on board, stay up to date on the industry and state regulatory environments, follow the FinCEN guidance to file SARs, and retain experts (legal, compliance, etc.)
 - The focus should be on local regulatory compliance – state licenses, local health codes, environmental and zoning compliance, and good relationships with local officials
 - Due diligence is not a one-time inquiry – there must be regular due diligence and mandatory updates

Banking Hemp (and CBD)

- A lot more complicated
- Not an option in states where hemp and/or CBD is illegal
 - So still no banking hemp or CBD in Texas since Texas does not have a legal hemp program under the 2014 Farm Bill and CBD is still very illegal in Texas (other than the limited use under the Compassionate Use Act)
- Possibly legal in states where hemp and/or CBD is legal
 - In Oklahoma, legal hemp growers can probably safely get bank accounts, since hemp is has been de-scheduled and the bank is not at risk for claims of money laundering or aiding and abetting
 - Banks will still want robust due diligence programs and may still consider filing marijuana SARs
- Section 10113 of the 2018 Farm Bill expressly does not preempt laws that are more stringent than those found in the Farm Bill regarding the production of hemp

Questions?

Disclaimer

This power point presentation is an educational tool that is general in nature and for purposes of illustration only. The materials in this presentation are not exhaustive, do not constitute legal advice and should not be considered a substitute for consulting with legal counsel. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Certain materials presented in this presentation were developed by industry sources or obtained from industry publications and research reports prepared for other purposes.