

What 2023 Has In Store For The Cannabis Industry

By **Tommy Tobin and Andrew Kline** (January 31, 2023, 5:53 PM EST)

The year ahead has much in store for the cannabis industry. Below, we outline some areas to watch at both the state and federal levels.

Implications of Landmark Cannabis Announcement

On Oct. 6, 2022, President Joe Biden made a **major announcement** regarding cannabis.[1]

First, he declared that his administration will pardon anyone with a federal conviction for possession of cannabis. Second, he invited governors to pardon persons convicted of state-level cannabis possession offenses. Third, he directed the U.S. attorney general and the U.S. secretary of health and human services to expeditiously examine the status of cannabis as a Schedule I drug and initiate a subsequent rulemaking process.

This is a groundbreaking announcement. While we do not yet have a timeline for the expeditious review of cannabis' Schedule I status, the coming months will assuredly see administrative efforts to conduct this review, which will likely continue into next year.

Additional administrative efforts to regulate cannabis and CBD are well underway. Already, the U.S. Food and Drug Administration has hired Norman Birenbaum — a former state cannabis regulator — as a full-time adviser focused on cannabis.

A recent Wall Street Journal interview with Birenbaum suggested that the FDA might decide within months regarding the appropriate regulation of CBD, and whether that regulation would require congressional action or new agency rulemaking.[2]

Just this month, the FDA issued final guidance regarding clinical research involving cannabis and cannabis-derived compounds.[3]

On Jan. 26, the agency announced it was denying three citizen petitions that asked the FDA to conduct rulemaking to regulate CBD as dietary supplements.[4] Instead, the agency **decided** "a new regulatory pathway for CBD is needed that balances individuals' desire for access to CBD products with the regulatory oversight needed to manage risks," and that it was prepared to work with Congress on a new way forward.[5]

This announcement was years in the making. It will take time for the FDA and Congress to collaborate on a new regulatory pathway for CBD to determine how CBD will be regulated now that the FDA has made its decision that existing regulatory frameworks for food and dietary supplements are not appropriate for CBD.[6]

Meanwhile, the states and the public will continue to see a patchwork of CBD-related requirements.

Congressional Efforts

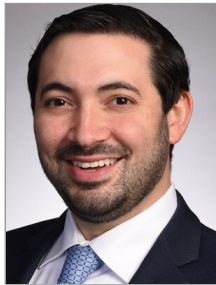
The 117th U.S. Congress saw numerous reform proposals to federal oversight of cannabis. Significant proposals included, but were not limited to, the following:

- The U.S. House of Representatives saw reintroduction of the Marijuana Opportunity Reinvestment and Expungement Act, which has **passed** in the chamber multiple times.[7]
- Rep. Nancy Mace, R-S.C., and four co-sponsors **introduced** the States Reform Act, a conservative bill to legalize and regulate cannabis.[8]
- Senate Majority Leader Chuck Schumer, D-N.Y., and Sens. Cory Booker, D-N.J., and Ron Wyden, D-Ore., **championed** the Cannabis Administration and Opportunity Act.[9]

While none of these proposals passed in Congress, they serve as important mile markers for future cannabis reform proposals.

Separately, Congress **did pass** the Medical Marijuana and Cannabidiol Research Expansion Act, which will encourage research into cannabis and CBD and expedite the application review process for those seeking to perform cannabis research.[10]

In 2023, a newly divided Congress may see further reform proposals. Nancy Mace is a moderate Republican who might be



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able to bring about bipartisan consensus in the Republican-controlled House.

The bipartisan Secure and Fair Enforcement Banking Act came close to being included in the U.S. Department of Defense Appropriations Act at the end of last year and **could see** reintroduction in the new Congress. Chances of passage, however, remain murky.

Recently it was reported that Sen. Sherrod Brown, D-Ohio, the chairman of the Senate Committee on Banking, Housing and Urban Affairs, signaled optimism that bipartisan consensus could be reached on the SAFE Banking Act

What's not clear is whether that bill will include equity provisions as proposed by Booker and Schumer, or whether it will be a straight-up cannabis banking bill. The latter has the potential to bring along some Republicans, while simultaneously alienating some Democrats.

Most notably, the 2018 Farm Bill is up for renewal. The 2018 Farm Bill was a game-changer regarding hemp. The law removed hemp and hemp derivatives containing 0.3% THC or less from the Controlled Substances Act. As a result, the nation saw a significant and rapid increase of hemp-derived products in the marketplace.

Now, the 2023 Farm Bill could see new proposals to further incorporate and address the regulation of hemp and hemp derivatives. Cannabis advocates see the 2023 Farm Bill as an opportunity for cannabis reform in the 118th Congress.

Time will tell how the bill's language addresses cannabis; intoxicating cannabinoids, e.g., Delta-8 THC; and nonintoxicating cannabinoids, e.g., CBD, in this must-pass piece of bipartisan legislation.

Among other things, legislators are expected to debate whether cannabinoids should be regulated on a total THC milligram model or the current percentage of Delta-9 THC basis.

Cannabis at the State Level

More than two-thirds of the states allow medical use of cannabis, and more than 20 states allow adult use.[11]

Medical cannabis sales began last week in Mississippi.[12] New York is **opening** its first adult-use dispensaries, and the state is expected to open dozens more in the coming weeks.[13]

Rhode Island, Maryland and Missouri **legalized cannabis** for adult use in 2022. In Rhode Island, five cannabis dispensaries were **operating** by December 2022, with an additional 28 dispensaries expected to receive licenses in the coming year.

In Maryland, a person 21 years of age or older will be able to possess and use cannabis beginning on July 1, 2023. July will also see automatic expungement of simple cannabis possession cases.

In Missouri, adults will be able to possess up to three ounces of cannabis once licensing and administrative protocols have been completed. The Missouri Department of Health and Senior Services believes cannabis will be available at approved dispensaries as early as February.[14]

Already in 2023, states have taken new action to bolster state-level cannabis markets. On his first day as governor of Maryland, Wes Moore released over \$46 million in state funds to support Maryland's new cannabis program, with \$40 million going into a cannabis business assistance fund to support the new adult-use industry in the state.[15]

The patchwork of state cannabis regulatory regimes will continue in 2023, meaning that companies operating in multiple markets may face different regulatory requirements. Compliance is critical, and cannabis companies should always check applicable requirements for the jurisdictions in which they operate.

Delta-8 and Unlicensed Copycat THC Products

Cannabis regulators at the state and federal levels continue to wrestle with the public health risks posed by unregulated intoxicating cannabinoids.

Among other things, state and federal officials have taken multiple approaches to regulating Delta-8 THC, an intoxicating cannabinoid derived from otherwise legal hemp, as well as other cannabinoids.

Delta-8 remains widely available, prompting public health concerns related to a psychoactive substance that often evades age restrictions, laboratory testing, potency limits and other basic public safety standards.

Some states have outright banned the cannabinoid from the regulated market, whereas others have taken a more hands-off approach.

Federal and state officials also are taking action on cannabis products that are inappropriately marketed to children. For example, in 2022, the FDA **issued several** warning letters targeting CBD and Delta-8 products, emphasizing the agency's concern regarding marketing towards children.[16]

The FDA also issued a consumer alert noting that accidental ingestion of copycat THC products can lead to serious adverse events, especially in children. The agency expressed its concern that copycat THC products are specifically designed to mimic the appearance of well-known brands and "are easily mistaken for popular, well-recognized foods that appeal to children." [17]

Likewise, more than 20 state attorneys general **authored** an open letter regarding copycat cannabis products, writing that "copycat THC edibles pose a grave risk to the health, safety, and welfare of our children." The state attorneys general noted that legislation was needed to address "counterfeit, unlicensed, unregulated, and untested THC edibles." [18]

Further developments are expected as state and federal officials continue to address issues arising from Delta-8 THC and copycat THC products.

The 2023 Farm Bill is one possible vehicle for further activity regarding Delta-8 THC derived from otherwise legal hemp. In debating the 2023 Farm Bill, Congress could learn from state experiences with regulating Delta-8 THC.

According to reports,[19] psychoactive Delta-8 THC has generated over \$2 billion in revenue over the past two years and is being sold even in jurisdictions that have not allowed a licensed, regulated cannabis marketplace with appropriate public safety standards.

Several states have taken to outright banning Delta-8 THC, and others have adopted a "total THC" approach to regulating the cannabinoid that lumps together Delta-8 and Delta-9 THC products.

Recession Fears

Threats of an oncoming recession loom large over the entire economy. A general economic downturn could have unpredictable effects on the cannabis industry generally and on individual cannabis businesses.

Weathering these headwinds is made more difficult in the cannabis space because of a general lack of access to federal bankruptcy protections as cannabis remains unlawful at the federal level, regardless of its status under state laws.

Given the lack of federal bankruptcy protections, distressed cannabis businesses, especially those that are plant-touching, may start using state-level protections and contractual arrangements to address issues.

These processes may be dynamic and could see some businesses going under, experiencing increased merger and acquisition activity, or expanding licensure opportunities.

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[6] *Id.*

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