

2021 Cannabis Review and 2022 Outlook: States Will Continue to Lead the Charge, Possibility of Federal Landscape Shift, Plus Other Drugs

JONATHAN HAVENS, SETH GITNER & ADAM FAYNE*

Despite federal cannabis reform stalling in 2021, states showed no signs of slowing down in establishing or expanding medical and/or adult-use (i.e., recreational) cannabis programs. At last count, thirty-seven states have medical cannabis laws on their books, with eighteen of those states also permitting adult use. After the November 2020 elections, trade (and several mainstream) press headlines said the same thing: Weed wins big at the ballot box.¹ Voters in five states approved medical and/or adult-use cannabis. More specifically:

- Arizona voters approved an adult-use measure;
- Mississippi voters approved a medical-use measure;
- Montana voters approved an adult-use measure;
- New Jersey voters approved an adult-use measure; and
- South Dakota voters approved both medical-use and adult-use measures (becoming the first state to do so at the same time).

While there were successful legal challenges to Mississippi's medical initiative and South Dakota's adult-use measure, the South Dakota legislature could in 2022 enact through legislation the reforms that voters approved in 2020. Mississippi's legislature already did so, and Governor Tate Reeves signed a medical cannabis measure (SB 2095) into law in February 2022.

Beyond acknowledging the significant impact November 2020 had on cannabis reform, it is worth discussing state activity in response to the same. For example, Connecticut enacted an adult-use law in June 2021, no doubt in response to both New Jersey voters approving adult-use, which is expected to launch this year (possibly as

* Jonathan Havens is a partner at Saul Ewing Arnstein & Lehr LLP, resident in the firm's Baltimore and Washington, DC offices, where he serves as the co-chair of both the firm's Cannabis Law and Food, Beverage & Agribusiness practices, and is a member of the firm's Life Sciences practice. Seth Gitner is an associate at Saul Ewing Arnstein & Lehr LLP, resident in the firm's Washington, DC office, where he is a member of the firm's Life Sciences, Cannabis Law, and Food, Beverage & Agribusiness practices. Adam Fayne is a partner at Saul Ewing Arnstein & Lehr LLP, resident in the firm's Chicago office, where he serves as the co-chair of the firm's Cannabis Law practice.

¹ See Jonathan Havens & Marc Adesso, *Cannabis 2021 Year in Review, and the Road Ahead*, CANNABIS BUS. EXEC. (Dec. 15, 2021), <https://www.cannabisbusinessexecutive.com/2021/12/cannabis-2021-year-in-review-and-the-road-ahead/>.

soon as April 2022),² and New York enacting an adult-use law earlier in 2021. Now, all eyes are on states in the region that already have medical cannabis programs—Delaware, Maryland,³ and Pennsylvania—as they could adopt adult-use measures this year or next.

Regardless of strong public opinion polling, there are still pockets of the country (both in traditional “blue” and “red” states) that oppose legalization. However, given the drastic expansion of state cannabis programs in the last several years, slow-adopter states risk losing out on significant tax revenue to their regional neighbors if they don’t follow suit in enacting cannabis reform. Beyond the Mid-Atlantic, states in the mid-west, central, and south could add some color to the cannabis legalization map. Arkansas, Florida, Missouri, Ohio, and Oklahoma could take up adult-use this year, and Nebraska and Wyoming could consider medical-use measures. For more information on these and other measures, we refer the reader to the *Cannabis Business Times*’ piece on state activity in 2022.⁴ Speaking of the south, we are monitoring developments in Alabama and Georgia, as both look to roll out medical programs this year, as well as in Virginia, especially with Governor Glenn Youngkin (R) taking office. Virginia enacted adult-use last year, and it is not clear how, if at all, Youngkin will impact the timing or implementation of that law.

For now, it’s state expansion or bust given the low prospect of sweeping federal reform, at least given the current makeup of the U.S. Senate. Congress’s upper chamber has become a bit of a legislative graveyard, stalling movement of even some key policy measures. While the 50-50 split in the Senate has caused headaches for stakeholders in a number of industries, there could be change on the horizon: Majority Leader Chuck Schumer (D-NY) signaled recently that the Senate could soon take up filibuster reform. It is unclear whether the Senate will actually consider such a measure, let alone approve it. Even if filibuster reform is adopted, it is also not clear whether all fifty Senate Democrats would support ending the federal prohibition on cannabis. Yet another variable is the impact the 2022 midterm elections will have on control of Congress. Although beyond the scope of this piece, it is feasible that Republicans could win control of the House, and given the 50-50 Senate split, they would only need a net plus one seat to gain control of the Senate.

It is also possible that if Republicans gain control of one or both houses of Congress, cannabis reform (either incremental or sweeping) could occur. Cannabis polls very well, and it is wrong to assume that only liberal Democrats support it. One stumbling block that has prevented incremental reform like the Secure and Fair Enforcement (SAFE) Banking Act from passing the Senate—even though it’s passed the House multiple times—is that Senators Schumer and Cory Booker (D-NJ), sponsors of the Cannabis Administration and Opportunity Act (CAOA), along with Senator Ron Wyden (D-Ore), have opposed piecemeal reform, opting instead for a comprehensive

² Tracey Tully, *Legal Marijuana Sales Expected to Start Within Weeks in New Jersey*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/2022/04/11/nyregion/marijuana-sales-nj.html>.

³ See Kyle Jaeger, *Maryland Lawmakers Officially Put Marijuana Legalization on the Ballot, Also Sending Implementation Bill to Governor*, MARIJUANA MOMENT (Apr. 1, 2022), <https://www.marijuanamoment.net/maryland-lawmakers-officially-put-marijuana-legalization-on-the-ballot-also-sending-implementation-bill-to-governor/>.

⁴ Tony Lange, Andriana Ruscitto, Eric Sandy & Melissa Schiller, *15 States That Could Legalize Cannabis in 2022*, CANNABIS BUS. TIMES (Oct. 27, 2021), <https://www.cannabisbusinesstimes.com/article/states-likely-legalize-cannabis-2022/>.

measure that includes social justice reform. Perhaps with a flip of the Senate, Republicans could advance a measure like the States Reform Act (SRA) introduced by Representative Nancy Mace (R-SC). The SRA could be more palatable to Republicans and moderate Democrats, as it contains the fundamentals of CAOAs with more narrowly tailored social justice measures.

Turning away from Congress, the U.S. Senate recently confirmed Dr. Robert Califf, President Biden's pick to lead the U.S. Food and Drug Administration (FDA). Califf is a cardiologist who previously served as FDA Commissioner and Deputy Commissioner under President Obama. Little is known about how a Califf-led FDA will impact cannabis and cannabis-derived products, although it has been reported that Califf recommended some cannabis-derived drug products to patients while in private practice. We should not read too much into that, other than to say that he realizes that any drug, whether it is cannabis-derived or otherwise, when well-researched and considered safe and effective, can and should be used to treat patients. We do not expect Califf to be any more or less active in the cannabis space than his predecessors. As others have done before him, he will let science inform FDA's decisions around which drug products it approves. Regarding hemp-derived cannabidiol (CBD), we do not see Califf departing from FDA's previously articulated stance regarding the illegality of CBD as a dietary ingredient unless Congress forces the agency's hand through legislation.

Speaking of cannabinoids, another issue we are monitoring this year is treatment of newer or lesser-known ones, such as delta-8 tetrahydrocannabinol (THC), delta-10 THC, THC-O acetate (THC-O), cannabigerol (CBG), and cannabinol (CBN). Particularly with regard to the THC cannabinoids in this list, there has been an increased amount of attention from industry and regulatory stakeholders, especially about the legality of products containing them. While a number of states have banned delta-8 THC, for example, it is still widely available, and federal enforcement is virtually non-existent.

Last, but certainly not least, while this section largely addresses cannabis, we have been receiving an increasing number of questions around psychedelics, both with regard to federal and state regulation of the same. We are seeing similarities between how the psychedelics space is developing now with how the cannabis space really started to take shape several years ago. The science around the potential effectiveness of methylenedioxymethamphetamine (MDMA), psilocybin (i.e., mushrooms), and lysergic acid diethylamide (LSD) to treat depression, post-traumatic stress disorder (PTSD), and more, is impressive.⁵ Regulators and policymakers, especially at the state level, seem to be taking note of the same.

While much of the psychedelics policy movement has occurred at the local level (e.g., the City of Denver was the first municipality to decriminalize psilocybin in 2019), Oregonians voted in 2020 to legalize psilocybin for therapeutic purposes. A great overview of many of these policies from across the country is available in this piece from Marijuana Moment.⁶ Although there is some way to go in opening up access to psychedelics, the U.S. Drug Enforcement Administration (DEA) and the

⁵ Paul Tullis, *How Ecstasy and Psilocybin are Shaking up Psychiatry*, NATURE (Jan. 27, 2021), <https://www.nature.com/articles/d41586-021-00187-9>.

⁶ Kyle Jaeger, *Psychedelics Decriminalization Advancing in Three More Cities, Spanning from Coast to Coast*, MARIJUANA MOMENT (Aug. 3, 2021), <https://www.marijuanamoment.net/psychedelics-decriminalization-advancing-in-three-more-cities-spanning-from-coast-to-coast/>.

National Institute on Drug Abuse (NIDA) have indicated in testimony to Congress their support for streamlining the process of researching certain schedule I drugs (e.g., cannabis, some psychedelics), which is an important step.

We will be monitoring developments regarding these issues and more in 2022.