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## Recent Congressional Efforts to Address the Cannabis Policy Gap

*Advisory*

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The Democratic-led House of Representatives recently took another step forward in advancing legislation to support the rapidly growing cannabis industry in the United States. In January, the Health Subcommittee of the House Committee on Energy and Commerce—the oldest continuous standing committee in the US House of Representatives, with some of the broadest jurisdiction in Congress—held a [hearing](#) titled "Cannabis Policies for the New Decade." This marked the committee's first ever cannabis-related hearing, setting the stage for potential future federal legislation affecting the cannabis industry. Although the subcommittee did not vote or markup legislation, six bills referred to the committee (described below and in the Appendix) provided the backdrop for robust debate on marijuana research, rescheduling marijuana and the future of medical marijuana.

This Advisory provides an analysis of the subcommittee's discussion on these topics, and the current state of play for other congressional priorities related to cannabis, including the Secure and Fair Enforcement Banking Act of 2019 (Safe Act), [H.R. 1595](#), which passed the House in March of 2019, and its Senate Counterpart, [S. 1200](#), which is currently pending before the Senate Committee on Banking, Housing, and Urban Affairs.

### I. The Current State of Cannabis Law

Cannabis law in the United States continues to be complicated to navigate. A patchwork of statutes and regulations has emerged as federal and state governments each develop their own frameworks for governing the emerging cannabis industry. Nonetheless, the federal government maintains a strict ban on manufacturing, sale, distribution, and possession of marijuana, except for limited purposes of sanctioned research, while allowing such activities with hemp.<sup>1</sup>

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<sup>1</sup> See 21 U.S.C. § 841.

**Federal and State Laws on Marijuana.** While the federal government took the lead on legalizing hemp and its derivatives, states have stepped out in front to legalize marijuana and its derivatives, which remain a prohibited controlled substance under federal law. As of January 2020, 11 states and the District of Columbia have enacted laws legalizing cannabis for personal use and at least 33 states and the District have legalized cannabis or its derivatives for medical use.<sup>2</sup>

**Federal and State Laws on Hemp.** In December 2018, Congress passed, and the President signed, [the Agriculture Improvement Act of 2018](#), Pub. L. 115-334, commonly referred to as the 2018 Farm Bill. The bill legalized hemp and its derivatives, such as cannabidiol (CBD). The 2018 Farm Bill defined hemp as "the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." In October 2019, the US Department of Agriculture (USDA) established a [regulatory framework](#) under the 2018 Farm Bill to govern the cultivation of hemp, including requirements for states and tribes that want to regulate hemp cultivation in their territories.<sup>3</sup> For more discussion on the 2018 Farm Bill and the USDA regulation, see our prior Advisories [here](#) and [here](#).

Most states have followed the federal government's lead and legalized hemp and hemp products. A few, however, continue to prohibit hemp entirely. Most states that have legalized hemp are in the process of submitting hemp agricultural plans to the USDA for approval. Many are also developing detailed laws and regulations addressing the manufacture and sale of hemp products (e.g., allowable products, licensing, testing, labeling). These product requirements can vary significantly from state to state.

## II. Energy & Commerce Committee's First Hearing on "Cannabis Policies for the New Decade"

On January 15, 2020, the Health Subcommittee of the House Committee on Energy & Commerce (Energy & Commerce or Committee) held its first ever cannabis-related [hearing](#). The subcommittee's debate, summarized below, focused primarily on two issues: the need for cannabis research and rescheduling marijuana. The subcommittee called this hearing partly in response to a [request](#) from four Republican leaders on the committee<sup>4</sup> for a hearing on federally-sanctioned cannabis research and to highlight the policy gap resulting from a stagnating federal regulatory framework surrounding cannabis. In addition to the four Republican leaders, there appears to be substantial bipartisan interest in increased research, as the number of bills under consideration attests.

The following witnesses testified at the hearing:

- **Nora Volkow, M.D.**, Director of the National Institute on Drug Abuse (NIDA) at the National Institutes of Health (NIH). Dr. Volkow's written testimony is [here](#).
- **Douglas Throckmorton, M.D.**, Deputy Director of Regulatory Programs in the Center for Drug Evaluation and Research of the Food and Drug Administration (FDA). Dr. Throckmorton's written testimony is [here](#).
- **Matthew Strait**, Senior Policy Advisor for the Diversion Control Division of the Drug Enforcement Administration (DEA). Mr. Strait's written testimony is [here](#).

<sup>2</sup> See Jeremy Berke and Skye Gould, [States where marijuana is legal](#), BUSINESS INSIDER (Jan. 1, 2020).

<sup>3</sup> See Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58522 (Oct. 31, 2019) (to be codified at 7 C.F.R. 990).

<sup>4</sup> The letter was signed by full Committee Ranking Member Greg Walden (R-OR-2), Health Subcommittee Ranking Member Michael Burgess (R-TX-26), Rep. Cathy McMorris Rodgers (R-WA-5), and Rep. Morgan Griffith (R-VA-9).

The committee was also responding to calls from civil rights advocates seeking action on the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, a bill to deschedule marijuana, impose a tax on its sale, and use the proceeds for a community reinvestment grant program.

## A. Cannabis Research

The evolution of state laws and the broad public acceptance of cannabis have put substantial pressure on existing federal laws that place roadblocks in the way of medical and related research with marijuana. Lawmakers at the hearing described the situation as a "Catch-22," where research is restricted because marijuana is a Schedule 1 drug under the Controlled Substance Act, yet more research would better determine if marijuana should be rescheduled or descheduled.

A leading proponent of legalizing cannabis stated in a recent interview,<sup>5</sup>

It illustrates how comprehensive the interest is in moving forward on research. I have talked to thousands of people this year, including hundreds in and around the Capitol. No one—not a single person—disputes the fact that we need to clear away the barriers to research.

Both Democrats and Republicans appear to agree on a need for more cannabis research. With the hurdle for hemp research largely cleared with the legalization of hemp, lawmakers are now focused on the hurdles facing marijuana research. In order to become an authorized marijuana researcher in the US, one must obtain a permit from the DEA and meet certain requirements imposed by the DEA, the FDA, and NIH. Once federally authorized, researchers may conduct marijuana research only with cannabis grown by the University of Mississippi, currently the only authorized marijuana producer for the entire U.S. marijuana research community.<sup>6</sup> Perhaps more significant for research purposes, the University of Mississippi produces a limited variety of cannabis strains that do not represent the wide variety now available in the state-legal markets.

There was bipartisan agreement during the Committee hearing that the DEA, the FDA, and NIH should increase (1) the number of government authorized farms and (2) the number of active marijuana researchers. In particular, **Rep. Frank Pallone (D-NJ-6)**, Chairman of the full committee, and **Rep. Larry Bucshon (R-IN-8)**, a former surgeon and member of the GOP Doctors' Caucus, supported increasing the type of marijuana used in research to include strains from different settings and of different strengths.

All three agency witnesses supported increased research on the health effects related to cannabis use. Mr. Strait (DEA) acknowledged concerns about the limited supply of research-grade cannabis and the lack of chemical diversity in the plants cultivated in Mississippi. He announced that the DEA had recently sent draft regulations to facilitate licensing additional growers to the Office of Management and Budget, an essential step before promulgation of proposed regulations. In response to questioning, Dr. Throckmorton (FDA) told lawmakers that the FDA is working on a timeline of three to five years to complete federal agency fact-gathering and rulemaking for hemp-derived CBD products. Dr. Volkow (NIH) noted several NIH studies that found that cannabis exposure can "negatively affect health," especially in pregnant women and children, and that marijuana use at younger ages "increases the risk of addiction to cannabis and to other drugs."

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<sup>5</sup> Kyle Jaeger, [Leading Marijuana Reform Advocate In Congress Weighs In On This Week's Legalization Hearing](#), MARIJUANA MOMENT, January 14, 2020.

<sup>6</sup> See [NIDA's Role in Providing Marijuana for Research](#) (revised August 2019).

## B. Rescheduling Marijuana

Under the Controlled Substances Act, drugs may be scheduled<sup>7</sup> by the DEA on a scale from I-V. Currently, marijuana is listed as a Schedule I drug, defined to be of "no medical value and high potential for abuse." Although Democrats and Republicans reached consensus on the need for increased cannabis-related research, there was a partisan divide on whether to reschedule or deschedule (remove) marijuana from the DEA's controlled substances list. Democrats and Republicans sparred, arguing whether or not marijuana had any reputable medical backing.

Republican members largely opposed removing marijuana from the controlled substances list, citing the lack of publicly available cannabis research. In particular, **Subcommittee Ranking Member Michael Burgess (R-TX-26)** and **Rep. Greg Walden (R-OR-2)** adamantly opposed both rescheduling or descheduling marijuana through legislation. They argued instead that the FDA should recommend guidance to the DEA if further research supports a change in marijuana drug scheduling. Mr. Strait of the DEA acknowledged that the DEA is "bound" to the FDA's recommendation regarding the scheduling of controlled drugs and substances.<sup>8</sup> One notable exception on the Republican side was **Rep. Morgan Griffith (R-VA-9)**, a self-described "Conservative Republican," and the author of the "Legitimate Use of Medicinal Marihuana Act." Rep. Griffith shared a story from his teenage years of friends smuggling marijuana into the hospital room of a dying cancer patient. This experience led Rep. Griffith to advocate for a "rational medical marijuana policy" which would (1) reschedule marijuana from a Schedule I drug to a Schedule II drug and (2) legalize medicinal marijuana in states that allow it.

Democrats, in contrast, such as **Rep. Joe Kennedy (D-MA-4)** and **Rep. Robin Kelly (D-IL-2)**, supported removing marijuana from the controlled substances list. Rep. Kennedy specifically cited the need to "deschedule, not reschedule" cannabis while committing federal resources to "restorative justice for communities of color." Democrats cited the federal government's inability to "keep up" with state movement in the cannabis industry.

## III. Cannabis Legislation Discussed in the Hearing

The subcommittee discussed various bills introduced in the House that offer a range of federal policies related to cannabis use and research. A brief summary of each bill is below.

- **[H.R. 171](#), the Legitimate Use of Medicinal Marihuana Act (LUMMA), sponsored by Rep. Morgan Griffith (R-VA-9).** The bill would move marijuana from Schedule I of the Controlled Substances Act to Schedule II and legalize medicinal marijuana in states that allow physician prescriptions of medicinal marijuana. The bill would not apply to states that have not legalized medicinal marijuana.
- **[H.R. 601](#), the Medical Cannabis Research Act of 2019, sponsored by Reps. Matt Gaetz (R-FL-1) and Darren Soto (D-FL-9).** The bill would increase the number of entities registered under the Controlled Substances Act to manufacture cannabis for legitimate research purposes and authorize health care providers in the Department of Veterans Affairs to provide recommendations to veterans regarding participation in federally approved cannabis clinical trials.

<sup>7</sup> [DEA's Drug Scheduling](#) involves five distinct categories or schedules depending upon the drug's acceptable medical use and the drug's abuse or dependency potential.

<sup>8</sup> Before the Attorney General may initiate rulemaking to add or remove a controlled substance from the schedules, he or she must request "a scientific and medical evaluation" and recommendation from the Secretary of Health and Human Services. The recommendation of the Secretary is binding on the Attorney General as to such scientific and medical matters. If the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. *See* section 201(b) of the Controlled Substances Act, 21 U.S.C. 811(b).



- **[H.R. 1151](#), the Veterans Medical Marijuana Safe Harbor Act, sponsored by Reps. Barbara Lee (D-CA-13) and Matt Gaetz (R-FL-1).** The bill would allow veterans to use, possess or transport medical marijuana and to discuss the use of medical marijuana with a physician in the Department of Veterans Affairs, where medical use is authorized by a state or Indian tribe.
- **[H.R. 2843](#), the Marijuana Freedom and Opportunity Act, sponsored by Rep. Hakeem Jeffries (D-NY-8).** The bill would remove marijuana from the schedules of the Controlled Substances Act and establish an opportunity trust fund that would consist of the greater of (1) 10% of the total tax revenue generated by the marijuana industry in the last 12 months or (2) \$10,000,000. In addition, several agencies would be directed to conduct studies: the National Highway Traffic Safety Administration to carry out a study of the effect of marijuana on different aspects of driving, and the Department of Health and Human Services (HHS) and National Institutes of Health (NIH) to conduct research on the overall public health effect of marijuana. The bill also would direct the Alcohol and Tobacco Tax and Trade Bureau of the Department of the Treasury to promulgate regulation that require restrictions on the advertising and promotion of products related to marijuana. Lastly, the bill would authorize \$20,000,000 for each fiscal year 2020 through 2024 to award grants to States and units of local government for the purpose of administering, expanding, or developing expungement or sealing programs for convictions of possession of marijuana.
- **[H.R. 3797](#), the Medical Marijuana Research Act of 2019, sponsored by Reps. Earl Blumenauer (D-OR-3) and Andy Harris (R-MD-1).** The bill would allow HHS to produce marijuana through the National Institute on Drug Abuse (NIDA) Drug Supply Program and sell to qualified marijuana researchers. In addition, the bill would permit applicants to register to manufacture and distribute marijuana for use in medical marijuana research.

**[H.R. 3884](#), the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019, sponsored by Rep. Jerrold Nadler (D-NY-10).** The MORE Act would remove marijuana from the schedules of the Controlled Substances Act; direct the Department of Labor Statistics to maintain demographic data on cannabis business owners and employees; establish an opportunity trust fund; and impose a five percent tax on the price of cannabis products sold. The taxes imposed on cannabis sales would support a "community reinvestment grant program." In addition, the bill would establish protections for insurance and lending companies, directing that the Administrator of the Small Business Administration "may not decline to provide a guarantee for a loan under this title to an otherwise eligible State or local development company solely because such State or local development company provides financing to an entity that is a cannabis-related legitimate business or service provider."

## IV. Beyond the Hearing: Federal Legislative Action on Cannabis

Although this was the first cannabis-related hearing in the House Energy & Commerce Committee, the 116<sup>th</sup> Congress has considered other significant legislative action in response to state legalization of cannabis.

One leading bill, the **SAFE Act** ([S. 1200](#) / [H.R. 1595](#)), would allow financial institutions to serve legal cannabis businesses. The SAFE Act passed the House on September 25, 2019, after protracted negotiations with Democratic members who also hoped to pass the MORE Act ([S. 2227](#) / [H.R. 3884](#)).

The **MORE Act** passed the House Judiciary Committee by a vote of 24 to 10 in November 2019, marking the first time Members of Congress have ever voted to federally deschedule cannabis. The hearing at Energy & Commerce allows the MORE Act to take another step closer to floor consideration in the House, although the measure faces potential consideration by six more committees, including the Committees on Ways and Means; Small Business; Natural Resources;

Education and Labor; and Oversight and Reform. While the Small Business and Natural Resources Committees appear likely to waive their jurisdiction, Ways and Means is not likely to do so given the tax provisions included in the bill.

In the Senate, hopes for quick action on the **SAFE Act** were dashed when **Senator Mike Crapo (R-ID)**, the Chairman of the Senate Banking Committee, outlined a number of concerns with the bill in December.<sup>9</sup> Another leading bill, the **STATES Act (S. 1028 / H.R. 2093)**, raised concerns from advocates by leaving in place the federal prohibition, while effectively legalizing cannabis only in those states which had themselves legalized cannabis and without addressing criminal justice reform. Coupled with progressive opposition to the **SAFE Act** because it fails to address restorative justice concerns, action on these two vehicles is effectively stalled.

**The Congressional Cannabis Caucus.** On January 9, 2019, **Rep. Earl Blumenauer (D-OR-3)** renewed the leadership team for the fast-growing bipartisan Congressional Cannabis Caucus.<sup>10</sup> The co-chairs of the caucus now include Rep. Blumenauer, **Rep. Barbara Lee (D-CA-13)**, **Rep. Dave Joyce (R-OH-14)**, and **Rep. Don Young (R-AK-At Large)**. The caucus aims to "discuss, learn, and work together to establish a better and more rational approach to federal cannabis policy."

## V. What Comes Next for Federal Cannabis Policy

Given the facts on the ground in the 33 states that have legalized cannabis in one form or another—for instance, there are more dispensaries in Portland, Oregon than there are Starbucks and McDonald's—the bipartisan support for research may ultimately drive the larger legislative debate by identifying and solving concrete regulatory challenges without forcing Members to vote on outright legalization.

During the Energy & Commerce hearing, **Subcommittee Chairwoman Anna Eshoo (D-CA-18)** announced that there will be future hearings on cannabis-related issues. Future hearings will include non-agency stakeholders and will likely focus more on possible legislation. The House Small Business Committee is also considering a markup in the near future regarding upcoming cannabis-related legislation.

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Companies seeking advice on marijuana-related legislation are encouraged to contact any of authors of this Advisory or their usual Arnold & Porter contact. The firm has an active cannabis working group, and Arnold & Porter's Legislative and Public Policy Practice Group is monitoring developments in Congress on cannabis.

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<sup>9</sup> See Senator Crapo's statement [here](#). On January 21, 2020, the four (bipartisan) House sponsors of the Safe Act responded by releasing a [letter](#) to Senator Crapo urging that he proceed with "caution before adding limitations to the legislation's safe harbor that impose unworkable burdens on financial institutions, or would jeopardize the larger, bipartisan effort to address public safety concerns associated with cash-only transactions."

<sup>10</sup> See Rep. Blumenauer's announcement [here](#).

## Appendix of Legislation Considered by the Energy & Commerce Health Subcommittee on January 15, 2020

| Bill Name   | Sponsor   | Summary   |
|---|---|---|
| <ul style="list-style-type: none"> <li><a href="#">H.R. 171</a>, the Legitimate Use of Medicinal Marijuana Act (LUMMA)</li> </ul> | <ul style="list-style-type: none"> <li>Rep. Morgan Griffith (R-VA-9)</li> </ul> | <ul style="list-style-type: none"> <li>Moves marijuana from Schedule I of the Controlled Substances Act to Schedule II.</li> <li>Legalizes medicinal marijuana in states which allow physician prescriptions of medicinal marijuana; would not apply to states which have not legalized medicinal marijuana.</li> </ul>   |
| <ul style="list-style-type: none"> <li><a href="#">H.R. 601</a>, the Medical Cannabis Research Act of 2019</li> </ul>             | <ul style="list-style-type: none"> <li>Rep. Matt Gaetz (R-FL-1)</li> </ul>      | <ul style="list-style-type: none"> <li>Increase the number of manufacturers registered under the Controlled Substances Act to manufacture cannabis for legitimate research purposes.</li> <li>Authorizes health care providers of the Department of Veterans Affairs to provide recommendations to veterans regarding participation in federally approved cannabis clinical trials.</li> </ul>  |
| <ul style="list-style-type: none"> <li><a href="#">H.R. 1151</a>, the Veterans Medical Marijuana Safe Harbor Act</li> </ul>       | <ul style="list-style-type: none"> <li>Rep. Barbara Lee (D-CA-13)</li> </ul>    | <ul style="list-style-type: none"> <li>Allows veterans to use, possess or transport medical marijuana and to discuss the use of medical marijuana with a physician of the Department of Veterans Affairs as authorized by a state or Indian tribe.</li> </ul>   |
| <ul style="list-style-type: none"> <li><a href="#">H.R. 2843</a>, the Marijuana Freedom and Opportunity Act</li> </ul>            | <ul style="list-style-type: none"> <li>Rep. Hakeem Jeffries (D-NY-8)</li> </ul> | <ul style="list-style-type: none"> <li>Removes marijuana from the schedules of the Controlled Substances Act.</li> <li>Establishes an opportunity trust fund which consists of the greater of (1) 10% of the total tax revenue generated by the marijuana industry in the last 12 months or (2) \$10 million.</li> <li>Directs the National Highway Traffic Safety Administration to carry out a study of the impact marijuana has on different aspects of driving. Authorizes \$50 million for each fiscal year 2020 through 2024.</li> <li>Directs the Department of Health and Human Services and the National Institutes of Health to conduct research on the overall public health impact of marijuana. Authorizes \$100 million each fiscal year 2020 through 2024.</li> <li>Directs the Alcohol and Tobacco Tax and Trade Bureau of the Department of the</li> </ul> |

| Bill Name  | Sponsor   | Summary  |
|--|---|--|
|  |   | <p>Treasury promulgate regulation that require restrictions on the advertising and promotion of products related to marijuana.</p> <ul style="list-style-type: none"> <li>• Authorizes \$20 million for each fiscal year 2020 through 2024 to award grants to States and units of local government for the purpose of administering, expanding, or developing expungement or sealing programs for convictions of possession of marijuana.</li> </ul>   |
| <ul style="list-style-type: none"> <li>• <a href="#">H.R. 3797</a>, the Medical Marijuana Research Act of 2019</li> </ul>                                | <ul style="list-style-type: none"> <li>• Rep. Earl Blumenauer (D-OR-3)</li> </ul> | <ul style="list-style-type: none"> <li>• Allows the Department of Health and Human Services to produce and sell marijuana to qualified marijuana researchers.</li> <li>• Allows registration of persons to manufacture and distribute marijuana for use in medical marijuana research.</li> </ul>  |
| <ul style="list-style-type: none"> <li>• <a href="#">H.R. 3884</a>, the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019</li> </ul> | <ul style="list-style-type: none"> <li>• Rep. Jerrold Nadler (D-NY-10)</li> </ul> | <ul style="list-style-type: none"> <li>• Removes marijuana from the schedules of the Controlled Substances Act.</li> <li>• Directs the Department of Labor Statistics to maintain demographic data of cannabis business owners and employees.</li> <li>• Establishes an opportunity trust fund and imposes a five percent tax on the price of cannabis products sold.</li> <li>• The taxes imposed on cannabis sales shall support a "community reinvestment grant program."</li> <li>• Establishes protections for insurance and lending companies, stating the Administrator of the Small Business Administration "may not decline to provide a guarantee for a loan under this title to an otherwise eligible State or local development company solely because such State or local development company provides financing to an entity that is a cannabis-related legitimate business or service provider."</li> </ul> |

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