New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Comments on Discussion Draft of the Cannabis Administration and Opportunity Act

COMMITTEE ON CANNABIS LAW

Cannabis #1 September 1, 2021

VIA ELECTRONIC DELIVERY
Honorable Charles E. Schumer
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510
Cannabis_Reform@finance.senate.gov

Re: Comments regarding the discussion draft of the Cannabis Administration and Opportunity Act

Majority Leader Schumer:

On behalf of The New York State Bar Association ("NYSBA") Committee on Cannabis Law ("Cannabis Committee"), we thank you for your leadership on the evolving issue of cannabis legalization and for offering the opportunity to review and comment on the discussion draft of the Cannabis Administration and Opportunity Act ("CAOA"). The Cannabis Committee is comprised of a diverse group of attorneys admitted to practice in New York who, collectively, have cannabis practice expertise and are engaged on behalf of NYSBA regarding the evolving legal status of cannabis at both the state and federal level. Upon review of the discussion draft, the Cannabis Committee offers the following comments for your consideration:

1. **Oversight by the U.S. Food and Drug Administration ("FDA")**

The following comments concern how the statutory and regulatory provisions and responsibilities of the FDA would be amended and regulated following the proposed regulations and authorities under the CAOA.

The Cannabis Committee applauds the effort to help create a more uniform regulation of the plant and products derived from Cannabis Sativa L. (the "Cannabis Plant"). The Cannabis Committee, however, is concerned that the new proposed definitions of "cannabis" in view of existing definitions of "hemp" and "marihuana" (referred to as "marijuana" going forward) as employed in various federal and state regulations will be confusing and not act to clarify the regulation of cannabis-derived products for the indicated regulatory authorities.

The Cannabis Plant poses a unique regulatory challenge, because the Cannabis Plant is capable of producing a wide variety of products, including hemp oil, fiber, and dietary products (and even batteries we have been told!), along with a complex list of terpenes and cannabinoids from the

resin, flower, and other plant components. As noted by the sponsors of the CAOA, the stigma of some of the psychotropic cannabinoids, primarily tetrahydrocannabinol ("THC"), traditionally focused on a delta-9 variety ("delta-9-THC"), has led to over- or under-regulation. In particular, the CAOA is concerned that criminal provisions related to possession and use of THC, designed to protect the public health from over- or mis-use have led to prosecution of specific ethnic or racial groups, and aims to correct those selective prosecutions that have been detrimental.

As correctly identified, the FDA regulates many or most of the potential products from the Cannabis Plant, and so is a natural regulatory authority, along with the Drug Enforcement Agency ("DEA") for the THC-related components with an abuse potential and the U.S. Department of Agriculture ("USDA") regarding its cultivation. The CAOA further proposes that the Alcohol and Tobacco Tax and Trade Bureau ("TTB") should assume a much greater role from the DEA, in part because the DEA may have over-limited its cultivation, processing, and uses based solely on its abuse potential, leaving many cannabis-derived products characterized at the highest level, Schedule I, under the Controlled Substances Act ("CSA"). In addition, the CAOA envisions a new Center for Cannabis Products in the FDA with roles for the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") along with some periphery responsibilities to study and establish limits for cannabis-impairment for drivers under the influence by the Department of Transportation ("DOT") and the Centers for Disease Control ("CDC").

The Cannabis Committee agrees that there should be joint federal and state regulation of the Cannabis Plant and its commercial uses, both for its physical products extracted cannabinoid and terpene products. However, we question whether the TTB would be the correct over-arching authority to regulate the Cannabis Plant over the DEA, which would seem to focus on the federal government's interest to tax recreational cannabis rather than permitting other uses for cannabis-derived products to be developed.

Instead, the Cannabis Committee suggests that the CAOA should work with the existing definitions of hemp and marijuana, but disagrees with the assumed dividing lines for "hemp" at or below 0.3% delta-9-THC with "marijuana" above this amount. As we understand it, the legislative demarcation came from the work of Dr. Ernest Small, a research botanist who began studying and writing about cannabis in the 1970s and published in 1976, along with his colleague, Arthur Cronquist, "A Practical and Natural Taxonomy for Cannabis." Dr. Small's work created a dividing line between hemp and marijuana at 0.3 percent THC for purposes of a biological taxonomy that was not based on the abuse potential and psychoactive effects of THC, which seem to occur at 1% delta-9-THC and above.[1] The Cannabis Committee recognizes that higher THC-content cannabis products have been associated with dependence and the potential for causing impaired thinking and interfering with a person's ability to learn and perform complicated tasks, especially for younger adults. For these reasons, individuals who have used marijuana may not be able to drive safely and may have problems playing sports or engaging in other physical activities, leading to state authorities (and other federal governments) looking to develop analytic ways to test for marijuana impairment or set THC levels for driving.

[1] See, e.g., Weinberg, Bill, "The Arbitrary Legal Line That Separates Hemp & Marijuana", *Cannabis Now*, available at: https://cannabisnow.com/the-arbitrary-legal-line-that-separates-hemp-marijuana/ (Dec. 20, 2018).

A. Suggested Federal Regulatory Framework

The Cannabis Committee proposes that the federal government develop a system that complements rather than competes or prevents the rationale regulation of our rapidly developing cannabis industry. We suggest the following roadmap, building upon the existing expertise that can be expanded to include the Cannabis Plant and cannabis-derived products to provide for the safety of the public health and development of appropriate scientific regulation:

- The USDA should encourage states to develop their own central regulatory agency for regulating cannabis growing that partners with the USDA to develop policies for healthy cannabis growing. Such policies should include definitions for "organic" and appropriate pesticide use that conforms with standards consistent with the Environmental Protection Agency ("EPA") guidelines. Where states do not have developed policies, the USDA should establish national guidelines for such states to adopt in the absence of their own standards. Right now, the USDA has developed guidelines tied to one or more Farm Bills (2018 and 2014 principally) including delta-9-THC testing to determine if the grown cannabis is "hemp" or "marijuana." The USDA redefined delta-9-THC to mean delta-9-THC plus THCA (adding only the THC part of THCA in the accounting), which should also be evaluated for correctness as a regulatory testing standard. A uniform growing policy will help to provide more plant consistency along with environmentally appropriate solutions to protect our water supply and other natural resources.

- As noted above, we think the 0.3% delta-9-THC demarcation of hemp v. marijuana should be revisited. In this regard, the federal government should set up a working group composed of the DEA, FDA, CDC, and NIH (principally the National Institute on Drug Abuse (NIDA)), and Substance Abuse and Mental Health Services Administration (SAMHSA) to determine an appropriate demarcation line based on mental health and science. Then this new limit should be redefined by the USDA for implementation at the state level.

- One the demarcation has been reset for "hemp" versus "marijuana", the USDA's growing limits should be adjusted to provide for reasonable limits that can be tested prior to harvesting. In addition, appropriate limits should be set for processing and final product preparation that are in line with those growing limits rather than providing the same limits as for the growing definitions of hemp and marijuana. For example, we have heard from growers that if 0.3% delta-9-THC remains the demarcation line (as defined by the USDA), then 1% THC would be appropriate for testing, and a higher limit would be required for processing, prior to final product formulation for consumers.

- DEA's regulation of the Controlled Substances Act ("CSA") should be so adjusted to keep hemp descheduled and marijuana and delta-9-THC should be scheduled as Schedule II or lower abuse-potential categories to reflect that it has an abuse potential but has legitimate medical uses as well. Such rescheduling will allow additional research to continue but will necessarily curtail recreational use until additional research has been conducted to determine safe use by adults and other age groups. In addition, this will reduce reliance on an antiquated, obsolete, and potentially dangerous supply of cannabis from the University

of Mississippi that NIDA has limited for cannabis research, which clinical researchers have indicated to us have little or no probative value. As new cannabinoids are discovered and isolated for particular medical or recreational uses, e.g., delta-8-THC and cannabigerol (CBG), the DEA in conjunction with the FDA should schedule each as Schedule II or less restrictive categories, including descheduling, where appropriate. In addition, the DEA should consider how to schedule synthetic versions of these cannabinoids based on their actual abuse potential rather than scheduling them as all as Schedule I, if not derived from Farm Bill-type hemp.

- We agree that the FDA should be affirmatively tasked with regulating many consumer and prescription cannabis-derived products. The FDA has already indicated that cannabis seed-type products, can be sold as new food products, because they contain no CBD or THC. Many hemp-based food products may contain high amounts of fiber and protein, for instance, and the FDA in conjunction with the USDA should develop appropriate food standards for hemp-based products. The FDA generally permits cannabis-derived products to be used as topical cosmetic ingredients, when such agents have no or minimal absorption through the skin into the bloodstream. But since many of the cannabinoids and some of the terpenes in cannabis have drug-like qualities, the FDA should set safe limits for dietary supplements, over-the-counter drugs, and prescription drug amounts of the principal drugs in cannabis, including delta-9 and delta-8-THC, CBD, CBG, and any other cannabinoid that has been singled out for consumer use. The FDA should also review medical devices meant to deliver cannabis-derived products such as transdermal patches as well as devices to prevent state authorities to be tasked with such review to protect the public health. As with other FDA-regulated products, the FDA should continue to work with complementary state authorities for regulating these products, where they involve interstate commerce. Because the FDA has been slow to regulate cannabis-derived products, Congress should set deadlines linked to drug-related user fees for the FDA to establish regulatory standards beyond its current limited oversight over drug-type claims for hemp-derived products. As with other FDA-regulated products, the FDA should be able to develop user fees for cannabis-derived products to hire reviewers with appropriate expertise and training to review and approve new cannabis products and provide continuing regulatory oversight.

- Given the TTB's overlapping role to regulate alcoholic beverages, with the FDA regulating content as a food (including approved food coloring) and the TTB primarily regulating alcoholic beverages as a taxing authority, we do not believe that the TTB should be charged with regulating most, if any, cannabis-derived products. Assuming appropriate limits are redefined for hemp and marijuana products, however, the federal government could establish tax rates to be collected by the TTB to be directed to the FDA and other regulatory agencies developing guidance for cannabis cultivation, processing, and use.

2. State and Federal Tax Implications

The following comments discuss the how the tax proposals set forth in the CAOA would impact the medical and recreational use program established in New York's Marijuana Regulation and Taxation Act ("MRTA") and the cannabis industry at large.

Currently, the largest tax issue facing the cannabis industry are the prohibitions found in Section 280E of the Internal Revenue Code. Section 280E, which prohibits all ordinary necessary business deductions, except cost of goods sold, for companies that traffic in a Schedule I or Schedule II controlled substances. As a result, cannabis companies operating in legal states can face up to 90% tax rates because of § 280E.

The CAOA would remove the effects of § 280E, but would include federal excise taxes starting at 10% and increasing to 25% over a 5 year period, after which, the flat tax would then switch to a THC potency tax for THC amounts that are ascertainable or maintain the 25% tax for products where amounts are not ascertainable. While descheduling cannabis would alleviate the harsh effects of § 280E, layering federal taxes on top of state cannabis taxes would lead to a resurgence of illicit sales, as the effective retail price of legal cannabis would substantially increase with the addition of the new taxes.

A. Potency Tax

The MRTA imposes a $0.005 excise tax per milligram of THC in cannabis flower, $0.008 excise tax per milligram of THC in cannabis concentrates, and $0.03 excise tax per milligram of THC in cannabis edibles. Further, there is a 13% flat tax at retail. The table below shows sample costs and tax rates under the MRTA:

Product	Amt (g)	THC (mg)	Wholesale Cost	Wholesale Tax	Dispensary Cost	Retail Tax	Cost w/ Tax[2]	Effective Tax Rate
Flower	1	200	$8.05[3]	$1.00	$9.05	$2.35	$20.45	27.04%
Cartridge	1	800	$19.60[4]	$6.40	$26.00	$6.76	$58.76	49.9%
Gummy	-	100	$8.00[5]	$3.00	$11.00	$2.86	$24.86	55.38%

In terms of flower, New York's average retail price will far exceed the illicit market price, which will jeopardize small businesses, particularly businesses owned by social equity applicants. The average cost of one medium quality ounce on the illicit market in New York is $271, or $9.56 per gram.[6] Small businesses will find it difficult to remain competitive with the illicit market at New York's current tax rate. If the federal government were to increase taxes initially by 10-25% and then institute a THC potency tax, these small businesses would essentially be priced out of the market.

Regarding the potency-based THC tax, one of the issues is the arbitrary nature of the various tax rates by product. Unlike alcohol, where lower proof products require substantially more volumetric consumption, e.g., 1.5 ounces of 80-proof liquor contains 0.6 ounces of alcohol vs. 12 ounces of 5% alcohol beer contains 0.6 ounces of alcohol, cannabis does not have the same type of

[2] Assumes retailers markup product by 100%.
[3] Average of Massachusetts and Illinois wholesale cannabis price per gram.
[4] Average wholesale price of California, Colorado, Nevada, Oregon and Washington.
[5] Average wholesale price of California, Colorado, Nevada, Oregon and Washington.
[6] https://oxfordtreatment.com/substance-abuse/marijuana/average-cost-of-marijuana/.

relationship. An 80% 1-gram THC vaporizer cartridge contains 800 milligrams of THC and one gram of 30% THC flower contains 300 milligrams of THC.

If an alcohol consumer wanted to feel the effects of four serving sizes of alcohol (0.6 ounces), the consumer could either drink four shots or have four beers; i.e., they could consume 6 ounces of liquor (¾ of a cup) or 48 ounces of beer (6 cups). It is without question easier to ingest 6 ounces instead of 48 ounces. Therefore, taxing the high-proof liquors at a higher rate than lower-proof beverages disincentivizes the consumer from purchasing the liquor and instead purchase lower-proof beverages, which will be drunk slowly, thereby reducing overindulgence.

However, the same is not necessarily true for cannabis. An 80% THC cartridge is 2.5 times stronger than 30% THC flower. Inhaling 2.5 puffs of cannabis flower, instead of one puff from a vaporizer, is unlikely to reduce the overall amount of cannabis consumed by the individual. Instead of consuming cannabis over a longer period, like what would happen when consuming four beers, 2.5 puffs of cannabis can be inhaled nearly as quickly as one puff of a vaporizer. Therefore, the cannabis consumer never faces the same type of restraint that promotes the reduction of consumption.

Like many other facets of the cannabis market, what works for alcohol does not necessarily work for cannabis, because they are fundamentally different and require laws and regulations specific to the substance.

Lastly, due to the fact that there are over 100 cannabinoids in the Cannabis Plant, the use of delta-9-THC (or total THC equaling 87.7% of THCA plus delta-9-THC) as the basis for excise taxation will likely cause the market to shift to other, less studied, forms of THC such as delta-8, delta-10, THCV and THCP.[7] A potency tax will likely cause the market to mimic the designer drug cat and mouse game, exposing consumers to potentially unknown and unstudied chemicals, while relying on the government to update an ever changing definition of THC. This could result in complexity for businesses as well as the government's tax administration efforts and produce consumer uncertainty with potential exposure to lesser studied THC variants having unknown effects.

B. Economies of Scale

A proposed THC tax levied on the wholesale level is "static" and not subject to change based on market conditions, which creates an artificial price floor. Essentially, the tax gets included into the cost of goods sold ("COGS") that is independent of the actual costs of production. This creates an imbalance in the industry where larger producers, benefitting from economies of scale, can create much lower cost products and therefore absorb the tax as a higher portion of their COGS even as prices fall. As a result, cultivators will be expected to offer lower wholesale prices, yet their tax burden per pound stays the same. Large producers will be able to meet the lower prices while balancing the lower profit margins with volume. This will create an outsized advantage over small cultivators who will be stuck at a set cost per pound, inflated by a static wholesale tax, and unable to be reduced without scaling.

[7] Research suggests THCP could be even more potent than delta-9 THC, see https://www.leafly.com/news/science-tech/thcp-cbdp-study-reveals-identification-two-new-cannabinoids.

If the taxes were calculated based on a percentage of the sale value, the small cultivator would have more flexibility to offer competitive pricing.

C. CAOA Tax Provisions and Impacts on the Industry

On the low end, a cannabis company that is not a dispensary could face federal effective tax rates of approximately 40%, versus the current 21% corporate rate and maximum 37% marginal pass-through rate.[8] The removal of § 280E would bring federal income tax rates of cannabis companies in line with other companies. However, the imposition of excise taxes would cause product prices to increase, as the excise tax would essentially be included in COGS. The newest states to legalize have seen wholesale costs of cannabis 200-300% higher than western states, due in part to supply and the fact that year-round cultivation is exclusively indoors, which increases production costs. As more dispensaries open, a common vector into the cannabis industry for small businesses and social equity applicants, demand will continue to exceed supply.

The table below demonstrates the price differential between new, northern and eastern, states and the mature western states when applying the wholesale costs per gram to each state's tax regime.

State	CA	CO	OR	NV	WA	IL	MA
Wholesale Cost (g)	$3.71	$3.12	$2.20	$4.75	$3.33	$7.72	$8.38
Retail Cost (g)	$10.51	$8.25	$5.16	$12.89	$9.12	$19.82	$20.11
Effective Tax Rate	41.53%	32.25%	17%	35.7%	37%	28.4%	20%
Illicit Market Cost (g)[9]	$7.30	$7.05	$6.60	$8.25	$6.95	$10.47	$9.98
Percentage Difference Legal and Illicit	44%	17%	-21%	56%	31%	89%	112%

As shown above, these western states have significantly lower wholesale costs and none of the states have implemented a THC potency tax. Whereas, Illinois and Massachusetts have, for the most part, comparatively lower tax rates than the western states, but their cost per gram is significantly higher. Further, Illinois has a THC tax that taxes products over 30% THC at a higher rate than those lower than 30%.

With a federal excise tax essentially increasing COGS, states that have recently legalized and those that will legalize in the future, where growing outdoors year-round is not possible, will see prices increase. As indicated in the above table, those states with high COGS will see the prices continue to surpass the illicit market by significant margins as the excise taxes effectively add to COGS;

[8] The pass-through rate does not include the § 199A deduction which can lower 37% rate to 29.6%. The effective tax rate on small businesses is approximately 20%.

[9] https://oxfordtreatment.com/substance-abuse/marijuana/average-cost-of-marijuana/.

even in the western states, except for Oregon. The addition of new federal excises taxes will increase retail prices far in excess of illicit market prices.

Moreover, increased COGS will disproportionately affect small businesses and social equity businesses that will struggle to compete with larger companies that can pay higher prices for cannabis as demand outstrips supply.

The CAOA will accelerate the establishment of winners and losers in the cannabis industry, enabling incumbent multi-state operators, which have been operating in legal states for years and are able to absorb the high tax rates due to larger profit margins than newer and smaller businesses, to dominate the market.

D. Suggested Federal Tax Regime

In order to support nascent industry and small businesses operated by social equity applicants, the Cannabis Committee recommends that the federal government refrain from initially taxing cannabis products. The loss of potential revenue by virtue of § 280E no longer applying may be offset by the creation of new businesses and workers paying employment and income taxes. Moreover, keeping the taxes on cannabis low will encourage illicit market businesses to move to the legal market, thereby increasing tax revenue that would have otherwise gone unreported. Additionally, as discussed above, lower taxation will help to suppress and eventually eliminate the illicit market by keeping prices competitive.

Federal taxation of the cannabis industry may be reevaluated based on industry data every year to determine if and when to slowly increase taxation. The federal government must track illicit market prices as well as regulated prices in order to determine if cannabis taxation is setting regulated sale prices in excess of illicit market prices. Moreover, excise taxes are generally regressive, whereby lower income households tend to spend a higher share of their pre-tax income on products subject to the excise taxes.[10] Therefore, to support both small businesses and to attract consumers of every economic level to the legal market, the Cannabis Committee advises that federal excise taxes should initially remain low.

The Cannabis Committee also recommends that foregone revenue from a reduced cannabis tax rate be paired with the repeal of § 199A. The repeal of § 199A could raise nearly $150 billion over the next decade.[11] Projections for a 15% cannabis excise tax indicate that the cannabis tax could raise $10 billion per year. The removal of § 199A in lieu of the cannabis excise tax would more than pay for itself while combatting the illicit market, which will in turn bring in more federal revenue in the form of illegal-turned-legal businesses.

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[10] The horizontal distribution of excise taxes is discussed more in CRS Report R43189, Federal Excise Taxes: An Introduction and General Analysis. See also Congressional Budget Office, The Distribution of Household Income and Federal Taxes, 2010, December 2013, p. 9, available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44604-AverageTaxRates.pdf.

[11] https://www.taxpolicycenter.org/sites/default/files/publication/160472/an_updated_analysis_of_former_vice_president_bidens_tax_proposals_1.pdf.

Additionally, the CAOA should offer tax credits for green energy companies and those able to offset their energy usage. Indoor cannabis cultivation is one of the most energy-intensive industries.[12] The federal government is in a unique position to offer extremely valuable incentives, credits, and rebates to producers designed to reduce, or ideally eliminate, the increased energy usage of cannabis facilities. Such incentives may include certification of cultivation facilities that can demonstrate energy efficient and environmentally responsible operations, entitling the company to a reduction in excise taxes.

Lastly, the government could offer small companies, those under a pre-determined revenue threshold, tax credits for taxes paid under § 280E that would have ordinarily been deductible expenses.

3. The CAOA and the Dormant Commerce Clause

The following comments highlight the Cannabis Committee's assessment of the interplay between the CAOA and the Dormant Commerce Clause ("DCC") and recommendations for amendments to address potential issues.

The stated intent of the CAOA is to "preserve the integrity of state cannabis laws" and enable states to devise regulatory schemes that advance their own health, safety, and welfare priorities. Indeed, references abound in the bill's Executive Summary to the regime of cooperative federalism that governs the alcohol industry.

However, as currently drafted, the Cannabis Committee has concerns that the intent behind the CAOA cannot be fully effectuated because the CAOA does not appear to account for the DCC and the potential implications for a regulatory scheme dependent upon state law in the wake of federal legalization. The DCC is designed to prevent states from enacting the kind of protectionist legislation that plagued the Republic during its unsuccessful experiment with the Articles of Confederation—beggar-thy-neighbors tariffs, embargoes, customs duties, import and export restrictions, among others.[13] Yet laws kindred to these control the U.S. cannabis market today because of the industry's unique origins.

Strictly speaking, there is no U.S. cannabis market. The cannabis industry consists instead of thirty-six discrete and insular intrastate markets. When California, Colorado, Washington and Oregon began to legalize cannabis for medical use, and later for adult use, the CSA and DOJ guidelines induced them to confine sales within their frontiers to stave off federal intervention. Consequently, legalization states have adopted a host of regulations—from import/export restrictions and domestic residency requirements, to idiosyncratic testing, labeling, and packaging prescriptions, to social equity programs—that, in the absence of the FCSA would violate the DCC and succumb to judicial review. However, once legalization occurs, the invalidation of individual state's regulations will leave a gaping hole in cannabis' regulatory fabric without a viable federal alternative to replace it.

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[12] https://www.ase.org/blog/legal-cannabis-presents-challenges-utilities-opportunities-energy-efficiency.

[13] See Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct 2449, 2459 (2019) (observing that the DCC prevents the States from adopting protectionist measures and preserves a national market for goods and services).

A. Recommended Amendments to Avoid DCC Pitfalls

To avert this outcome, the Cannabis Committee envisions two scenarios. Either Congress can augment the CAOA by adopting a full-fledged regulatory scheme that would supplant, i.e., preempt, state law., or Congress can amend the CAOA to shield state programs from DCC challenges. By adding a clause that overrides the DCC,[14] Congress can expressly authorize states to insulate their domestic marijuana industry from interstate competition and to protect their unique regulations from DCC challenges for a transitional period of seven years.[15] In that time, state regulators and domestic producers can prepare accordingly for interstate competition and/or for the prospect of federal regulation.

The Cannabis Committee suggests that the amendment to the CAOA mirror language in the McCarran-Ferguson Act[16] and/or the Bank Holding Company Act that suspends the DCC and preserves the integrity of regulation that may burden interstate commerce. It would provide as follows:

> **"It is the policy of Congress to recognize, to preserve, and to protect the primary responsibilities and rights of the States to regulate the cultivation, manufacture, distribution, and sale of cannabis within its borders and to vest the states with unfettered authority to implement a licensing structure and regulatory regime that advances the health, safety, and welfare of its people and that realizes its goals of restorative justice."**
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> **"This legislation accordingly shall not preempt state law unless a state has declined to implement an autonomous regulatory regime or the state expressly has adopted a federal regulatory regime established at a later date. Nor shall this legislation interfere with existing state restrictions on interstate commerce for a period of seven (7) years from the date this statute takes effect."**

By adding the foregoing clause, Congress would provide both state regulators and industry stakeholders ample time to adapt to the momentous changes to the cannabis economy that the CAOA's enactment would otherwise precipitate.

4. Tied-House Prohibition

The following comments provide recommendations regarding the Tied House provisions set forth in the CAOA.

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[14] The DCC figures as perhaps the only Constitutional constraint that Congress can supersede.

[15] See Scott Bloomberg & Robert Mikos, Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana (2021), available at http://ssrn.com/abstract=3909972. See id. at 43-44.

[16] The McCarran-Ferguson Act, a law upholding the primacy of states' regulation of the insurance market, expressly suspends the DCC's application to taxes and regulations imposed upon out-of-state firms. Congress enacted this law in 1944 to prevent the DCC from disrupting an insurance market and regulatory structure that states meticulously had developed for the preceding seventy-five (75) years.

Section 304(2) of the CAOA, or the "No Tied House" provision, generally prohibits the vertical integration of cannabis operators. Applying this broad-sweeping prohibition will have a devasting impact on dozens of cannabis operators who are vertically integrated either because certain states permit it, or because they require it. New York's ten "registered organizations" or "ROs" who act as the entire medical cannabis industry in NY operate as vertically integrated because New York law requires vertical integration by law. Section 304(2) would therefore require New York to amend its medical cannabis laws, and result in the forced sale of assets owned by the ROs, at a critical and sensitive time as NY's adult-use program just begins to take shape. It would also prevent well-financed cannabis companies who are vertically integrated or possess a non-retail license from providing financing or otherwise form strategic partnerships with minority retail operators, which currently serves a critical source of capital and non-financial resources to social equity operators.

The Cannabis Committee suggests that the sponsoring office amend section 304(2) to create: (i) an exemption for existing state laws that permit or require vertical integration, (ii) a safe harbor for vertical or non-retail cannabis companies to continue to invest in and incubate social equity retailers, and (iii) a safe harbor for wholly-owned retail operations, similar to the TTB's alcohol regulations on "Unlawful Inducements", especially considering that Section 304(2) is virtually identical to Section 105(b) of the Federal Alcohol Administration Act.

5. Expungement Under the CAOA

The following comments provide recommendations regarding the expungement provisions set forth in the CAOA.

The Cannabis Committee supports and comments how expungement is a focal point in the CAOA. We ask that you ensure that the expungement provisions of the Act have the intended impact of reinstating formerly convicted individuals to a civil status as if the offense never occurred, not simply to erasing the paper trail as if the offense never occurred (on paper).

The Committee believes this can be achieved this in the following ways:

A. Address Gaps in Educational, Employment, Residential, and Credit History

Incarceration or a criminal record often eliminates an individual's access to education, employment, housing, and consumer history/credit rating. Each of these is an essential element for day-to-day living, like applying for a job, a lease, a loan, or further education. The Cannabis Committee recommends assurances of expungement and reinstatement through (i) Congress passing legislation so that any such gaps in a person's history on account of an expunged conviction cannot be used to discriminate against the individual, and (ii) a campaign to educate the public on expungement and gaps in a person's history.

B. Eliminate the "Aggravating Role" Limitation

The CAOA specifically excludes individuals who have received an aggravating role adjustment to their convictions pursuant to federal sentencing guidelines. This means an individual found to be an organizer, leader, manager or supervisor of any criminal activity is ineligible to have their

records expunged. While the aggravating role adjustment was designed to augment the sentencing of "kingpins", a wide swath of people has been caught in its wake, including people whose sole connection to cannabis were based on familial relationships. Women – mothers, wives, and girlfriends – have been particularly at risk of being identified as having aggravated roles due to cohabitation, shared living expenses, use of utilities, etc.[17] The Cannabis Committee recommends that these individuals have the ability to petition the applicable court for expungement of their records.

C. Put Mixed-status Families Back Together

Under Section 313 of the CAOA "aliens may not be denied any benefit or protection under the immigration laws based on any event, including conduct, a finding, an admission, addiction or abuse, an arrest, a juvenile adjudication, or a conviction, relating to cannabis, regardless of whether the event occurred before, on, or the effective date of this Act." Yet many American citizens, in addition to aliens, will suffer unless the CAOA recognizes that hundreds of thousands of families of mixed-status documentation have been, and continue to be, dismantled on account of convictions now expugnable under the CAOA.[18] Rather, the Cannabis Committee recommends that the CAOA be amended to allow individuals who have been deported due to an expugnable act to apply to reinstate their status or otherwise be eligible to visit family in the United States.

6. Decriminalization Provisions

The following comments provide recommendations regarding the decriminalization provisions set forth in the CAOA.

There is a growing trend within the United States to legalize marihuana[19] for both recreational and medicinal purposes. With approximately forty-nine (49) states legalizing medical marihuana use in some capacity, and the overwhelming majority of American citizens favoring marihuana legalization, the CAOA serves to align federal law with the thoughts and desires of United States citizens.

The proposed legislation to decriminalize marihuana and to remove it from Schedule I of the CSA is significant. Before discussing the potential racial and socioeconomic inequities that this legislation seeks to address, it is important to note that marihuana no longer satisfies the statutory criteria for Schedule I Placement under the CSA. See 21 U.S.C. § 812(b)(1).

A. Accepted Medical Marihuana Use No Longer Places It Within Schedule I of the CSA

Under the CSA, placement on Schedule I specifically requires a finding that the substance "has no currently accepted medical use in treatment in the United States." See 21 U.S.C. § 812(b)(1)(B). However, marihuana does not meet this criterion because it has become an accepted medical

[17] Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color.
[18] Marijuana conviction is the fourth most likely reason for an individual to be deported from the United States.
[19] The term "marihuana" is used in the CSA to refer to cannabis or marijuana.

treatment on the state level, as evidenced in the legalization of medicinal marihuana throughout the country. For this reason alone, federal decriminalization is warranted.

The idea that marihuana does not have any medicinal benefit has fallen by the wayside. Deleting marihuana from Schedule I of the Controlled Substances Act - where it is currently listed alongside heroin, LSD, and other narcotics – is legally sound. Notwithstanding the widely-accepted medicinal marihuana treatments in this country, marihuana is also used recreationally. Thus, it is more accurately compared to tobacco and alcohol than to the narcotics with which it is currently grouped.

B. Marihuana Decriminalization Acknowledges and Attempts to Address the Disparities in Marihuana-Related Prosecutions on the Federal Level

Marihuana decriminalization at the federal level provides individual states with the discretion to decide whether legalization is appropriate within their respective jurisdictions. Simultaneously, the proposed legislation will allow individuals to lawfully possess marihuana at the state level – or to transport marihuana interstate – without fear of federal criminal prosecution. This is particularly relevant to people of color, who are disproportionately arrested and convicted of marihuana-related offenses.

Despite relatively equal marihuana usage across racial, ethnic and socio-economic lines, minorities (and African Americans in particular) are arrested at more than three times the rate of other marihuana consumers. See CAOA § 2(8). Minorities are, on average, sentenced to longer terms of incarceration for such offenses than non-minority offenders. See CAOA § 2(9). We are encouraged that these statistics have been set forth in the findings of this legislation but there is concern that these numbers will remain stagnant until such time as marihuana possession and use has been decriminalized throughout the nation. Although it is unlikely that a single legislative act can fully and finally address the long-standing racial disparities that exist within our criminal justice system on all levels, this act represents a step in the right direction.

C. The “Diversion Cannabis” Section and Its Penalties are Excessive

The CAOA defines “Diversion Cannabis” as more than ten (10) pounds of cannabis, which is grown, manufactured, shipped, transported, received, possessed, sold, distributed or purchased in violation of state or local law or without having paid the applicable taxes. See CAOA § 112. Though we believe this is a necessary provision and that ten (10) pounds is an acceptable threshold under the section, we respectfully submit that the proposed criminal sanction of five (5) years is excessive. The length of the proposed sanction means that a violation of the section would result in a felony conviction. It is respectfully suggested that a term of imprisonment not to exceed one year is a more acceptable alternative. In which case, a violation of the “Diversion Cannabis” section would result in a misdemeanor conviction.

The decriminalization of marihuana on the federal level would not preclude criminal penalties in those states that choose not to legalize marihuana use. Insofar as there are concerns about Contraband Cannabis, such concerns should be addressed through civil penalties at the federal level.

7. Secure and Fair Enforcement ("SAFE") Banking Act

The following comments provide recommendations regarding incorporation of the provisions set forth in the SAFE Banking Act.

While not part of the CAOA, the Cannabis Committee also recommends action on the provisions of the SAFE Banking Act. The last several decades of misguided application of the criminal justice system has had a disproportionate impact on underserved minority communities. Many states who have and continue to decriminalize and regulate adult-use cannabis (especially New York) treat social equity a key component of their programs in their attempt to course-correct on the War on Drugs. In fact, New York recently passed legislation to legalize adult use cannabis with a goal of awarding one half of all licenses to minority and women owned businesses. However, the lack of access to traditional financial services, whether it be simple traditional business banking or the ability to raise non-predatory capital (debt or equity) creates incredibly high financial barriers to entry for the same groups the CAOA is intended to help. Without access to these traditional financial services and capital markets for minority entrepreneurs, the industry will continue to be dominated by high-net-worth individuals, and minority operators will continue to be forced to choose between the struggle of under-capitalization or be subject to potential predatory financing options.

While the overall issue of access to capital is less relevant upon passage of the CAOA, including the SAFE Banking Act as an amendment to the CAOA and prompting FinCEN to revise its guidance to financial institutions will provide the clarity and comfort necessary to put small and minority cannabis operators on a level playing field with its industry counterparts. Moreover, ensuring access to traditional financial services will reduce the amount of cash flowing through New York's nascent industry, thereby protecting the industry's employees, owners, and consumers all located in New York, from the physical harms presented by operating in a cash-heavy environment.

The Cannabis Committee respectfully suggests including the provisions of the SAFE Banking Act as amendment to the discussion draft, or in the alternative, supports passage of the SAFE Banking Act as an interim step to providing access to capital for those who need it most.

6. Conclusion

The Cannabis Committee appreciates the opportunity to review and provide comments regarding the CAOA and related legislation. We welcome the opportunity to discuss any of these comments and recommendations with your office. Please do not hesitate to contact the members of the Cannabis Committee, and we hope we can be a resource to you and your Congressional colleagues as you consider cannabis legalization at the federal level.

Respectfully Submitted,

Lynelle Kathleen Bosworth, Esq.
Chair, Committee on Cannabis Law