

Trump v. Biden: CANNABIS LEGALIZATION

With the 2020 presidential election just days away, the future of cannabis legalization will likely rest on the shoulders of whoever is sitting in the Oval Office on January 20, 2021. So where do Donald Trump and Joe Biden stand with respect to the cannabis industry? The Cozen O'Connor Public Strategies team brings you perspectives from both sides of the election spectrum.

Second Trump Administration

White House

With a successful re-election wiping away any concerns about the potential political or electoral advantages of neutrality, President Trump and his political allies in the White House would likely be openly hostile to the cannabis industry and all related ancillary businesses, in terms of both business and public policy.

Department of Justice

The DOJ is likely to continue providing restrictive guidance to administration agencies based on its interpretations of existing law.

- For example, as part of a recent court case, the Justice Department's Office of Legal Counsel released a previously undisclosed memo which argues that the DEA's 2016 announcement to expand the number of cannabis production facilities would be a violation of the US's obligation to the UN Single Convention on Narcotic Drugs. This guidance led the Drug Enforcement Agency to stonewall applications from scientists to cultivate cannabis for research purposes.
- Additionally, the DOJ may continue to seek to thwart cannabis company mergers and acquisitions. While official Antitrust Division probes would be subject to unwanted scrutiny due to whistleblower investigations of the office, the (demonstrated) animus toward the industry remains.

Department of Homeland Security

In April of 2019, the U.S. Citizenship and Immigration Services issued policy guidance to "clarify that violation of federal controlled substance law, including for marijuana," remained a conditional bar to establishing good moral character for naturalization – even where that conduct would not be an offense under state law. This policy would likely continue under a second Trump administration.

Food and Drug Administration

The FDA would likely increase regulatory hurdles associated with both cannabis and cannabis-derived compounds. While the FDA recently issued draft guidance on cannabis-related clinical research and generic oral CBD medications, it has yet to offer a comprehensive framework for CBD's regulation in consumer products. This lack of regulatory clarity has effectively stymied market research and investment, a strategy that is not likely to change soon.

Congress

Should President Trump be reelected, it is likely either one or both chambers of Congress will have Republican majorities. Under this scenario – a Republican majority and an emboldened second-term president no longer beholden to a relatively pro-cannabis electorate (and famously critical of the substance) – there is likely to be little appetite to address cannabis-related legislation.



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- Nevertheless, there is one piece of cannabis legislation with some chance of passing: The Secure and Fair Enforcement Banking Act, which would ensure access to financial services for cannabis businesses, has the support of more than 30 bipartisan Attorneys General who argue that its passage would allow officials to collect much-needed tax revenue from the marijuana industry amid the coronavirus-driven economic shock. Moreover, given that the Strengthening the Tenth Amendment Through Entrusting States Act (which would grant each state the autonomy to participate in a legalized marijuana scenario) was written for a Republican Congress, there would probably be renewed chatter about its political viability. But, it is still more likely than not that both of these bills would wither on the vine in such a political environment.

Biden Administration

White House

Notably, Biden has not committed to legalizing marijuana for recreational use at the federal level; instead, his administration would reschedule it from a Schedule I to Schedule II drug under the Controlled Substances Act and allow states to set their own laws vis-à-vis its recreational use. He has, however, vowed to “support [its legalization] for medical purposes.”

- While Biden has rather reluctantly come to embrace cannabis-related policy changes, the candidate has moved significantly on marijuana in just the past year, and his administration would provide the political environment to move in a direction where broader cannabis reform is a reality. There is broad support for change; A PEW Research Center survey found 67% of Americans supported federal legalization of marijuana in 2019, including 55% of Republicans and Republican-leaning independents.
- Since the survey, the Black Lives Matter movement has effectively connected federal drug policy with racial injustice in American opinion, likely moving the needle to even higher support. This national reckoning over race, together with a desperate need for tax revenue and jobs across the US amid the recession, could propel a Biden-Harris administration even further over the next few years.

Department of Justice

Under a Biden administration, the DOJ would “not launch federal prosecution for matters that are legal at the state level,” including the adult use of cannabis for recreational purposes. Additionally, Biden has stated his administration would expunge past federal convictions for cannabis-related offenses; he has instead expressed support for the use of drug courts and treatment diversion programs, working with health and social service agencies to transition cannabis-related crimes out of the criminal justice system and into health care treatment programs, and implementing harm reduction interventions. Moreover, in a departure from Trump administration policy, a Biden administration would likely issue guidance to allow for the increased approval of cannabis research permits.

Department of Homeland Security

A Biden administration would remove cannabis possession and use from the list of deportable offenses. Currently, offenses “other than a single offense involving possession for one’s own use of 30 grams or less of marijuana,” is cause for deportation. Moreover, it would likely rescind guidance establishing that a “violation of federal controlled substance law, including for marijuana,” remains a conditional bar to establishing good moral character for naturalization.

Food and Drug Administration

While partially contingent upon his choice for FDA Commissioner, a Biden administration would likely increase the frequency of hearings on cannabis and CBD products, paving way for the agency to promulgate actionable guidance.

Congress

Should Biden be elected, it is possible either one or both chambers of Congress will have Democratic majorities – prompting an increase in cannabis-related legislative activity.

- House Democratic leadership has already committed to voting on the [Marijuana Opportunity Reinvestment and Expungement Act](#) during their post-election lame duck session. The MORE Act would remove cannabis from the Controlled Substances Act while addressing key issues of social equity and restorative justice, and is almost certain to pass if Democrats retake the Senate.
 - The [SAFE Banking Act](#) would almost surely be passed should Democrats take control of both chambers – it's even possible under a Republican Senate. And, in a Senate under Democrats' control, federal legalization would also likely be on the table.
 - Democratic lawmakers are also likely to attempt to lift the congressional rider barring the District of Columbia from taxing and regulating legal cannabis, which has been extended every year since 2014. Joe Biden has personally advocated for the rider's removal.
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