

Comments of Behalf of the Minority Cannabis Business Association Regarding the Cannabis Administration Opportunity Act Discussion Draft

Cannabis Administration and Opportunity Act Sponsoring Offices,

On behalf of the minority cannabis business community and the individuals and communities most impacted by Federal cannabis prohibition, the Minority Cannabis Business Association (“MCBA”)¹ would first like to express our gratitude to the Sponsoring Offices for your unwavering commitment to ending Federal cannabis prohibition and ensuring equity is the cornerstone of the Federal cannabis framework. MCBA is the largest national trade association dedicated to serving the needs of minority cannabis businesses and the communities most impacted by federal cannabis prohibition and the broader War on Drugs (“impacted communities”). We are more than 300 minority and allied cannabis businesses, industry, and community leaders who share a vision for an equitable, just, and responsible cannabis industry. Our mission is carried out by a 15-member Board of Directors composed of a diverse group of industry veterans, medical and legal professionals, advocates and community leaders.

On behalf of our members, we offer these comments in response to your request for comment on the Cannabis Administration and Opportunity Act Discussion Draft (“CAO Act or “Discussion Draft”). We look forward to continued opportunities for engagement and support as we work together to end cannabis prohibition and restore and empower impacted communities.

I. EXECUTIVE SUMMARY

In our comments to the Discussion Draft, MCBA asks the Sponsoring Offices to consider the following:

1. Broadly define equity to ensure the scope of Federal cannabis reform is equal to the harm of federal cannabis prohibition. We ask the Sponsoring Offices to include equitable justice, equitable communities, equitable access, and equitable industry as guiding principles to ensure that equity is incorporated in all aspects of the CAO and no opportunity for restorative justice is overlooked.
2. Help end cannabis prohibition at the federal, state, and local level to an end by utilizing the Opportunity Trust Fund Grant Programs to incentivize states and localities to decriminalize

¹ *Who we are.* Minority Cannabis Business Association. (n.d.). <https://minoritycannabis.org/who-we-are/>.

cannabis, protect Black, Latino, and Indigenous youth from continued disparate enforcement of cannabis laws, and protect medical cannabis patients.

3. Ensure that a proper foundation to support the equity provisions of the Act is established prior to enactment. Such information will help (1) support remedial race classifications to address the historic and ongoing consequences of federal cannabis policy, (2) direct the development and implementation of federal cannabis justice programs, and (3) minimize the regulatory burden for minority businesses.
4. Ensure that the restorative justice and economic development proposals as well as the federal regulatory scheme are implemented in a timely and effective manner and in advance of interstate commerce but allow the existing state-lawful markets to continue undisrupted.
5. Consider additional policies to promote minority participation in the federally regulated market that would help eliminate undue barriers to entry and sustainability through, improve access to capital before and after enactment and promulgation of federal regulations, and minimize regulatory hurdles and compliance burdens.
6. Consider additional policies to strengthen provisions to economically restore and empower the individuals and communities most impacted by the War on Drugs, such as expanding Community Reinvestment Fund Grants and funding for research and training for HBCUs and other Minority Serving Institutions.

II. INTRODUCTION

Ending Prohibition

MCBA applauds the proposal to remove cannabis from the controlled substance schedule to help bring an end to cannabis prohibition and provide access to additional remedies for the injustices from which communities of color have suffered dire consequences across every social determinant of health², including poverty, housing, education, and criminal justice engagement. Marijuana's³ status as a

² Wodak, A. (2002). Costs of cannabis controls may outweigh the benefits. *BMJ*, 324(7329).
<https://doi.org/10.1136/bmj.324.7329.0/f>

³ While MCBA recognizes the historical implications of the term "marijuana," marijuana remains the term used throughout existing Federal policy. As such, MCBA uses "marijuana" and "cannabis" interchangeably throughout this document.

Schedule I drug is not the product of scientific evidence or sound public health policy.⁴ Marijuana was made a Schedule I controlled substances due to Federal actions rooted in racism and politics.⁵

The Federal government cannot address inequity while upholding a system that maintains it. To that end, we ask the Sponsoring Offices to aggressively seek opportunities to use Federal funds to incentivize states to end the criminalization of cannabis that continues to disproportionately impact communities of color.⁶

What is Equity in Federal Cannabis Policy?

The Federal cannabis framework and the remedies proposed must be of depth and breadth equal to the harm to meaningfully address the impacts of federal cannabis prohibition.

To that end, MCBA asks the Sponsoring Offices to consider the following guiding principles to ensure that equity is incorporated in all aspects of the CAO and no opportunity for restorative justice is missed:

1. **Equitable Justice:** preventing the deprivation of basic rights of citizenship to individuals incarcerated for nonviolent⁷ cannabis offenses, loss of immigration status or federal benefits due to the use of state-legal cannabis products or affiliation with the state-legal cannabis industry, and addressing the disproportionate arrest and imprisonment for cannabis offenses within impacted communities.
2. **Equitable Communities:** empowering communities to address generational economic, health, and educational disparities due to disparate enforcement of cannabis laws. The investment in communities must be targeted to affect the breadth of the harm done to impacted communities--from health and wellness services to economic development.

⁴ The Nixon Administration placed marijuana on Schedule I of the Controlled Substances Act contrary to the advice of Shafer Commission experts who found marijuana to be no more harmful than alcohol. See Nahas, G., & Greenwood, A. (1974). The first report of the National Commission on marihuana (1972): signal of misunderstanding or exercise in ambiguity. *Bulletin of the New York Academy of Medicine (U.S. National Library of Medicine, January 1974)*. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1749335/>; see also Downs, D. (2016, April 19). *The science behind the DEA's long war on marijuana*. Scientific American. <https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/>.

⁵ See Ibid; See also Baum, D., Bernstein, J., Quilty, A., & Gurland, H. (2016, March 31). *[Report]: Legalize it all, by Dan Baum*. Harper's Magazine. <https://harpers.org/archive/2016/04/legalize-it-all/>.

⁶ Greytak, E. (2020). "A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform." *ACLU*. <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>

⁷ Includes offenses involving violence enhancements that do not involve actual acts of violence.

3. **Equitable Access:** Ensuring legal access to medical cannabis patients, including ending the denial of access to safe and legal cannabis medicine to immigrants, veterans, seniors, and disabled persons and eliminating the risk of loss of immigration status, benefits, housing, or medical care.
4. **Equitable Industry:** preventing the exclusion of the individuals and communities most impacted by cannabis prohibition from participating in the legal cannabis industry, including exclusion because of inequitable access to capital⁸ and lack of access to Small Business Administration loans and services;⁹ exclusion of immigrants and individuals with prior cannabis convictions from participating in the legal cannabis industry;¹⁰ and the unconstitutional IRS policy denying nonprofit status to cannabis advocacy organizations.¹¹

Without addressing the ways Federal cannabis policy creates barriers to equity in state-legal cannabis industries, the individuals and communities that have paid the greatest price, and whose plight serves as impetus for reform, will be excluded from realizing the potential for economic empowerment and restoration through the legal industry. A holistic approach to restorative justice through Federal cannabis reform must include all elements of equity. Lacking any element, justice is incomplete. We cannot claim justice for the communities most impacted by federal cannabis if justice is not complete.

Immediate Research on the Need for Remedial Race Classifications on Federal Cannabis Policy

Federal cannabis policy was predicated upon racist intent¹² and has had a disparate impact on the

⁸ Current Federal law exposing financial institutions to risk of Federal prosecution impedes equitable access to capital for the minority cannabis businesses lacking access to private equity funds and personal and general wealth.

⁹ Cannabis and cannabis-related businesses are denied access to SBA loans and services including emergency COVID relief despite the “essential business” designation.

¹⁰ See Chapa, J., & Sutton, M. (2020, September 10). *Immigrants being left out of marijuana decriminalization reform*. ILRC. <https://www.ilrc.org/immigrants-being-left-out-marijuana-decriminalization-reform>.

¹¹ IRS Bulletin No. 2019 –1 (January 2, 2019) provides the Service may decline to issue a determination letter for nonprofit status if the letter is requested by an organization seeking 501(c)(6) whose purpose is directed at “...the improvement of business conditions of one or more lines of business relating to an activity involving controlled substances (within the meaning of Schedule I and II of the Controlled Substances Act, 21 U.S.C.S. § 801 et seq.) which is prohibited by Federal law regardless of its legality under the law of the state in which such activity is conducted...”. “Internal Revenue Bulletin: 2019-01,” Internal Revenue Service, January 2, 2019, https://www.irs.gov/irb/2019-01_IRB.

¹² John Ehrlichman, who was White House Counsel to President Nixon, once stated, "We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs?"

communities the policies sought to disenfranchise. Recent legal challenges to Congressional efforts to help “socially and economically disadvantaged” restaurant owners receive assistance in the wake of a national crisis and the Biden Administration's efforts to redress the grave injustices done to Black farmers raises concerns about the sustainability of any remedial race classifications, or the absence thereof, within the CAO Act.

In March 2021, Congress ordered the Small Business Administration (“SBA”) to include a 21-day exclusivity period for the Restaurant Revitalization Fund for women, military veterans, and "socially and economically disadvantaged" individuals with limited financial capital. Non-socially and economically disadvantaged business owners sued, alleging discrimination. As a result, SBA altered its approach, stopped payments on priority applications, and revoked 2,965 application approvals, likely leaving the most vulnerable business owners without relief. Similarly, a loan forgiveness payment program in the \$1.9 trillion stimulus package passed in March 2021¹³ would have allocated \$4 billion to address the historical racial injustice in American farming. However, the program was blocked by a federal judge on the basis the program violated the Equal Protection Clause¹⁴.

States and localities that have implemented¹⁵ cannabis social equity programs with remedial racial classifications (or proxies for race¹⁶) to address the consequences of cannabis prohibition have faced similar legal challenges to the aforementioned federal efforts. The legal challenges to state and local programs often succeeded due to inadequate reporting and data collection to support the compelling government interest in such remedial action. This result flies in the face of the extensive well-documented scope of historic and ongoing discrimination against communities of color in the enforcement of Federal cannabis laws.

As with the recent Federal programs that sought to utilize remedial race classifications, legal challenges to state and local programs have stifled efforts to address the impacts of systemic racism in the

Of course we did.” Baum, D., Bernstein, J., Quilty, A., & Gurland, H. (2016, March 31). *[Report]: Legalize it all*, by Dan Baum. Harper's Magazine. <https://harpers.org/archive/2016/04/legalize-it-all/>.

¹³ H.R. 1319 - American Rescue Plan Act of 2021, Section 1005

¹⁴ *Judge Blocks \$4 Billion U.S. Debt Relief Program for Minority Farmers*, Michael Levenson. New York Times. June 23, 2021. <https://www.nytimes.com/2021/06/23/us/politics/biden-debt-relief-black-farmers.html>

¹⁵ Virginia, New York, New Jersey, and Connecticut have passed adult use cannabis legislation but have yet to implement the programs or complete the promulgation of regulations to effectuate the statutes.

¹⁶ Proxies for race have included residency in neighborhood or other areas with disproportionate cannabis arrests combined with other factors including unemployment rates and income qualification.

enforcement and administration of laws.¹⁷ The elimination of such programs undermines the potential to economically restore and empower the communities most impacted by cannabis prohibition through access to cannabis tax revenues and business development opportunities.

Other states and localities¹⁸ have avoided the use of remedial racial classifications in their cannabis social equity programs, instead opting for broadly tailored criteria that do not effectively remedy the harms of prohibition. Unfortunately, these policies are far more successful in facilitating ownership by large non minority-owned cannabis companies and investors than by minority owned businesses or investors. Accordingly, these measures are inadequate to redress the harm done to communities of color through federal cannabis policy.

Federal cannabis prohibition is rooted in racism. As such, race-based solutions in federal cannabis reform are critical to remedying the harm. We encourage Congress to hold hearings, direct that the appropriate studies be conducted, and gather data through the Congressional Research Service among other sources that are necessary to ensure that effective remedial measures for impacted minority individuals and communities are undertaken as part of the effort to enact any comprehensive federal cannabis reform. We believe there are currently many existing sources and data that can be the basis for findings in legislation that would provide the legislative record necessary to support efforts to create targeted programs and initiatives to provide meaningful solutions to address the inequities resulting from federal cannabis prohibition.

III. DECRIMINALIZATION OF CANNABIS, RECOGNITION OF STATE LAW CONTROLLING CANNABIS

Expungement and Retroactivity

To ensure the provisions of the CAO Act that seek to expunge and revise the sentences of individuals convicted of federal cannabis offenses can fulfill that purpose, MCBA asks that Sponsoring Offices work closely with community organizations and individuals with knowledge and experience of the challenges facing those seeking to restore their rights of citizenship after a federal cannabis arrest. Such

¹⁷ See Sarah Ganley Alex Malyshev, “The Challenges of Getting Social Equity Right in the State-Legal Cannabis Industry,” Reuters (Thomson Reuters, July 22, 2021), <https://www.reuters.com/legal/litigation/challenges-getting-social-equity-right-state-legal-cannabis-industry-2021-07-22>.

¹⁸ See Ibid.

organizations include Root & Rebound¹⁹, Last Prisoner Project²⁰, and the Weldon Project.²¹

Although the CAO Act provides expungement relief for “non-violent” cannabis convictions, it does not define the term “non-violent.” The lack of clarity as to which cannabis offenses are eligible for relief will create challenges for restorative justice. To avoid this obstacle, a person convicted of a federal marijuana offense should be accorded relief from all charges that rely on marijuana being a controlled substance. This relief should apply to the underlying offense, investigation, and discoveries based on the marijuana prosecution. All such qualifying convictions shall be expunged, except violent offenses as defined in 18 USC 3156(4)(A) & (C).

Additionally, the greatest impact and current harm of federal marijuana convictions rests upon those imprisoned, or those serving sentences of supervised release or probation. As such, any remedies for these impacted individuals must be accorded priority in advance of those who have completed their sentence.

Further, to ensure an efficient cannabis expungement program, federal legislation should contain provisions that (A) require physical decimation of a person's criminal record; (B) the expunged record is no longer legally enforceable by ICE, employers, and background companies to utilize; and (C) individuals are provided a chance to file a writ of mandamus with a court in response to public or private entities misusing records related to the individuals expunged conviction. Without physical destruction of records, employers, law enforcement agencies, and other entities may still discriminatorily use the no longer relevant conviction.

Recognition of State Law Controlling Cannabis, Establishment of Public Safety and Enforcement

Under the CAO Act and the Constitution, states have general police power, providing states the authority to prohibit the possession, production, distribution, or cultivation of cannabis. Notwithstanding federal decriminalization, this would maintain state prohibition, and with it the disproportionate arrests and harms to Black, Latino, and indigenous individuals and communities. To truly facilitate the end of prohibition, the CAO Act should incentivize states to decriminalize cannabis by making grant funding provided by the Act contingent upon statewide laws decriminalizing cannabis. Congress can do so pursuant to its power under the Spending Clause (Article I, Section 8, Clause 1 of the U.S.

¹⁹ <https://www.rootandrebound.org/>

²⁰ <https://www.lastprisonerproject.org/>

²¹ <https://www.theweldonproject.org/>

Constitution).²²

To implement this proposal, the Sponsoring Offices can amend the definition of “eligible State or locality”²³ to include the requirement to have decriminalized cannabis cultivation, production, distribution, sale, use, or possession. We believe such a requirement would fall squarely within the restrictions on Congress’s Spending Power.

Interstate Transportation and Possession of Medical Cannabis

To protect medical cannabis patients temporarily residing in or traveling through a state that does not end cannabis prohibition, MCBA recommends the CAO Act include in the eligibility for state and local grant programs, a requirement that states and localities implement a safe harbor for medical patients traveling through or temporarily residing in the state or locality to use or possess cannabis legally obtained and held in conformity with the laws of the state medical program in which they participate. This condition would reduce the risk of arrest or police interactions for medical cannabis patients and eliminate the risk of the burden or expense of civil penalties should the state choose to decriminalize while maintaining civil penalties for possession.

Primacy of State Law

MCBA recommends that states retain primary authority on the licensing of cannabis operations with secondary authority to TTB and FDA to implement Federal premises and product registration programs. TTB should maintain primary authority for labeling and marketing of cannabis products. FDA should set national standards with primary authority for manufacturing practices and national testing standards for all cannabis and cannabis products, as well as the labeling, packaging, and marketing of pharmaceutical cannabis products and other non-adult-use only cannabis products. This division of authority would help create uniform national standards to promote product quality and safety and decrease the compliance burden and operational costs for small and very small businesses.

However, we have concerns about the proposed TTB permitting process, taxation, and the regulatory burden on small businesses that the CAO may impose. Moreover, we are concerned about the scope of

²² *South Dakota v. Dole*, 483 U.S. 203 (1987).

²³ The CAO Act currently provides that the term “eligible State or locality” means a State or locality that has taken steps to— “(i) create an automatic process, at no cost to an individual, to expunge, destroy, or seal criminal records for cannabis offenses; and (ii) eliminate violations or other penalties for individuals under parole, probation, pre-trial, or other State or local criminal supervision for a cannabis offense.”

FDA authority and the Federal preemption of state medical cannabis programs that would deny access to medicine for the estimated 5.46 million medical cannabis patients²⁴ in the United States. The Discussion Draft would grant FDA authority over cannabis products from seed to sale, including cannabis cultivation and harvest, but we do not believe that FDA does have adequate expertise, nor the current infrastructure in place, to effectively and efficiently regulate cannabis agricultural practices or trade. MCBA instead recommends the United State Department of Agriculture (“USDA”) have primary regulatory authority over cannabis from seed to harvest and work in partnership with state departments of agriculture to administer the Act and provide leadership to industry on agriculture, natural resources, rural development, and related issues based on public policy, the best available science, and effective management.

Further, USDA has existing programs and infrastructure, as well as foundational expertise to create and implement new programs that can support small and minority farmers and businesses, including those within rural communities where cannabis arrest disparities and the harms of the War on Drugs are amplified. MCBA recommends that USDA programs for cannabis include USDA guaranteed loans, access to community grants, small and microbusiness grants, and loans for improvements to land and infrastructure to ensure small and rural farmers and businesses of color can participate in all aspects of cannabis cultivation.

Interstate Commerce

To protect patients and consumers that rely on the state-lawful cannabis markets that currently exist and to enable small and minority cannabis businesses and workers to compete, we ask—with exception to the laws necessary to end cannabis prohibition, facilitate expungement of records, implement programs to support a timely and equitable transition into a federally regulated market, disperse grant and funding programs designed to support socially and economically disadvantaged businesses, and similar measures—that cannabis commerce be limited to intrastate commerce governed exclusively by state law. As written, the CAO Act would immediately open the door for interstate commerce. Without clear and uniform federal standards and the benefit of access to federal, state and local grant and loan programs, few existing minority operators will survive the initial push for national market share and consolidation without the access to capital, infrastructure, and relief from extraordinary tax liabilities and compliance costs necessary to stabilize businesses struggling to compete with the unregulated market, let alone compete with existing multistate operators or multinational consumer products manufacturers who will

²⁴ <https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/>

enter the market with Federal legalization.

Unlike small businesses, large operators and consumer products companies will enter the interstate market with relatively limitless funding, resources, expertise, and economies of scale, as well as access to vast business and political networks gained from multi-state and multinational operations. To avoid these risks and to avoid disruption to the existing cannabis markets, we recommend that commerce remain within the states and that state law govern, with exception of the proposed federal laws necessary to end prohibition and implement the provisions of Title III.

MCBA recognizes the potential benefits of interstate commerce to minority cannabis businesses. Such benefits could include access to low-cost high-quality cannabis, access to established brands and genetics, and greater access to a diverse supply chain. Additionally, interstate commerce could provide opportunities in state markets currently captured by a handful of large multi-state operators. However, MCBA wants to emphasize that such benefits could only manifest if legacy operators and other impacted individuals have a meaningful opportunity to prepare for and participate in interstate cannabis commerce. To this end, the implementation of interstate trade must follow an efficient but thorough process that recognizes (1) the impact of the capture of state markets by a small number of large cannabis firms and (2) the vast disparity between large operators and small and minority-owned cannabis businesses in access to capital and resources.

To be clear, MCBA does not support the arbitrary or indefinite suspension of interstate trade. Indefinitely or arbitrarily delaying interstate commerce would simply provide more time for large operators to secure additional state market share while small operators struggle with exorbitant tax rates and the lack of access to capital due to federal prohibition. Instead, MCBA asks the Sponsoring Offices to set and enforce reasonable timelines for the promulgation of regulations and implementation and funding of state grant programs that would allow for timely and equitable implementation of interstate commerce. Additionally, we ask for ongoing data collection on diversity of ownership in the cannabis industry from the time of enactment to better assess the needs of small and minority businesses and the impact of legalization, federal regulation, and the implementation of interstate commerce.

As with interstate commerce, MCBA asks that the implementation of any import programs follow the implementation and funding of programs to support participation by small and minority owned businesses. Additionally, we ask that additional studies be conducted into the potential impact of the

importation of cannabis and cannabis products on small and minority businesses as well as potential barriers to participation in the export market.

MCBA also supports efforts to connect minority cannabis businesses with trade programs offered by federal export offices within the Department of Commerce to provide technical assistance and training to help minority operators successfully navigate the complex rules and regulations for international trade.

Lastly, we recommend that federal agencies work to ensure that minority businesses are included in any potential development matchmaker trade delegations to foreign destinations. Export related agencies and programs within the Department of Commerce should also be required to track and produce an annual report on participation of minority businesses in these programs including an outline of the number and type of cannabis businesses that participated in annual trade delegations, technical assistance programs, and trade related conferences.

Establishing Minimum Age, Restriction on Retail Sale

The Discussion Draft would establish 21 years of age as the minimum age required to purchase cannabis. MCBA recommends the Sponsoring Office include in the eligibility requirements for state and local grants under Title III of the Act language that discourages states that legalize cannabis from creating or maintaining new crimes for youth (persons ages 18-20) and incentivizes education-based prevention of the use of cannabis by persons ages 18-20.

Cannabis Diversion and Penalties

We encourage the Sponsoring Offices to forego the use of criminal penalties as it is critical to end the continued incarceration of Black, Latino, and indigenous people for cannabis offenses. Civil penalties are sufficient to punish and deter diversion. Additionally, during the transition period, the CAO Act must protect individuals and entities who make a good faith effort to comply with State and Federal regulations.

IV. RESEARCH, TRAINING, AND PREVENTION

Further, MCBA recommends the Sponsoring Offices include specific funding for research into promising lines of cannabis research into treatments for conditions disproportionately impacting communities of color.

Funding for HBCUs and Other Minority Serving Institutions

Diversity is the key to a successful and sustainable cannabis industry. Companies that have diverse workforces perform better financially, are more innovative, and better understand the needs of the diverse set of customers to whom they offer products and services. Unfortunately, racial disparities remain in the industry. According to a 2017 study by Marijuana Business Daily, eighty percent of cannabis business owners are white, while Blacks and Hispanics together constitute just 10% percent of business owners combined.

On the cusp of legalization and legitimacy, the nation cannot ignore the people and communities that have borne the brunt of bad policy and are too many times in the nation's history, left out of new economic development opportunities or the wealth that is generated by new industries. This must not happen again. Congress must work to ensure that every possible opportunity is made available that will result in the development of a cannabis industry with a diverse workforce that can access the economic opportunities that will come with the growth of this industry.

An essential step to ensuring access to the economic opportunities created by the cannabis industry is investing in education grants and training programs at HBCUs, Hispanic Serving Institutions, and Tribal Colleges and Universities. To that end, MCBA asks the Sponsoring Offices to consider the following:

- Grants to fund Centers of Excellence at HBCUs, Hispanic Serving Institutions, and Tribal Universities to help make these institutions centers of new research and knowledge around the growth, processing, and manufacture of cannabis related materials and products.
- Grants to support research initiatives in relevant fields including agriculture, genetics, biology, chemistry, plant genetics, pharmacology, engineering, and other relevant programs.
- Grants for expanding existing partnerships with federal programs like NSF's Innovation Corps to support researchers at these educational institutions in transferring their cannabis related discoveries into start-ups and navigating the regulatory and the business challenges to bringing a discovery to market.
- Grants for education extension programs (or cooperation with existing extension programs) to transfer newly developed agricultural techniques and research into real-world practice in the industry.

Additionally, MCBA recommends funding for job training programs including agricultural and

agricultural technology, environmental technology, manufacturing, HVAC, and to support a curriculum to provide impacted communities with access to the unique legal, policy, and business knowledge necessary to identify opportunities and succeed in roles from cannabis industry participants to ancillary service providers to lawmakers. The funding should extend beyond four-year universities to community colleges and technical schools to ensure accessibility to those most impacted by cannabis prohibition.

V. RESTORATIVE JUSTICE AND OPPORTUNITY PROGRAMS

Funding the Office of Cannabis Justice

It would be most effective for the Office of Cannabis Justice to be funded with appropriations, rather than from the cannabis tax revenues to be generated by the CAO Act's proposed excise tax. Federal cannabis legalization will save the Federal government an estimated \$3.37 billion.²⁵ The cost savings is more than sufficient to fund the implementation of the agencies involved in the creation and operation of the Office of Cannabis Justice and federal cannabis regulation and enforcement. Additionally, funding the Office of Cannabis Justice through appropriations will ensure that delays in program implementation do not amount to delays of justice for those most impacted by the War on Drugs.

Community Reinvestment Grants

Given the scope of the impact of cannabis prohibition beyond the individuals incarcerated for cannabis offenses, we ask that Community reinvestment grants be extended to repair the harms to the communities most impacted by prohibition. Cannabis prohibition not only deprived individuals of their liberties and basic rights of citizenship, prohibition also deprived communities and families of economic stability and opportunity, health, wellbeing, and safety. As such, the programs and services supported by federal cannabis revenues should encompass the breadth of harms of federal cannabis prohibition. MCBA further recommends the 10 percent of funding allocated for the administration of the Office of Cannabis Justice be redirected to the Community Reinvestment Fund.

MCBA suggests the Office of Cannabis Justice develop these programs in consultation with all federal agencies with regulatory authority and expertise across all areas of impact. Additionally, we ask for an open and transparent process with notice and meaningful opportunity for public comment.

²⁵ \$3,368,674.55 is \$2.4 billion, the amount of savings to the Federal Government estimated in 2005 adjusted for inflation. Budgetary Implications of Marijuana Prohibition, Jeffrey A. Miron, 2005
<http://web.archive.org/web/20110718082631/http://www.prohibitioncosts.org/mironreport.html>

Support of Minority Cannabis Businesses

Review of Current SBA loan programs

Under the CAO Act, SBA would provide funding to assist small businesses in the cannabis industry owned by socially and economically disadvantaged individuals through the Cannabis Opportunity Grant Program and the Equitable Licensing Grant Programs. While MCBA applauds the Sponsoring Offices efforts to make SBA programs open to individuals who have been impacted by the War on Drugs, we also believe the use of the term “socially and economically disadvantaged individuals” would exclude minority cannabis entrepreneurs who do not fit the criteria for “economically disadvantaged” under current SBA regulations (i.e., regulations around personal net worth). As a result, use of this term as a criterion for the Act’s grant programs could unnecessarily exclude minority entrepreneurs who still face current and ongoing discrimination within the industry.

We additionally ask Sponsoring Offices to include language in the Act that would require SBA to conduct a review of these programs to ensure that the current regulatory framework doesn’t place unnecessary burdens on the individuals as they seek to access these programs. One example of a current SBA policy that would place unnecessary burdens on small businesses operated by people impacted by the War on Drugs are the regulations involving the Section 7(a) loan program. Under current SBA regulations and policies, a small business is ineligible for a loan if it has a principal who is facing charges, is under supervision, or incarcerated. SBA regulations further require that principals “must also be of good character.” These character determinations are made through a multi-step evaluation process that determines whether an applicant satisfies the “good character” requirement contained in agency regulations.

Under agency procedure, applicants must disclose if they have ever been convicted or plead guilty to a crime. Disclosure is required even if an individual’s record has been expunged or sealed. If an applicant has a prior criminal record, they are required to submit a Statement of Personal History. In this statement applicants must outline the relevant facts of their case and provide documentation proving that any court mandated conditions were satisfied. Additionally, if a criminal case involves a felony conviction SBA is required to conduct a background investigation and make an individual character determination based on the information provided to the agency.

In the context of cannabis legalization, these rules would place a significant administrative burden on individuals who have already been adversely impacted by past government policies regarding cannabis and would essentially undermine the expungement provisions. They will have to comply with additional regulatory hurdles for crimes born from policy the Sponsoring Offices agree resulted from bad policy. Even efforts to expunge and seal records will not protect individuals from increased scrutiny and compliance.

Congress could legalize cannabis and open SBA programs to cannabis businesses, yet those most impacted by cannabis prohibition may still find themselves unable to access these programs due to existing regulatory policy. To root out potential problems in existing policy, MCBA recommends that Sponsoring Offices include within the Act a provision requiring SBA to do a review of its existing policy to see how its programs could exacerbate disparities within the cannabis industry - especially regarding minority businesses and individuals impacted by cannabis prohibition and the broader the War on Drugs.

Equitable Licensing Grant Program

The development of a federally regulated interstate marketplace will be a complex process fraught with challenges for even large, well-funded companies. For many small and minority-owned cannabis businesses, which often lack capital and technological expertise, this challenge will prove insurmountable. MCBA recommends the Act include additional grants directly to states and increased funding for federal agencies like the Small Business Administration, Minority Business Development Agency, and the various federal export agencies to fund technical assistance programs to help minority and small businesses understand the new regulatory environment that will result from legalization.

MCBA also supports grants to states to offer technical assistance to help minority businesses on traditional business creation and scaling (i.e., courses related to business formation, marketing, capital access, developing new markets, etc.). These grants should flow to state small business development centers and should also be offered directly from federal agencies to non-profits within communities most impacted by the War on Drugs.

Provide SBIC Funding for Seed Capital to Minority Cannabis Businesses

MCBA supports the Sponsoring Office's policies to provide opportunities for minority entrepreneurs to

access capital to start and grow their businesses. MCBA supports efforts to provide minority entrepreneurs access to SBA's capital programs and grants to state and local governments to establish loan programs. However, MCBA also believes that in order to truly diversify the industry, then early-stage minority companies will need access to funds that they have not traditionally been able to obtain.

State and local governments across the country have been implementing social equity programs to reinvest in individuals and communities that have been most harmed by the War on Drugs. However, the lack of capital continues to undermine the efficacy of these programs, and limit participation of people of color in the cannabis industry. These social equity programs often have high costs of entry (license and application fees, real estate requirements, etc.) that require significant upfront capital for a business to even apply for a license. Moreover, even if a license is granted, a licensee will need access to large amounts of additional capital to fund operations and satisfy state and local regulatory requirements.

Many social equity operators and minority cannabis businesses have a difficult time securing funding and, unlike large multi-state operators, lack access to private equity funds, personal wealth, or personal networks to overcome this burden. As a result, many minority entrepreneurs are often not able to fully take advantage of state social equity programs. Most often entrepreneurs find themselves unable to apply or scale a business even if they can obtain a license (this often leads to licensee owners selling their licenses out of necessity rather than choice). Moreover, even when equity licensees can access loans, they often come with exorbitant fees and terms that make it impossible for owners to run a successful operation.

To help overcome this problem, MCBA suggests that the Sponsoring Offices create an SBIC initiative for early stage companies in the cannabis industry. This initiative would be similar to the Early Stage Innovation SBIC Initiative that set aside \$1 billion in capital to invest in high growth businesses in various industries.²⁶ This program would invest in early stage cannabis and cannabis related companies that are minority owned. These SBICs could serve as sources of patient capital that would give social equity licensees and other minority cannabis companies the capital they need to succeed.

Under this program, at least 50 percent of each fund's capital would have to go to companies that (1) are minority owned or (2) were incubated at HBCUs, Hispanic Serving Institution, or Tribal Colleges and

²⁶ See SBA, "Small Business Investment Companies—Early Stage SBICs," 77 Federal Register 25043, 25050, April 27, 2012.

Universities. This program would define early stage to mean companies not having gross sales exceeding \$10 million in any of the previous three years.

The Act could also implement a version of the Small Business Intermediary Lending Pilot Program, which was enacted in the Small Business Jobs Act of 2010, P.L. 111-240. Under this program, direct loans of \$75 million per year (for 5 years) could be directed to non-profit intermediaries to lend to early stage cannabis start-ups incubated at HBCUs, Hispanic Serving Institution, or Tribal Colleges and Universities. Individual loans would range from \$250 to \$500,000 under this program. The interest rate on these loans could not exceed 2 percent.

Funding and Leveraging the Minority Business Development Agency and Office of Small and Disadvantaged Business Utilization

MCBA also supports funding for the Minority Business Development Agency (MBDA) and MBDA business centers to offer industry focused support services to the minority companies within the cannabis industry. This includes additional dollars for the individual MBDA business centers to serve as one stop shops for companies operating in the cannabis industry.

The Small Business Act (and its reauthorizations) created the Office of Small and Disadvantaged Business Utilization (OSDBU). Every federal agency by statute is required to have an OSDBU that reports to the head of the agency. One major function of the OSDBUs is to perform outreach to the small business community - letting them know about contracting opportunities at different federal agencies, hosting conferences and workshops, and offering compliance assistance to small business as required by the Small

Business Regulatory Enforcement Fairness act of 1996.

MCBA believes that these offices will provide a much needed service to minority owned companies in the cannabis industry. However, the association also believes that these programs could be much more effective in their mission of helping minority companies with contracting opportunities, training, and regulatory compliance. Many of these offices operate in silos in their individual agencies and are not able to work together to create and pursue shared initiatives and programs. With the growing importance of minority businesses in the nation's economy and the diversification of the nation's workforce, MCBA believes that the federal government should allocate more resources to the OSDBU offices. As a result, MCBA believes that a body should be created to coordinate initiatives across OSDBU offices in the

federal government. MBDA with its mission of assisting minority businesses would be a natural choice for this coordinating body.

Federal Contracting

MCBA also believes that OSDBUs should engage in outreach to minority cannabis companies to help them find contracting opportunities in the federal government. Although these opportunities are not apparent at the outset, looking to the state level one can see potential opportunities for government contracting in the federal sphere. For example, states have released several opportunities for cannabis related operators including:

- Program evaluation services for cannabis education programs,
- Administrative support services related to the taxation of cannabis,
- Security and surveillance related to cannabis business inspection services,
- Software & services related to medical cannabis research, and
- Advertising contracts related to cannabis education efforts.

MCBA supports efforts to fund studies on the contracting opportunities that will be open to cannabis companies post legalization. The organization also supports efforts to engage with minority cannabis companies on these potential contracting opportunities.

VI. TAXATION OF CANNABIS AND ESTABLISHMENT OF TRUST FUND

Imposition of Tax on Cannabis Products

MCBA appreciates the Sponsoring Offices' recognition that small cannabis producers will be unable to compete if subject to a significant federal excise tax. We are, however, concerned that a federal excise tax rate in excess of 20 percent for larger producers and 12.5 percent for small producers would make it difficult for legal operators to out-compete the illicit market. Under the CAO, cannabis products will be subject to a federal excise tax, state and local specific taxes, and state sales tax. There is risk of a cascading effect on price and cost of business that would make legal products less competitive than is required to overcome the illicit market. In California, for instance, there is cultivation tax on flower (\$9.65/oz), leaves (\$2.87/oz), and fresh cannabis (\$1.35/oz); a nominal 15 percent excise tax (the effective rate is higher); local taxes; and the state sales of 7.25 percent. Although the state lawful market is growing, the illicit market is estimated to be worth several billion dollars, in part due to price differences. Competition with the illicit market is not limited to California, nor are high taxes at the state

and local level. Adding a 25 percent federal excise tax on top of these tax burdens (or 12.5 percent for small businesses) will risk price competitiveness.

MCBA is supportive of the concept of small producer tax credit. To further ensure that small producers benefit and are not faced with a tax cliff, we suggest that the tax credit be phased out slowly. For instance, assuming the proposed threshold of \$20 million in annual sales is maintained, the full 50 percent tax credit should apply on taxes paid on the first \$20 million threshold and then slowly be reduced on sales in excess until it is phased out. The phase out point could be \$25 million or \$30 million. The phase out will benefit small and minority owned businesses by minimizing disruption as they grow.

The administrative burden of compliance with a new tax should also be considered, especially for small producers. A lower rate, at least for small businesses, would offset some of the compliance burden. Moreover, we recommend that the Sponsoring Offices consider technical programs and resources for small cannabis producers to help them comply with their tax obligations as efficiently and cost-effectively as possible. Such businesses are the least capable of affording third party tax compliance services, so support from the federal government will both ease their burden (so they can compete) and improve tax compliance. For similar reasons, allowing small producers to file their tax returns on a quarterly or even an annual basis would be helpful by reducing administrative burdens.

Establishment and Permitting

The Discussion Draft would require any person selling cannabis products at wholesale to obtain a permit from the Treasury Department. In addition, any person producing taxable cannabis products must obtain a Treasury Department permit and register for tax purposes. A producer of cannabis products would also be required to register with the FDA. The Discussion Draft instructs the Treasury Department and FDA to coordinate in order to streamline the permitting process and minimize administrative duplication, and it is intended that a cannabis business would be able to make all three filings on a single, unified application. The Discussion Draft provides that a cannabis permit may be denied or revoked if the premises are inadequate to prevent tax evasion or diversion, operation of the premises do not comply with federal or state law, or an applicant fails to disclose material information or makes a false statement. In addition, a cannabis permit application may be denied if the applicant has been convicted of a disqualifying offense. For these purposes, a disqualifying offense is a felony criminal offense that occurred after enactment of this Act and within the preceding three years.

In lieu of permitting, MCBA recommends that TTB instead implement a registration process to ensure that TTB can (1) protect the public; (2) protect cannabis tax revenues and prevent evasion; and (3) combat diversion by ensuring that licensed state operators in good standing have an opportunity to lawfully operate under a federal framework. A permitting system similar to tobacco regulations would create an untenable burden for small businesses with Federal permitting adding to the cost, complexity, and uncertainty of existing state and local licensing compliance without increased public benefit. The registration process with authority to otherwise conduct inspections and enforce the provisions of this chapter would enable TTB to gather all necessary information to protect the public and the revenue while minimizing the regulatory for small businesses.

Previous or Current Legal Proceedings regarding felony violations relating to cannabis or cannabis products.

The Discussion Draft proposes to modify the existing permitting language to provide exemptions for cannabis convictions less than 3 years before and following the enactment of the CAO. We applaud this decision and ask for clarity around the waiver process including prior consultation with social equity operators and opportunity for notice and public comment to minimize uncertainty within that could have a chilling effect on partnership and lending to individuals with prior cannabis convictions or companies that hire individuals with prior cannabis convictions.

Definition of “Commencing Business” and “Commencing Operations”

MCBA has concerns about the lack of clarity over when business commences and the potential need for small businesses to secure property prior to receiving permission to operate a federally regulated cannabis business.

For many social equity cannabis operators, the step to fund operations requires significant investments including securing real estate and equipment that follow securing a coveted state license. Before investors invest in a business, they would likely want to know that the business was going to be able to get a permit. To give these investors some certainty around the permitting process, we suggest that “commencing business” (within this Act) be defined as the point at which a business plan has been prepared (i.e., identifying the terms of the business, where it will be located, etc.). A bank, financial institution, or investor will want to see a business plan anyway, so there is no substantial additional cost to develop one.

We recommend the Act instruct agencies to promulgate regulations to either (1) allow for flexibility in determining when business commences to allow operators with provisional state licenses to apply for a Federal registration or permit prior to obtaining property, or (2) allow for provisional registrations or permits that grant a permission to proceed with final determination pending the outcome of the premises inspection. Additionally, the CAO Act should require TTB to issue a small business compliance guide for premises inspections to assist small businesses in choosing and preparing their premises for inspection to meet TTB requirements.

Regulatory Authority

Should TTB implement a Federal permitting process, MCBA would call for increased regulatory certainty and transparency regarding the regulatory process. The Discussion Draft language and existing permitting language are vague regarding the standards for obtaining a permit. One administration could take a hard line on the issuance of permits under a particular fact pattern, while another could be much more lenient in its issuance of permits under the exact same scenario.

Fee Waivers

The Discussion Draft proposes fee waivers for individuals with an income of 250 percent or below the Federal Poverty Level. MCBA recommends that fee waivers also be extended to participants in state and local social equity programs.

Operations

The CAO Act would establish operational rules for manufacturers of cannabis products, similar to those for alcohol and tobacco, including a requirement that operators maintain a bond, to ensure cannabis excise taxes are paid. MCBA recommends fee reductions for small businesses and fee waivers for very small businesses.

VII. PUBLIC HEALTH, CANNABIS ADMINISTRATION, AND TRADE PRACTICES

Food and Drug Administration Regulation of Cannabis (Section 501-506)

Creating Appropriate Regulatory Pathways for Cannabis Products

MCBA recommends the CAO Act provide appropriate pathways for (1) cannabis drug products and (2) other cannabis products not subject to the drug approval process. Many cannabis products have a long and well documented history of medical uses that would constitute “drug” uses under the Federal Food,

Drug, and Cosmetic Act. Yet, the lack of potential patent protection for these well-established medical uses makes it unlikely that a manufacturer would undergo the extensive and costly New Drug Application process to obtain FDA approval. Therefore, cannabis products intended for certain well-established medical uses (e.g., glaucoma) should not be considered “new drugs” that require an FDA approval.

MCBA recommends that pathways for cannabis drug products include reduced fees and fee waivers for small and very small businesses. Additionally, we suggest the Center provide ample, free or low cost, regional educational opportunities to assist small and very small businesses in understanding and navigating the approval processes.

MCBA recommends that products that are not marketed for (1) adult use only that contain cannabis, or (2) to diagnose, cure, mitigate, treat, or prevent disease, would be referred to as “cannabis products.” Such products would be subject to a 75-day premarket notification and facility registration similar to that of dietary supplements. Additionally, cannabis products would be subject to product listing requirements. In addition to “structure-function” claims — that is, claims that characterize the way a substance affects the normal structure or function of the body, cannabis products must also have a pathway for approved claims similar to health claims for food and dietary supplements. The claim approval process must include the safe history of use, evaluation by experts in cannabinoid medicine, and meaningful opportunity to consider public information and comment.

As FDA evaluates evidence of safety and efficacy, we further ask that evidence of the safe history of use of cannabis and cannabis products not be limited by arbitrary legal and definitional barriers that could exclude decades, if not centuries of safe use to support and maintain the structures and functions of the body and to treat and mitigate disease.

Funding FDA

Federal legalization will not end stigmas and prejudice that prevail throughout the Federal Government regarding the medical or adult use of cannabis products. With that concern in mind, MCBA has great concern about leaving funding of the Center for Cannabis Products subject to funding through appropriations. The appropriations process could leave the Center at risk of underfunding due to budget constraints or political climates. Such underfunding could create challenges with implementation, research, evaluation of applications and registrations, and enforcement.

MCBA recommends nominal product listing and facility registration fees for cannabis products. Additionally, both the user fees for cannabis products and cannabis drugs should reflect the actual cost of administration and enforcement with fee reductions and waivers for qualified small and very small businesses.

To address the breadth and depth of impacts of federal cannabis prohibition on communities of color and create a federal cannabis framework with broad restorative impact on communities most harmed by cannabis prohibition, the process of promulgating and reviewing regulations must encompass the depth and breadth to that of the harm. To that end, in addition to experts in cannabinoid medicine and research and patients' rights advocates, the Cannabis Products Regulatory Advisory Committee ("Committee") should include representatives from impacted communities including public health experts with knowledge of broad impacts of War on Drugs on communities of color, veterans health experts, as well as representatives from the minority and small business communities.

Agencies must approach the Committee with recognition of stigmas that continue to impede Federal cannabis policy to select a diverse committee of community, public health, and economic experts that can guide the timely promulgation of a regulatory framework that ensures access to safe and effective cannabis products without creating undue burdens on small and minority businesses.

In addition to submitting recommendations on and for rulemaking the Committee should hold regional public hearings to provide ample opportunity for feedback from the communities that have been impacted by Federal cannabis prohibition and will be impacted by Federal cannabis regulation. The recommendations of the Committee should be made public, in addition to agency responses to the recommendations to allow for additional public accountability.

VIII. ADDITIONAL ISSUES AND GENERAL ITEMS

Minimizing the Regulatory Burden for Small Business

MCBA asks the Sponsoring Offices to immediately explore the regulatory barriers to entry and sustainability for small cannabis businesses, including the unique impact on small minority operators to ensure the final proposal to end Federal cannabis prohibition takes into full account the unique challenges those communities face in compliance with the proposed framework. We ask that the findings of this research are reflected in the findings of the CAO Act to ensure that agencies are guided by the "significant impact" the regulations will have on a "substantial number of small entities."

Additionally, we call for the Sponsoring Offices to encourage the regulating agencies to conduct a thorough Regulatory Flexibility Act (“RFA”) review. Agencies’ RFA reviews must reflect the challenges obtaining accurate information on the impact to small cannabis businesses. To that end, the RFA reviews must account for (1) current Federal illegality impacting industry size and participants, (2) the diffused and segmented nature of the cannabis industry, and (3) challenges of the Federal Government gathering feedback from cannabis operators and state and local regulators given the current Federal legal status.

Additionally, the RFA reviews should include opportunities for regional public hearings and roundtables through SBA’s Office of Advocacy to help ensure diverse feedback and testimony from the small business community is gathered and appropriately considered. SBA’s Office of Advocacy, like all SBA offices, remains inaccessible to assist the cannabis industry. As such, we ask the Sponsoring Offices to provide timely access to SBA’s Office of Advocacy to facilitate a thorough review process.

Should the agencies determine the application of the regulations would have a “significant impact” on a “substantial number of small entities,” the Regulatory Flexibility Act would require the agencies to seek a less burdensome regulatory alternative, provide additional assistance, and provide periodic oversight and review of the burden on small businesses. A thorough and fair RFA review would help ensure the appropriate application of the RFA to help reduce and remove barriers to entry for small and minority owned businesses.

MCBA also requests the CAO Act include staggered implementation similar to FDA’s implementation of the Food Safety Modernization Act (“FSMA”) and the Current Good Manufacturing Practice for Food and Dietary Supplements that provided different regulatory compliance deadlines for small and very small businesses.²⁷ Additionally, we ask the Sponsoring Offices to provide for a tiered system of compliance, similar to that of FSMA that implements a sensible framework that protects the public while minimizing and simplifying the compliance burden for small and very small businesses. Further, we ask the Sponsoring Offices to direct the agencies to provide additional compliance guidance, education, and training to small businesses to support them in transitioning to compliance with Federal regulations.

Finally, federal agencies like SBA and MBDA should be required to hold conferences and technical

²⁷ *FDA FSMA and Small Business*. <https://www.fda.gov/food/food-safety-modernization-act-fsma/fda-fsma-and-small-business>

assistance training sessions to help minority and small businesses.

Timely Access to Capital for Minority Cannabis Businesses

Ensure Timely Access to Capital for Minority Cannabis Business and State and Local Social Equity Programs

Without timely access to capital for minority cannabis businesses and support for state and local social equity programs, insurmountable barriers to ownership will continue to prevent minority cannabis entrepreneurs from participating in the industry they built, often at the cost of their liberties. Without access to traditional bank loans, generational wealth, or private equity investors, minority entrepreneurs face a near-impossible journey to ownership in the cannabis industry. From the lack of startup capital for the “exhaustive application”²⁸ process to extraordinary operational costs, minority business owners often face the painful decision to give up or sell their interests to predatory investors²⁹ who use management agreements with exorbitant fees, forced sale provisions, to seize management and intellectual property rights.

Each day without capital for startup and operations, minority cannabis businesses lose ground and market share to large multistate cannabis businesses, including publicly traded cannabis companies. Meanwhile, minority operators struggle to operate with often negative profit margins,³⁰ due to the high cost of goods and services, including security and inadequate banking services for this cash business. Further, most small businesses lack the capital necessary to leverage tools employed by large operators, including local tax rebates, bonds, and complex business structures, that minimize operational costs and tax burdens. Without timely access to capital for minority cannabis entrepreneurs, social equity programs meant to ensure individuals most impacted by cannabis prohibition are included in the legal industry will continue to fail, yielding few, if any, minority operators. From Los Angeles³¹ to Illinois,³² many social equity programs that aspired to level the playing field have become “astonishing”³³ failures. The failed programs harm the very individuals and communities they were intended to serve. Without relief, so too will follow emerging state programs including New Jersey, New York, and Virginia.

²⁸ <https://www.politico.com/news/2021/01/24/illinois-marijuana-industry-diversity-461476>

²⁹ <https://www.latimes.com/california/story/2020-06-23/cannabis-licenses-social-equity-4th-mvmt>

³⁰ <https://www.cannabisfn.com/how-280e-is-killing-the-cannabis-industry/>

³¹ <https://mjbizdaily.com/local-level-key-to-california-cannabis-social-equity-program/>

³² <https://chicago.cbslocal.com/2021/01/22/after-losing-50000-social-equity-applicants-waiting-for-marijuana-licenses-say-state-has-failed-them/>

³³ <https://mjbizdaily.com/only-2-percent-of-long-beach-california-marijuana-social-equity-applicants-operating/>

To help ensure the survival of minority cannabis business and social equity programs by improving access to urgently needed capital, we ask the Sponsoring Offices to work with their Senate colleagues to pass the Secure and Fair Enforcement Banking Act of 2021 (“SAFE Banking”). The Discussion Draft does not currently include provisions that timely implement and clarify protections from anti-money laundering statutes for financial institutions doing business with lawful state cannabis businesses. The lack of timely protections and clarity that could undermine minority businesses’ access to basic bank services. There are at least two potential barriers to access to financial services if the CAO Act is enacted as written.

First, the CAO Act does not provide a safe harbor for financial institutions to hold, process, or deploy funds generated from transactions that occurred prior to the effective date of the CAO Act that violated the Controlled Substances Act. Accordingly, risk remains that financial institutions would violate federal anti-money laundering laws by accepting such funds. This would continue financial institution's hesitancy to lend to and bank the cannabis industry and the disproportionate impact of lack of access to capital on minority cannabis businesses without access to private equity funds or generational wealth.

Secondly, financial institutions would still face risk under federal anti-money laundering laws if they accept proceeds from transactions involving cannabis products that violate the FDCA. The Discussion Draft would continue to prohibit medical cannabis, cannabis foods, and inhalable cannabis products that do not comport with FDA rules; thus, the proceeds of sales of such products would trigger federal anti money launder laws. Accordingly, financial institutions are likely to be reluctant to work with any cannabis companies (as they currently are with many CBD companies) post-enactment.

Although Section 101(d) provides for a “retroactivity” provision that would apply the changes to the status of cannabis under the Controlled Substances to “any offense committed, case pending, conviction entered” that occurred prior to enactment, this provision is unlikely to provide financial institutions the legal clarity they require to service high-risk companies. This provision (1) does not apply to violations of the FDCA; (2) does not apply to any penalties that can be levied by the federal banking regulators (such as civil money penalties or loss of charter or deposit insurance, among others); and (3) does clearly apply to violations of federal anti-money laundering statutes based on violations of the Controlled Substances Act.

There is a risk, absent additional changes, that the banking and traditional financial services industries will consider cannabis companies to be high-risk and thus, subject to more stringent oversight and costs,

thereby reducing the availability and increasing the price of financial services. Many legal industries (including debt collectors, digital asset companies, and nonbank small dollar lenders, among others) are deemed high risk and face perpetual challenges to accessing banking services and finance.

MCBA has concerns that any lack of clarity regarding the application of anti-money laundering statutes to financial institutions doing business with lawful cannabis operations will result in continuing disparities in access to capital between Blacks and Latinos and whites that are amplified among cannabis businesses.

MCBA recommends the Sponsoring Offices provide a safe harbor for financial institutions to hold, process, or deploy funds generated from transactions that occurred prior to the effective date of the CAO Act that violated the Controlled Substances Act to help ensure minority businesses have improved access to capital to assist the transition to a federally regulated industry and improve chances of survival in an interstate market. Through SAFE Banking, this could be accomplished in advance of the enactment of the CAO Act to ensure that small and minority cannabis businesses have the resources to enter the state market, sustain, transition to Federal regulation and interstate commerce. Although the bill contains a “retroactivity” clause, this provision alone would not provide the legal clarity that financial institutions need to service cannabis companies. Currently, the retroactivity clause does not address situations in which federal banking regulators could levy financial penalties against financial institutions for accepting these proceeds

Improving Access to Capital for Minority Cannabis Business

Oversight for Opportunity Fund Loans

MCBA applauds the inclusion of funding for loans to small cannabis businesses and the individuals and communities impacted by Federal cannabis prohibition. However, the Opportunity Fund loan programs will rely on private lending institutions that, without adequate protections, guidance, and oversight will continue to perpetuate disparities in lending to minority cannabis businesses. We additionally ask the Sponsoring Offices to include provisions for ongoing oversight and reporting on funding and grants to minorities through the programs created through Title III to ensure the Act provides meaningful support to impacted individuals seeking to enter and sustain in the legal cannabis market.

Promoting Access to Financial Services for Minority Business Owners

Moreover, the Discussion Draft does not help create a favorable regulatory regime to promote access to financial services. For instance, the Discussion Draft does not address the application of fair lending laws or the Community Reinvestment Act to cannabis businesses, which are designed to encourage lending, or the use of Minority Depository Institutions (MDIs) and community development financial institutions (CDFIs) to improve access to financial services for minority cannabis businesses.

Minority Depository Institutions and Community Development Financial Institutions

MCBA believes that Minority Depository Institutions (MDIs) and community development financial institutions (CDFIs) can play an important role in extending capital to minority cannabis companies. As the Sponsoring Offices know, minority owned cannabis businesses often lack sources of inexpensive capital and credit to grow their businesses. Although MDIs and CDFIs have traditionally been sources of capital for minority companies, they need increased lending capabilities in order to meet the growing demand from companies (especially in the cannabis space). MCBA believes that increasing capital to MDIs and minority owned CDFIs would increase the flow of capital to communities and credit to minority businesses. MCBA commends Congress for allocating \$12 billion for MDIs and CDFIs, including \$9 billion for the Emergency Capital Investment Program and \$1.75 billion for the Emergency Support and Minority Lending Program, last year as part of its historic efforts to combat the financial crisis caused by the COVID-19 pandemic. We encourage the Sponsoring Offices to consider allocating additional long term, low-cost capital funding for MDIs and CDFIs through those programs so that those institutions can service the many minority owned businesses operating in and will operate in the cannabis space.

Direct the federal financial regulators to create a strategic plan to facilitate access to capital for minority owned cannabis businesses

We also suggest the Sponsoring Office include a provision directing the federal financial regulators (the OCC, FDIC, FRB, SEC, FinCEN, and NCUA) to develop a plan to increase financial services to minority cannabis businesses. Various regulators have worked on plans to promote financial inclusion for a wide range of businesses. MCBA asks that these regulators extend this work to include initiatives to incentivize financial institutions to offer services to minority cannabis companies. The regulators could also release RFIs to engage with industry and community stakeholders on the best ways of encouraging access to capital for small and minority cannabis businesses.

Reduce the risk profile of cannabis companies

The perceived high-risk of the cannabis industry is compounded by perceptions and standards in lending that give weight to factors that may not prove good indicators of default or creditworthiness³⁴ yet provide the basis for financial institutions to deny loans to Blacks and Latinos. When Black and Latino borrowers can obtain loans, they are frequently charged more than similarly situated white borrowers³⁵ even after controlling for credit scores, loan-to-value ratios, the existence of subordinate liens, and housing and debt expenses relative to individual income, to receive a high-cost loan.³⁶

MCBA is concerned that even with legalization financial services institutions will consider cannabis companies to be in the “high risk” category and subject them to increased oversight and costs. This would result in reduced capital for cannabis companies and increase the cost of accessing the products and services that are offered by financial institutions, including operating accounts, electronic payments, and treasury management. The industry would find itself in a familiar situation where large companies could access traditional banking and investor finance while smaller companies (and especially minority cannabis companies) would be left out. One way to prevent this is to include language in the bill that directs federal banking regulators and FinCEN to update their Bank Secrecy Act examination procedures and guidance to reduce the risk profile of cannabis businesses and thus incentivize financial institutions to offer affordable products and services to all cannabis companies.

Ensure the Community Reinvestment Act helps minority owned cannabis businesses

MCBA believes language should be included in the bill that directs the federal banking regulators to update their CRA examination procedures and to issue guidance clarifying that providing CRA-eligible financial services to CRA-eligible cannabis businesses will be given appropriate CRA credit. The Sponsoring Offices should also consider amending the CRA to provide additional incentives to banks to service minority owned cannabis businesses.

³⁴ Debt to income ratio is not a good indicator of default. However, this factor is often used to support the higher rates of denial of loans to Blacks and Latinos. <https://www.urban.org/urban-wire/how-debt-burden-affects-fha-mortgage-repayment-six-charts>

³⁵ (e.g., Bayer, Ferreira, and Ross, 2015; Been, Ellen, and Madar, 2009; Bocian et al., 2011; Courchane, 2007; Rugh, Albright, and Massey, 2015)

³⁶ Rugh, Albright, and Massey (2015)

VIII. Conclusion

On behalf of our members, we thank you for your leadership and unwavering commitment to achieving equity through federal cannabis reform and the opportunity to comment on this thoughtful and comprehensive proposal. As we work to reshape cannabis policy, we ask you to include equitable justice, equitable communities, equitable access, and equitable industry as guiding principles to ensure that equity is incorporated in all aspects of the CAO and no opportunity for restorative justice is overlooked.

Again, we thank you for your leadership and welcome the opportunity to continue to work with you in the fight to end prohibition, restore impacted individuals and communities, and create an equitable and just cannabis industry.

Respectfully submitted,



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