



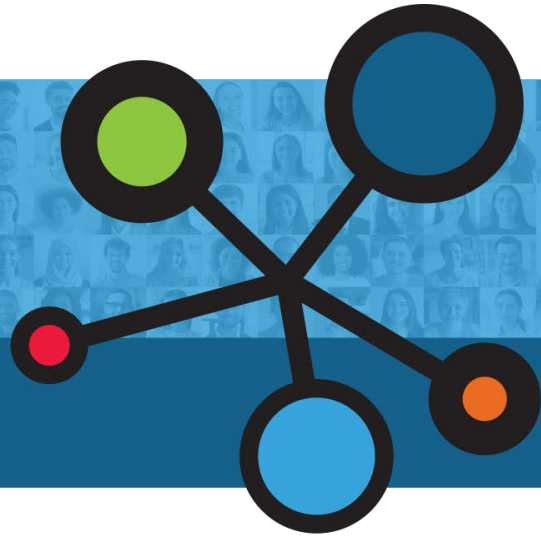
# *Captive* CAFE

**See Through the Smoke:**

***Cannabis, Captives, and All Things In-Between***

# Save the Date: October 22

IN PARTNERSHIP WITH



## Captive Audience: Collaborative Viewpoints

Thursday, October 22 | 1:00pm - 3:30pm



- Webinar Session 1: Insurtech and Captives as an Accelerant of Change
- Webinar Session 2: Climate Change, Sea-Level Rise and Flood Insurance

# Today's Webinar

- The webinar is being recorded. Both the recording and slides will be available upon request.
- Questions will be addressed at the end of the presentation. Please use the Q&A function on the Control Panel and ask questions throughout.



# Captive CAFE

## Featured Speakers:



**Cassie Bachman**  
Arsenal Insurance  
Management, LLC



**Nate Reznicek**  
CIC Services, LLC



**Ross Ellick**  
Wilson Elser



**Moderated By:**  
**David Stephenson**  
Johnson Lambert LLP

# Cassie Bachman, Esq., ACI – Titans Group



Cassie currently serves as the Director of Legal Affairs for Titans Group and sits on the Self Insurance Institute of America's (SIIA) Future Leaders Committee. She served as judicial intern for the Chief Justice in the Eastern District of Oklahoma before graduating with honors from the University of Oklahoma College of Law.

Prior to joining the Titan Group, Cassie worked for an independent captive manager as the Managing Director of Compliance. She has tremendous experience on helping Fortune 500 companies with complex compliance issues surrounding US integration of international executives and key employees.

Cassie also received an Associate Degree in Captive Insurance from the International Center for Captive Insurance Education. Cassie travels between Hartford, CT and Alabama and spends her free time with her family, traveling, as well as volunteering with the League of Women Voters, Susan G. Komen foundation and the American Foundation for Suicide Prevention.

# Nate Reznicek, ACI – CIC Services, LLC



Nate maintains an active leadership position in the captive industry and sits on the Captive Insurance Companies Association (CICA) Programming Committee, the Self Insurance Institute of America's (SIIA) Captive Advocacy and Captive Committees, as well as the International Center for Captive Insurance Education (ICCIE) Curriculum Committee and as a faculty member where he teaches the "Forming and Operating a Captive" course.

In 2019 Nate was a finalist for the Emerging Captive Service Professional of the Year by US Captive Service Awards and Captive Review and has the same honor in 2020. In 2020 Nate was the recipient of the Business Insurance Break Out Award as recognition for his leadership in the insurance industry.

A native of Kansas, Nate spent his formative years at the University of Kansas, as an Airman in the USAF Air National Guard, and serves as a subject matter expert on captive insurance for independent brokers and strategic advisors across the country.

# Ross Ellick – Partner, Wilson Elser Moskowitz Edelman & Dicker LLP



Ross Ellick is a member of the firm's Executive Committee and a co-chair of its Complex Tort & General Casualty practice. He focuses his practice on complex litigation matters, with an emphasis on the defense of general, premises and construction liability claims, including those involving New York's often-challenging Labor Law, and the defense of construction defect and property damage claims. A key component of Ross's practice is his skill in navigating difficult insurance coverage and contractual indemnification issues essential to the transfer of risk, liability and indemnity from his clients.

Much of Ross's client base comprises business entities with significant self-insured retentions, in addition to owners of single-parent captive insurance companies and members of group captives and risk retention groups.

# Agenda

- Defining the Product and Emerging Market
- Why Captives and Cannabis?
- Current State
- Risk Management Considerations
- Future
- Claims



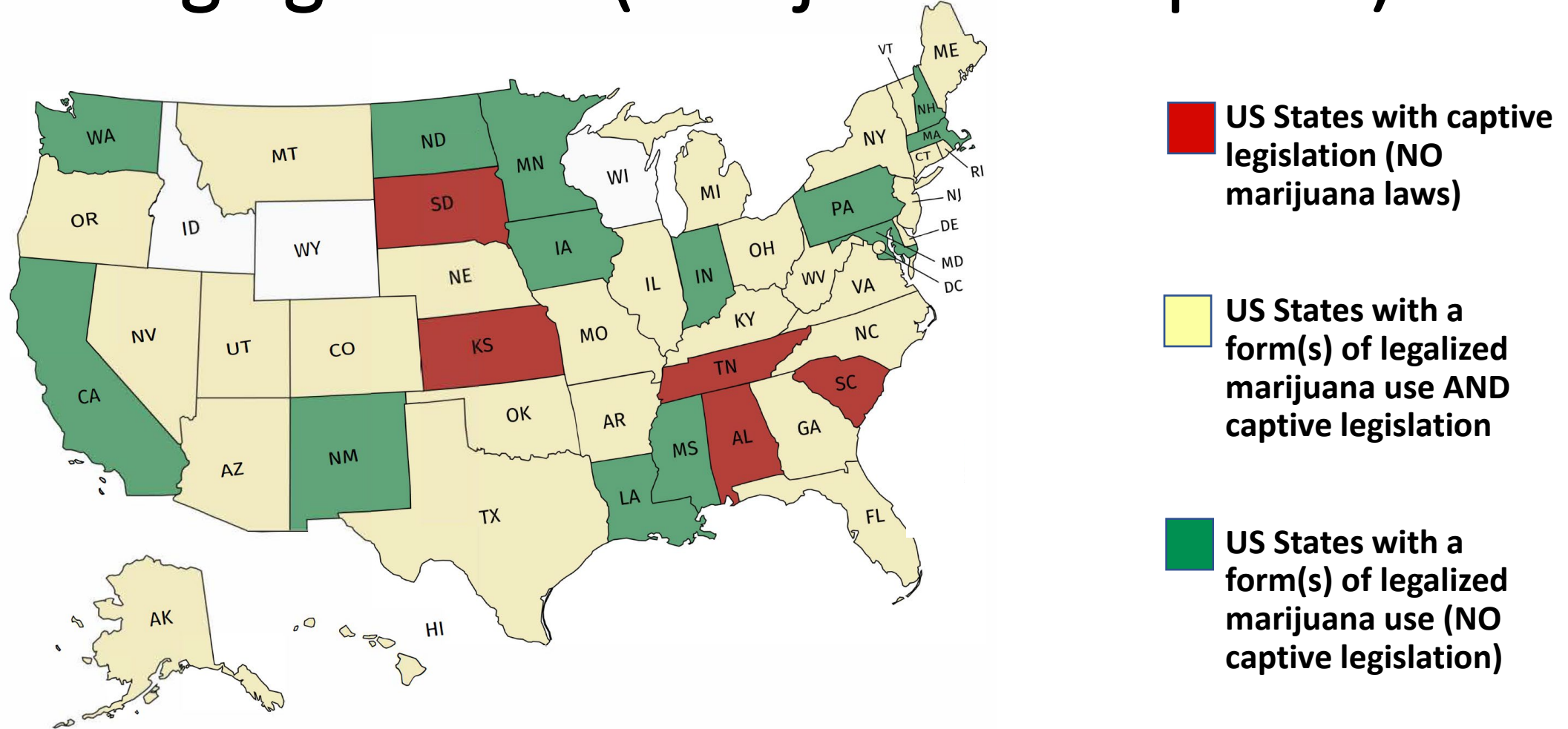
# Defining the Product

- **Cannabis**
  - General term to describe any variety of the plant.
- **Marijuana**
  - Refers to psychoactive and intoxicating cannabis that contains THC.
  - “Marijuana” is a designated **Schedule 1** drug within the **Controlled Substances Act (CSA)**, along with heroin, LSD, peyote, methaqualone and Ecstasy.
  - Notably, Schedule 1 drugs under the CSA have “**no currently accepted medical use and a high potential for abuse.**”
  - Even more notably, **33 states have passed medical marijuana laws!**

# Defining the Product (cont'd)

- **THC**
  - Tetrahydrocannabinol is the primary psychoactive and intoxicating cannabinoid.
- **CBD**
  - Cannabidiol is the primary medicinal cannabinoid. It is psychoactive but is not intoxicating.
- **Hemp**
  - Variety of Cannabis used for many industrial purposes and as source for CBD.
  - Under Farm Bills, defined as containing no more than 0.3 percent

# Emerging Market (Marijuana & Captives)



## Emerging Market (cont'd)

- Industry remains largely under-insured. Clear and significant need for:

General Liability

Product Liability

Business Auto

Professional Liability (for doctors)

Workers Compensation

Equipment breakdown

Property; Fire, Water Damage,  
Explosion, Theft, Vandalism

Kidnap & Ransom

Executive Liability; D&O, EPL, Crime

Crop, Indoor & Outdoor Grow

Cyber Liability

Equipment Breakdown

Builders Risk

# Why Captives and Cannabis?

- **Limited established commercial carrier market**
  - Standard policy forms not often clear as to coverage
  - Often contain exclusions and limitations for: “contraband,” “illegal substances,”
  - “Schedule 1,” and “banned substances”
- **Commercial insurance, especially for specialty risks, is expensive**
- **Industry of Entrepreneurs, not overly risk adverse**
  - Many are flush with cash or capital, and are prime candidates to share risk through captives, and then control/mitigate loss through effective risk management

# Current State: What's the holdup?

- **Federal illegality; Schedule 1 drug; As a result:**
  - Domiciles generally not willing to license cannabis-related captives
  - Many captive managers are hesitant, for fear of being prosecuted for aiding and abetting a felony; i.e., money laundering
  - Commercial carriers remain hesitant to write participate as a front, for fear of having premiums and collateral seized, or being prosecuted for aiding
- **Lack of data around frequency and severity of losses**
- **Difficulties around banking**

# How Risky Is It?

- ***De-facto* legalization at federal level**
  - There has been no reported federal action that has been taken to date against any insurance company, MGA/MGU, captive/risk retention group, or insurance broker that works with state-legal cannabis insurance
  - Federal government seems to have no interest in prosecuting plant-touching or ancillary companies engaged in state-legal commercial cannabis activity
    - Despite rescission of Cole Memo on January 4, 2018, the DOJ and DEA have taken no aggressive action against the cannabis industry
    - Rohrbacher Blumenaur protections are written into the federal budget, and limit the ability of the DOJ and DEA to expend federal monies enforcing federal law against state-legal *medical* cannabis commercial activity
      - These protections do not apply to adult use cannabis activity, although the U.S House passed a bill in October 2019 that would extend protections to adult use as well

# How Risky Is It (cont'd)?

- **Financial Crimes Enforcement Network**
  - Official bureau created by the Secretary of the Treasury to enforce the provisions of the Bank Secrecy Act
    - Issued guidelines to clarify continuing obligations of banks seeking to provide services to marijuana related businesses
    - FinCEN expressly states that the guidelines are meant to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”
      - Not a safe harbor, but does explain and clarify its intent
- **Other significant bills pending in Congress**
  - Most notably, the Secure and Fair Enforcement (SAFE) Banking Act
    - Passed by the U.S. House with broad bipartisan support on September 25, 2019
      - If passed by the Senate and signed into law, the Act would provide a Safe Harbor for Banks and Insurance Companies to service the state-legal cannabis industry



# Legal Cannabis is Here to Stay

- **Cannabis industry is thriving and strong**
  - Issued guidelines to clarify continuing obligations of banks seeking to provide services to marijuana related businesses
    - \$20 Billion in sales expected in 2021
- **Industry and workers have been declared essential**
  - Sales stronger than ever during COVID Pandemic
- **States and counties are dependent on tax revenue**
- **Growing public support for legalization**
- **Legal action, now before the U.S. Supreme Court, regarding de-classification of Cannabis**
  - *Marvin Washington, et al., Petitioners v. William P. Barr, Attorney General, et al.*, which seeks to invalidate marijuana's Schedule I status under the Controlled Substances Act on constitutional grounds.

# Legal Cannabis is Here to Stay (cont'd)

- **More rated carriers now active in the space, and may be more willing to allow for formal risk participation**
- **Domicile interest appears to be increasing where cannabis statutes overlap**
- **Captives are in fact being formed to insure/reinsure industry risks (RRGs, Groups, Association Captives, Pure)**

# Legal Cannabis is Here to Stay (cont'd)

- **State and federal regulations; compliance is the minimum**
- **Industry operators should strive to be “best in class,” which will help with insurability and the effective use of captives**
- **Education and standardization; industry-wide best practices**
  - Quality Control
- **Industry not dissimilar others; can easily learn from others**
- **National Cannabis Risk Management Association (NCRMA)**
  - <https://ncrma.net/>

# Risk Management Considerations

- **Analysis is very different than for marijuana**
- **Hemp and hemp-derived products have been removed from the CSA by the 2018 Farm Bill**
  - So long as the hemp is cultivated pursuant to a Farm Bill-compliant state hemp program and contains less than 0.3% THC on a dry weight basis.
- **USDA regulates hemp cultivation**
  - Interim final rule issued in October 2019
- **FDA regulates cannabinoids in food, supplements, cosmetics and drugs**
- **Uncertain regulatory framework, and a lack of guidance from case law as many judges stay legal proceedings while FDA engages in formal rule-making on complicated issues**
  - Judges don't want to stick their necks out

# Risk Management Considerations (cont'd)

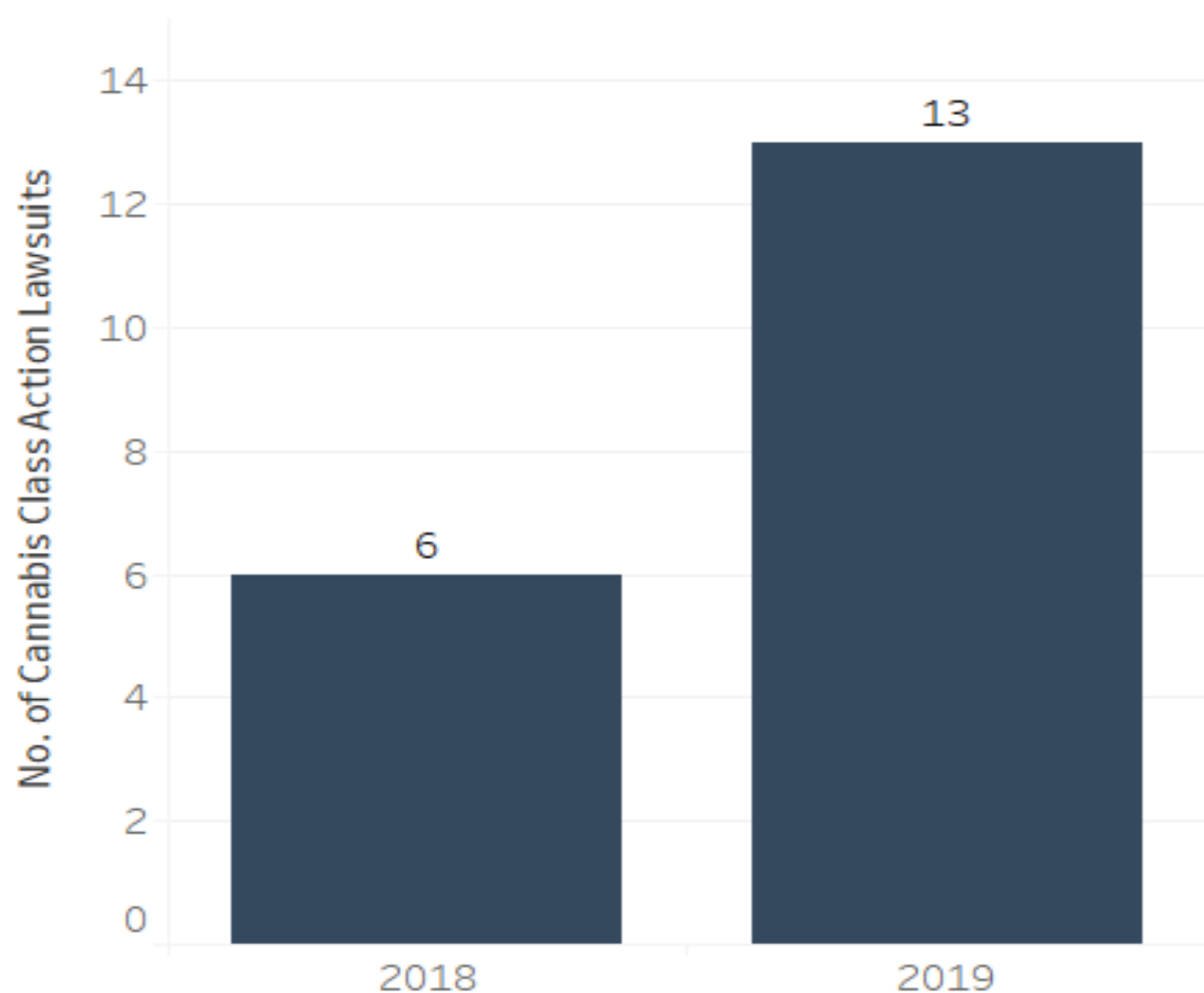
- **FDA's position is that CBD is an impermissible food additive that cannot be marketed or sold as a food, beverage, or dietary supplement.**
  - The agency has taken little enforcement action other than sending warning letters over the past four years to companies that:
    - make health and disease claims;
    - mislabel the amount of CBD in the product;
    - specifically market the product as a dietary supplement.
- **FDA's prohibition on CBD in ingestible form is primarily based on the Drug Exclusion Rule.**

# Claims

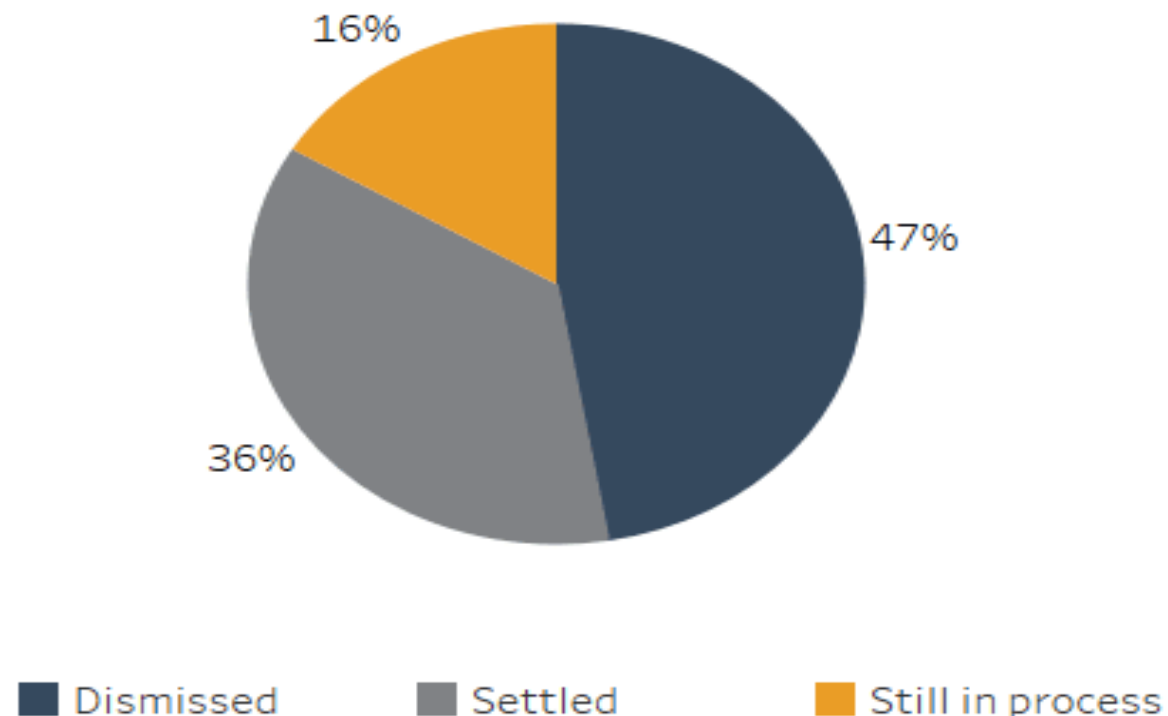
- **Passage of time shows that “Slippery slope” claims have not occurred as many industry pundits predicted**
- **Claims being driven primarily by fire and theft**
- **Contamination claims not yet seen**

# Class Action Securities Lawsuits in the United States

## Class Action Securities Lawsuits Filed Against Publicly Held Cannabis Companies



## Outcomes of Federal Securities Class Action Cases, 2009-2018



Note: Includes outcomes of cases for all industries, not just cannabis.

# Future

- **Emulation of FCIC- Losses measured by expected/actual yield**
- **Expanded FCIC program to include DIC for mites, fungi, germination rates, etc.**
- **Genetic signatures of strains – trace to individual grow operations, lots, etc. to prove sourcing and protect IP**
- **Auto exposures – grubhub/uber eats for THC/CBD delivery (<https://blackbirdgo.com/>)**



# Future (cont'd)

- **Tremendous exposure in labelling and consumer facing issues**
- **Lack of independent testing labs**
- **Regulatory framework: concentration limits, manufacturing standards, enforcement penalties**
- **With legalization comes interstate commerce, and obvious potential conflict between federal oversight and varying state laws; will likely lead to much confusion**
- **Novel Cannabinoids**

# Future (Cont'd)

- **Marijuana Opportunity Reinvestment and Expungement (MORE) Act; H.R. 3884 (116)**
- **Presidential and congressional elections**
- **Elections – If Dems take control of senate, Safe Banking Act is far more likely to likely pass**
- **Possible de-scheduling of Cannabis under CSA**



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Questions