

Wondering Where to Place Your Bets on Cannabis Rescheduling?

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On August 29, 2023, the secretary of the U.S. Department of Health and Human Services (DHHS) transmitted a letter to the U.S. Drug Enforcement Administration (DEA) recommending that cannabis move from a Schedule I substance to a Schedule III substance under the federal Controlled Substance Act (CSA). This letter followed President Joe Biden's request on October 6, 2022, to review the scheduling of cannabis, which is widely regarded as misplaced as it is currently classified alongside other Schedule I substances, such as heroin.

Understanding the historical context of cannabis regulation in the U.S. offers a backdrop to its current classification and potential rescheduling. Initially, when cannabis was unregulated, it was used both medicinally and recreationally. However, the 20th century brought a shift in perception, influenced by political, racial, and economic factors. The Marihuana Tax Act of 1937 marked the beginning of federal cannabis prohibition². This shift was not grounded in scientific evaluation, but rather in societal and political attitudes of the time³. There are many instances in U.S. history of policymakers disregarding commissions and reports, such as the 1944 La Guardia Report on the realities of cannabis use, and instead opting for severe criminal approaches⁴.

Drug scheduling is a classification system used by different nations to categorize and regulate controlled substances based on their medical usefulness,

potential for abuse, and overall risk to public health. This concept arose from the Single Convention on Narcotic Drugs, as the convention provided guidelines for drug scheduling and encouraged countries to place substances into specific schedules based on the convention's criteria, promoting international cooperation in controlling the production and distribution of narcotics, including cannabis, opioids, and other drugs. The U.S. adopted such schedules under the Controlled Substance Act, which became effective May 1, 1971⁵. The reclassification of cannabis from Schedule I to Schedule III at the federal level, as recommended by the secretary of DHHS, would not necessarily change cannabis laws at the state level, unless the federal government interprets "practitioner" under 21 U.S. Codes §829 to include state licensed medical dispensary owners or takes other steps during the rulemaking process to remove the need for U.S. Food and Drug Administration approval and DEA registration to conduct cannabis related business. Currently, only speculation is possible because any change must go through a federal rulemaking process. Therefore, even if rescheduling does occur, there is still time to place bets on whether it would only result in the tax change discussed below or a much more significant shift that would allow state medical programs to operate legally under federal law.

Many questions related to rescheduling should be viewed in terms of comfort levels with conducting cannabis-related business and activities in the face of persisting federal prohibition. If rescheduled to Schedule III, cannabis will likely still be federally illegal to grow, manufacture, and sell outside the federal rules that govern Schedule III substances.

In addition to a change in federal status that would accompany rescheduling, there could be more comfort in engaging in cannabis-related business activities as federal enforcement of cannabis-related prohibitions appears to become less and less likely. In 2021, the U.S. Supreme Court denied certiorari in a cannabis case. Regarding the denial of certiorari, Justice Clarence Thomas wrote, "[o]nce comprehensive, the federal government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."⁶ He also noted that the federal government has sent "mixed signals." Even Thomas has indicated that cannabis is in a gray area and therefore enforcement is becoming decreasingly defensible.

Will §280E still apply?

IRS Code §280E prohibits businesses from taking standard business deductions from activities related to Schedule I substances, such as cannabis. This

prohibition has had a significant financial impact on the cannabis industry and has often been cited as an impediment to sustaining an economically viable business model. If cannabis is rescheduled federally, §280E will no longer apply because the code itself only references Schedule I and Schedule II substances. However, questions remain about whether there would be an appetite for Congress or the White House to pursue a federal excise tax to replace this lost revenue.

“State statutes, state constitutional provisions, and state regulations are determined by those individual states and most of these state laws are currently in defiance of federal law pertaining to cannabis.”

Will banking change?

A change in schedules will not be dispositive to a change in access to banking. However, because of guidance issued by the Financial Crimes Enforcement Network (FinCEN), some financial institutions are allowing cannabis-related businesses to maintain accounts at their institutions. The fees for these accounts are often staggeringly more expensive than for non-cannabis related accounts.

A change in schedules would not change the current FinCEN guidance, but it could change comfort levels and encourage financial institutions to follow suit. In addition, it could encourage Congress to pass the Safe Banking Act, or some version of banking access for cannabis-related businesses.⁷

Will it be legal to move cannabis across state lines?

There have been conflicting predictions as to whether rescheduling would allow cannabis transportation across state lines. While rescheduling under the CSA will not automatically legalize transportation across state lines, it could have an impact on how state and federal entities view potential enforcement actions or the lack thereof. California’s Department of Cannabis Control (DCC) tested the interstate commerce waters by requesting an opinion from its state attorney general as to whether such a change would potentially put the state at risk for federal enforcement if it engaged in interstate commerce with other states with legalized cannabis programs. California Attorney General Rob Bonta issued an opinion stating that he could not advise that there would not be significant risk.⁸ Interstate commerce is widely expected to be a sea change to cannabis industries when it eventually becomes a reality.

Will rescheduling change the involvement of Nevada gaming licensees in cannabis-related businesses?

The governing bodies that oversee Nevada’s gaming industry—the Gaming Control Board (GCB) and Nevada Gaming Commission (NGC)—have issued very few rulings on cannabis activities, except to admonish licensees that they shall not engage in cannabis-related business activity. The Nevada Gaming Policy Committee adopted a resolution on March 5, 2018, stating that, “Nevada gaming licensees should not contract with or maintain business relationships with individuals or entities engaged in the sale, cultivation or distribution of marijuana.”

The legal basis for the prohibition on gaming licensees conducting cannabis-related business activities will not likely change based on the rescheduling of cannabis, given the narrow opportunity for the federal government to reconcile the state-federal conflict when rescheduling from Schedule I to Schedule III (by either interpreting practitioners to include licensed dispensaries (under 21 USC Code §829) or another manner of sanctioning state medical cannabis programs). Perhaps, though, the NGC and GCB will be inclined to further evaluate the potential for gaming licensees to engage in cannabis-related business activities, given the federal government’s persistent lack of enforcement of businesses that are adhering to and compliant with their respective state laws and regulations governing cannabis.

What are the next steps?

Now that DHS has transmitted its findings regarding rescheduling cannabis, the DEA must conduct a review of the relevant evidence. If the DEA finds that rescheduling is warranted, then it must initiate a federal rulemaking process under the Administrative Procedure Act. This process must allow for public comment and will culminate in a decision on whether to adopt the proposed rule. As of the date of the submission of this article, this has not yet happened. The version of rescheduling that is most optimistic for current state-licensed operations is that the state-licensed medical programs will be allowed to dispense as “practitioners” under 21 USC Code §829, or the process will somehow allow for state cannabis programs to be considered legal under federal law. However, this seems unlikely given the lack of enthusiasm for sweeping and eloquent cannabis policy reform at the federal level.

The proposed rescheduling raises several legal and regulatory questions. It could lead to a complex interplay between federal and state authority and jurisdiction, especially in states where cannabis remains illegal. Additionally, it may prompt discussions around international drug treaties to which the U.S. is a signatory.

A Decade of Change Ahead

While the potential reclassification of cannabis from Schedule I to Schedule III at the federal level would not automatically change state cannabis laws or entirely alleviate the many varied federal and state approaches to cannabis and cannabis regulation, it would provide more security and stability to cannabis-related businesses legally operating under their state's laws. If rescheduling proceeds, cannabis research, the taxation of cannabis businesses, the industry's global financial presence, and more, stand to change significantly within the next decade.

ENDNOTES

1. With contribution from Shubham Kolase, BE, MS (in progress), University of Nevada, Las Vegas.
2. Hudak, John (2020). Marijuana, A Short History.
3. *Id.*
4. Frontline (n.d.). Marijuana Timeline. Retrieved from <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html>.
5. Gabay, Michael (2013). The Federal Controlled Substances Act: Schedules and Pharmacy Registration. Retrieved from National Center for Biotechnology Information.
6. Thomas, J. (2021). Standing Akimbo, LLC, Et Al., v. United States on Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Retrieved from https://www.supremecourt.gov/opinions/20pdf/20-645_9p6b.pdf
7. Perlmutter, Ed. (2021). SAFE Banking Act of 2021. Retrieved from <https://www.congress.gov/bill/117th-congress/house-bill/1996>
8. Curley, Mike (2023). "Calif. AG Says Interstate Pot Law Carries Legal Risk." Retrieved from <https://www.law360.com/articles/1779739/calif-ag-says-interstate-pot-law-carries-legal-risk>

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