

Practice Update

DEA Breaks Silence on Reclassification of Marijuana, Proposing Move to Schedule III

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After months of anticipation following the U.S. Department of Health and Human Services' recommendation to reschedule marijuana from a Schedule I to a Schedule III controlled substance, we finally have insight into the direction that the U.S. Drug Enforcement Administration (the DEA) will take on the matter. On April 30, 2024, the DEA announced that it will propose to reclassify marijuana as a Schedule III drug, according to reports. The proposal solidifies the federal government's position on the drug's potential for acceptable medical uses in treatment.

The United States federal government regulates drugs through the Controlled Substances Act (21 U.S.C. § 811) (the CSA), which places controlled substances into five categories, or schedules. Marijuana is currently classified as a Schedule I controlled substance under the CSA, subjecting it to the most stringent of controls. A Schedule I controlled substance by definition has a high potential for abuse and has no accepted medical use in the United States, and there is a lack of accepted safety for the use of the drug under medical supervision. Other drugs in Schedule I include heroin and LSD.

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The classification of a drug under Schedule I comes with significant implications. Such classification makes it a felony to possess, manufacture, dispense or distribute the drug, and it cannot be legally prescribed for medical use. Furthermore, a drug's placement on Schedule I makes it extremely difficult for researchers to perform scientific studies. The financial implications are also significant.

Marijuana's placement on Schedule I means that marijuana businesses cannot take certain federal tax deductions under the Internal Revenue Code Section 280E. In addition, the placement triggers a host of issues for both businesses and banks, making traditional services unobtainable for marijuana businesses, if not simply prohibitively expensive. This is just to name a few of the consequences that may arise from engaging in the marijuana business – and this is still the case despite the fact that most states in the U.S. now permit and regulate marijuana for medical purposes.

Moving marijuana to Schedule III would put it in the same class as other drugs that have accepted medical use and lower potential for abuse, such as ketamine, Tylenol with codeine, and testosterone. Schedule III drugs are available by prescription, subject to FDA prior approval and registration by a DEA-registered pharmacy. However, the reclassification does not mean that marijuana now becomes “legal.” State-authorized marijuana programs as they operate today will continue to be illegal, because such dispensaries are not federally approved, and neither are the marijuana products they dispense. Schedule III drugs are still highly regulated, and although penalties for violations are less than that of a Schedule I drug violation, many legal consequences will remain in place even after the rescheduling is finalized. However, the move is still a progressive step that will open doors for further policy reform.

If the rescheduling is ultimately approved, perhaps the most direct and immediate consequence for businesses will be tax relief. Section 280E prohibits

the taking of deductions for business that engage in trafficking of controlled substances listed in Schedule I and II. A move to Schedule III means that those marijuana businesses will be eligible to deduct expenses like any other business. This means more profits and increased ability to compete against illegal sellers. Investment and research are likely to increase accordingly.

There are several administrative steps that need to occur before the rescheduling is finalized, and it will likely take many months to complete the rulemaking process. It is anticipated that the move will be hotly contested by opponents, and delays in implementation are to be expected. The uncertainties created by the reclassification will likely take years to shake out.

Disclaimer:

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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