



August 13, 2024

MARIJUANA CLASSIFICATION AND IMPLICATIONS OF RESCHEDULING

Brief

On May 21, 2024, the U.S. Department of Justice Drug Enforcement Administration published a notice of proposed rulemaking to transfer marijuana from Schedule I to Schedule III under the Controlled Substances Act

Discussion of such a move began on October 6, 2022, when President Biden asked the U.S. Attorney General and the U.S. Secretary of Health and Human Services to launch a scientific review of how marijuana is scheduled under federal law. On August 29, 2023, the U.S. Department of Health and Human Services (HHS) recommended that the Drug Enforcement Administration (DEA), as part of the DOJ, reschedule marijuana to Schedule III to reflect HHS's updated views on marijuana's currently accepted medical use and potential for abuse and dependence.

The [announcement](#) of the proposed rule opened a period of public comment through July 22, 2024. Comments may be submitted electronically via the [Federal eRulemaking Portal](#) using the reference "[Docket No. DEA-1362](#)." Interested parties may also request legal hearings to further debate the issue through June 20, 2024.

[*Note:* The CSA's definition of marijuana excludes (1) products that meet the legal definition of hemp, and (2) the mature stalks of the cannabis plant; the sterilized seeds of the plant; and fibers, oils, and other products made from the stalks and seeds. Federal law defines hemp as the cannabis plant or any part of that plant with a delta-9 tetrahydrocannabinol (THC) concentration of no more than 0.3 percent, including cannabidiol (CBD).]

Drug Scheduling

Under the CSA, drugs, substances, and certain chemicals used to make drugs are classified into [five distinct categories, or schedules](#), depending upon the drug's acceptable medical use and the drug's abuse or dependency potential.

Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote.

Schedule II drugs, substances, or chemicals are defined as drugs with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous. Some examples of Schedule II drugs are: combination products with less than 15 milligrams of hydrocodone per dosage unit (Vicodin), cocaine, methamphetamine, methadone, hydromorphone (Dilaudid), meperidine (Demerol), oxycodone (OxyContin), fentanyl, Dexedrine, Adderall, and Ritalin.

Schedule III drugs, substances, or chemicals are defined as drugs with a moderate-to-low potential for physical and psychological dependence. Drug abuse potential for Schedule III drugs is less than Schedule I and Schedule II drugs but more than Schedule IV. Some examples of Schedule III drugs are: products containing less than 90 milligrams of codeine per dosage unit (Tylenol with codeine), ketamine, anabolic steroids, and testosterone.

Schedules IV and V are reserved for drugs with progressively lower risks of abuse and dependence. Examples of Schedule IV drugs include Xanax, Valium, and Ambien. Schedule V drugs are often diarrhea-, cough-, or pain-relieving medicines that contain limited quantities of certain narcotics, like Robitussin AC, which contains codeine.

In addition to the general scheduling framework, the CSA includes regulatory provisions specific to marijuana, such as mandatory minimum sentencing and special registration requirements for those who manufacture marijuana for research purposes.

History of the Controlled Substances Act

In the 19th century, the United States had a disjointed federal drug regulatory scheme composed of tariffs, import and export controls, and purity and labeling requirements that skirted around the constitutional debate about banning substances outright. In 1914, Congress passed the Harrison Narcotics Tax Act to establish oversight for the legal trade of narcotics and to penalize illicit trafficking. In the following decades, federal control expanded beyond narcotics to include marijuana, stimulants, depressants, and hallucinogens.

In 1970, Congress repealed nearly all existing federal substance control laws and imposed the unified framework we know as the Controlled Substances Act. The CSA also served to satisfy the obligations in [international drug-control treaties](#), namely the Single Convention on Narcotic Drugs (1961) and the Convention on Psychotropic Substances (1971). Marijuana has been a Schedule I drug since Congress enacted the CSA.

Rulemaking Authority and Reasoning

Congress and the Executive Branch share the authority to change the status of marijuana. Congress can change the status of a controlled substance through legislation, while the CSA empowers the DOJ/DEA to make scheduling decisions through the notice-and-comment rulemaking process. The process can be proposed by the DEA, HHS, or by petition from an interested party, like the National Organization for the Reform of Marijuana Laws has done in the past. In the present case, the U.S. Attorney General has started the rulemaking process. [Note: The Attorney General historically has ceded their CSA-granted rulemaking authority to their subsidiary, the DEA; but here, the Attorney General opted to initiate it directly.]

Prior petitions for marijuana rescheduling have been denied primarily due to the DEA's criteria for "currently accepted medical use" (CAMU). Since 1992, the DEA's position has been that a drug has a CAMU only if either:

- The U.S. Food and Drug Administration (FDA) has approved the drug under the Food, Drug, and Cosmetic Act (FDCA); or
- The drug meets a five-part test that tracks the core standards developed under the FDCA:
 - The drug’s chemistry is known and reproducible;
 - There are adequate safety studies;
 - There are adequate and well-controlled studies proving efficacy;
 - The drug is accepted by qualified experts; and
 - Scientific evidence about the drug is widely available.

Historically, the DEA determined that marijuana cleared neither hurdle and, therefore, rejected previous rescheduling petitions. The most recent petition was denied in 2016.

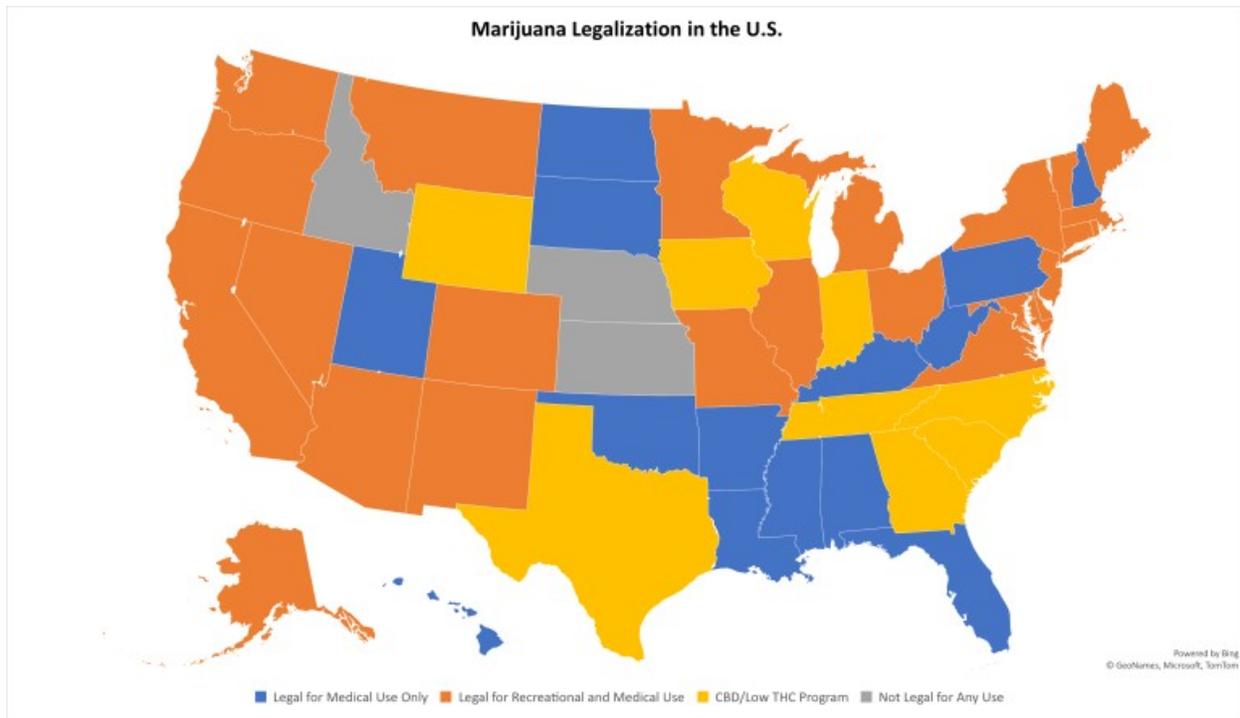
With the present rulemaking proposal, the Executive Branch has added an alternative criterion that marijuana may satisfy. In response to the President’s request, HHS found that it would be inconsistent with the text and purpose of the CSA for the existing standards to be the “sole basis for determining whether a substance has a [CAMU].” Their recommendation and the subsequent [Slip Opinion from the Attorney General](#) state that, regardless of whether a drug was approved by the FDA or satisfied the DEA’s five-part test, a drug could have a CAMU if it satisfied a new, two-part inquiry, which considers:

- The extent and nature of medical use, including:
 - whether there is “widespread current experience with medical use of the substance by U.S. Licensed health care practitioners” and the extent to which medical regulators recognize the substance having at least one medical use; and
- Whether there is “some credible scientific support for at least one medical use of the substance.”

Using these parameters, HHS determined that marijuana has a currently accepted medical use and, therefore, should be eligible for rescheduling. In the Slip Opinion, the Attorney General corroborated their analysis, saying that the existing criteria were “impermissibly narrow,” and that the new two-part inquiry is sufficient to establish a basis for CAMU.

Regarding international law, previous administrations have interpreted treaty language to require marijuana to be listed as Schedule I or II. The Attorney General’s Slip Opinion changes course to say that, because the treaty language allows for the use of both laws and regulations and does not invoke the American scheduling framework, rescheduling marijuana to Schedule III, plus incorporating additional regulatory controls, would satisfy treaty requirements.

Current Legal Landscape



As of June 2024, medical marijuana use is legal in 38 states and the District of Columbia. Recreational use of marijuana is legal in 24 states and the District of Columbia. While possession and use may be legal under a state’s laws, the Constitution’s Supremacy Clause dictates that marijuana’s federal status as a Schedule I Controlled Substance means that activities involving marijuana can still be seen as a crime in the eyes of the federal government and could be subject to enforcement.

A congressional [appropriations rider](#), although, allows states to implement their own medical marijuana programs and prohibits federal prosecution of state-legal activities involving medical marijuana. However, there is no bar on federal prosecution related to recreational marijuana.

The friction between state and federal law still manifests, though, in business and in people’s personal lives. One hallmark issue is that, although marijuana can be a state-legal business, federal anti-money laundering laws may hold the managing financial institutions in violation for handling drug-related income, often disallowing these businesses use of traditional banking services. Congress has repeatedly introduced the [SAFER Banking Act](#) to remedy this conflict. Marijuana businesses are also ineligible for certain federal tax deductions. On an individual scale, any involvement with marijuana may negatively impact a person’s immigration process or a person’s ability to receive certain federal government benefits. Additionally, users of controlled substances are federally prohibited from owning or possessing a gun, regardless of state legality.

Rescheduling Implications

Classifying marijuana as Schedule III would allow pharmacies across the country to dispense the prescription drug, pending FDA approval. The DEA and Kansas rules and

regulations already permit pharmacists to dispense Schedule III, IV, and V substances. There would be [no impact](#) on the legal status of recreational marijuana.

Additionally, [research](#) involving marijuana would become easier to conduct. Research on marijuana thus far has been limited due to tight Schedule I registration requirements. Moving to Schedule III would ease these DEA registration requirements and grant researchers more flexibility in their work. Rescheduling would not affect FDA research obligations.

For state-legal businesses, rescheduling would mean that they would become eligible for certain tax credits and deductions, alongside having more access to bankruptcy courts. The law regarding financial services, though, applies to controlled substances generally, so rescheduling would not open financial services to state-legal marijuana businesses. Legislation would still be required.