

DEA is Going to Have a Hard Time Fighting Marijuana Rescheduling

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Last week, the Department of Health and Human Services (HHS) released the full text of its letter ([HHS Letter](#)) to the Drug Enforcement Administration (DEA), recommending marijuana rescheduling from Schedule I to Schedule III. Schedule I substances are deemed to have no currently accepted medical use (CAMU) and include drugs like heroin and MDMA. Nothing in the HHS Letter comes as a shock. We already knew that HHS recommended moving marijuana to Schedule III and have extensively written about it:

- [DEA Likely to Reschedule Marijuana Based on Congressional Report](#)
- [From Schedule I to Schedule III: Potential Shift in Marijuana's Legal Status](#)
- [Rescheduling Marijuana: Understanding the Legal Impacts](#)
- [Federal Legalization of Marijuana May Be Closer Than You Think](#)

The full version of the HHS Letter was made available thanks to the [work](#) of attorney Matt Zorn, who sued the HHS over a heavily redacted version of the letter released last year. The HHS Letter, which HHS sent to the DEA in August 2023, does not necessarily change anything right now. However, it provides hundreds of pages of data justifying marijuana's placement as a Schedule III substance, making it increasingly difficult for the DEA to maintain marijuana's status as a Schedule I substance.

HHS Confirms Recommended Marijuana Rescheduling to Schedule III

The HHS Letter summarizes its findings as follows:

After assessing all available preclinical, clinical, and epidemiological data, FDA recommends that marijuana be rescheduled from Schedule I into Schedule III of the CSA. Schedule III drugs are classified as having a potential for abuse less than the drugs or other substances in schedules I and II, a currently accepted medical use in treatment in the United States, and moderate or low physical dependence or high psychological dependence that may result from their use.

This letter shows HHS's work in reaching this conclusion and is a treasure trove of data when it comes to the science of marijuana. It also validates what seem like uncontroversial points: that marijuana is less dangerous than cocaine and heroin and has legitimate medical use. In the past, it has been difficult to fund and publish research on marijuana because, generally, the federal government has not considered even state-legal medical marijuana use legal. In this letter, HHS has clearly started to take into account the decades of data that has come from the medical use of marijuana.

According to the letter, “[t]he current review is largely focused on modern scientific considerations on whether marijuana has a CAMU and on new epidemiological data related to abuse of marijuana in the years since the 2015 HHS [eight factor analysis] on marijuana.” This references the last time that HHS reviewed marijuana’s status in 2015, upon request by the governors of Rhode Island and Washington, [which was ultimately denied by the DEA](#).

HHS Eight Factor Analysis

In determining where marijuana should be scheduled, the HHS Letter focuses on the following eight factor analysis test (8FA) required by the Controlled Substances Act (CSA) listed in 21 USC 811(b). Below is a brief analysis and summary of each factor as set forth in the HHS Letter:

1. Marijuana’s actual or relative potential for abuse – HHS found that marijuana has the potential to create hazards for health; however, when compared to Schedule I and II substances, marijuana is less likely to result in incidences of adverse outcomes or severity of substance use disorder.

2. Scientific evidence of marijuana’s pharmacological effect, if known – HHS discusses how cannabinoids interact with the [endocannabinoid system](#). The HHS reviewed studies of marijuana use in animals and humans. Pages 16 and 17 of the HHS Letter list recorded clinical responses to marijuana use as positive subjective, sedative, anxiety and negative, perceptual, psychiatric, social and cognitive, and physiological.

3. The state of current scientific knowledge regarding marijuana – This section focuses on the state of scientific knowledge on marijuana, including its chemistry and interaction with the human body. The HHS Letter points out the complexity of studying marijuana due to the variable organic plant material and manufactured preparations. For example, marijuana comes in many forms, such as flower, vapor, and edibles.

4. Marijuana’s history and current pattern of abuse – HHS determined that marijuana is used extensively in the U.S., both medically and recreationally; it is not as prevalent as alcohol but is used more than other drugs scheduled under the CSA. In collecting data, HHS looked at studies at both the federal and state level, as well as international studies.

5. The scope, duration, and significance of abuse – There is significant overlap between factors 4 and 5. In summary, HHS concludes, “although abuse of marijuana produces clear evidence of harmful consequences, including substance use disorder, they are relatively less common and less harmful than some other comparator drugs.”

6. What, if any, risk there is to public health – One metric is the risk of hospitalization or Emergency Department (ED) visits. Unsurprisingly, HHS concluded that “[t]he risks to the public health posed by marijuana are low compared to other drugs of abuse (e.g., heroin, cocaine, benzodiazepines), based on an evaluation of various epidemiological databases for ED visits, hospitalizations, unintentional exposures, and most importantly, for overdose deaths. The rank order of the comparators in terms of greatest adverse consequences typically places heroin, benzodiazepines, and/or cocaine in the first or immediately subsequent positions, with marijuana in a lower place in the ranking, especially when a utilization adjustment is calculated. For overdose deaths,

marijuana is always in the lowest rankings among comparator drugs.” Put another way, HHS is verifying that “Reefer Madness” does not really exist.

7. Marijuana’s psychic or physiological dependence liability – The psychic dependence analysis looks at how a substance can create psychic or psychological dependence. HHS found animal behavioral data shows that delta-9 THC “produces rewarding properties that underlie the abuse potential of marijuana,” while epidemiological data demonstrate that some individuals who use marijuana for its rewarding properties go on to develop cannabis use disorder. In examining physical dependence, “marijuana withdrawal syndrome appears to be relatively mild compared to the withdrawal syndrome associated with alcohol, which can include more serious symptoms such as agitation, paranoia, seizures, and even death.” The HHS Letter likened the withdrawal symptoms from marijuana to the withdrawal symptoms of tobacco.

8. Whether marijuana is an immediate precursor of a substance already controlled – This analysis turns on whether marijuana is a precursor of a controlled substance, which means a compound that is used to manufacture a controlled substance. HHS determined that marijuana is not an immediate precursor of another controlled substance.

Based on the 8FA, HHS made the following recommendations:

1. **Marijuana has a potential for abuse less than the drugs or other substances in Schedules I and II.**
2. **Marijuana has a currently accepted medical use in treatment in the United States.**
3. **Abuse of marijuana may lead to moderate or low physical dependence or high psychological dependence.**

DEA Has Final Say in Marijuana Rescheduling

In September, we wrote about a Congressional report that indicated that the DEA was likely to follow HHS’s recommendations:

According to a [report](#) from the Congressional Research Service (the Report), the Drug Enforcement Administration (DEA) is likely to follow the Department of Health and Human Services (HHS) and the Food and Drug Administration’s (FDA) [recommendation](#) to move marijuana from Schedule I to Schedule III under the Controlled Substances Act (CSA). According to the Report, the DEA confirmed in a 2020 congressional hearing that it will be bound by the FDA’s recommendation, “and if past is prologue, it could be likely that DEA will reschedule marijuana according to HHS’s recommendation.”

Under the CSA, the HHS evaluation and recommendations with regard to scientific and medical matters are binding on the DEA. 21 USC 811(b). However, the DEA may consider “all other relevant data” in making its final determination. This means that while the DEA does have the ability to deny marijuana rescheduling, the release of the HHS Letter makes this more challenging because the DEA would need to identify factors that outweigh the scientific and medical data and determinations thoroughly outlined in the HHS Letter. The political winds also are not in favor of the DEA going rogue, as this rescheduling process comes under the directive of President Joe Biden. He oversees the executive branch of the government and likely wants to campaign ahead of the upcoming election on his administration successfully following through on its promises of drug policy reform.

In addition to these background considerations, the HHS Letter does expressly account for one basis upon which the DEA may reject HHS's findings and justify marijuana's Schedule I status:

We acknowledge that the DEA, acting on behalf of the Attorney General, may ultimately implement any changes in the federal control status of marijuana pursuant to section 201(d)(1) of the CSA (21 U.S.C. 811(d)(1)), due to the control of cannabis and cannabis preparations internationally in Schedule I of the Single Convention on Narcotic Drugs of 1961 (hereafter, the Single Convention), and the requirement for the United States to be compliant with control measures stipulated for drugs controlled under the Single Convention.

While the U.S. is a party to the Single Convention on Narcotic Drugs, that does not necessarily mean that its obligations under international law will be enough to justify a DEA rejection of HHS' recommendation. Canada is also subject to the Single Convention and has legalized marijuana nationwide.

The Takeaway

The major importance of the HHS Letter is its impact on limiting the DEA's next moves on marijuana. Although nothing is certain, it seems very likely that the DEA will move forward with the rulemaking process to reschedule marijuana.

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