

DEA Likely to Reschedule Marijuana Based on Congressional Report

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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." The FDA operates under the umbrella of the HHS, so the Report interchanges references to whether the recommendation comes from the HHS or the FDA. In turn, the Department of Justice (DOJ) oversees the DEA.

To recap, in October, President Biden [requested](#) that the DOJ and the HHS evaluate marijuana's status as a Schedule I substance under the CSA. The CSA places drugs into one of five schedules; Schedule I is the most restrictive and seen as having no medical use and a high potential for abuse. Due to these restrictions, Schedule I substances are nearly impossible to research. Schedule III substances are considered to have an accepted medical use and a relatively lower potential for abuse compared to Schedule I and II substances. The CSA grants the HHS and the DEA the authority to reschedule or deschedule substances.

Could Congress Get Involved with Rescheduling?

Although the headline from the Report is that the DEA is likely to reschedule marijuana, there are other provisions of note, including that the de- or re-scheduling of marijuana could occur in other ways. For example, the Report lists the following "Considerations for Congress":

Congress may choose to address any number of issues related to the potential rescheduling of marijuana. First, Congress could take legislative action to keep marijuana on or remove marijuana from Schedule I. If Congress removed marijuana from Schedule I, it might (1) place marijuana on one of the other schedules of controlled substances, (2) create another schedule or separate classification for marijuana under the CSA, or (3) remove marijuana as a controlled substance altogether. If the administrative scheduling process moves forward, Congress may consider whether to devote additional resources to the FDA and the U.S. Department of Agriculture (USDA) to ensure the safety and quality of the many different products already available in many state markets.

While the rescheduling pathway currently in progress is being handled through an administrative channel, that would not stop Congress from acting to re- or de-schedule marijuana in the meantime. Administrative agencies are creatures of statute. They operate based on the legislation passed by Congress, subject to oversight through the executive branch. It is the CSA that grants the authority to the HHS/FDA and the DOJ/DEA to reschedule marijuana. In other words, Congress could place marijuana in any schedule it wanted, remove it entirely, regulate it in some new novel manner, or get rid of the CSA altogether. It seems unlikely that Congress would do any of these options, but it certainly has the legal authority to do so.

Congress also has the power of the purse. It can allocate resources to government agencies such as the FDA or the USDA, who, in turn, could take increased roles in the marijuana context. Marijuana is in the FDA's jurisdiction, and the FDA has broad jurisdiction over food, drugs, and cosmetics. The FDA has worked with pharmaceutical companies to develop cannabis-based or cannabis-related drugs, such as Epidiolex and Marinol. However, when it comes to state-legal recreational or medical marijuana programs, the FDA has largely stayed out of the fray. After all, although state-legal marijuana programs operate outside of federal law, they are – across the board – very tightly regulated. The Report considers what might change with regards to the FDA should marijuana be de- or re-scheduled:

The scope of and demand for FDA oversight for medical marijuana and related products may grow considerably. In the short term, FDA may need to generate or update a substantial amount of technical information to clarify its regulatory approach to marijuana for relevant stakeholders. Given that marijuana is a complex substance containing various pharmaceutical components and is available to consumers in numerous formats, FDA may also need to consider long-term resource allocation to ensure that marijuana products consistently meet applicable regulatory standards.

While these are all possibilities, it remains to be seen how Congress and the relevant government agencies will react to marijuana if the DEA does reschedule marijuana.

How Could DEA Rescheduling Impact Medical Marijuana?

The Report lists several potential impacts of rescheduling. As reported elsewhere in-depth, rescheduling would make Internal Revenue Code Section 280E inapplicable to marijuana businesses, allowing marijuana and marijuana-related businesses to take deductions. In addition, the Report states, “[t]hose who use medical marijuana lawfully may now be eligible to (1) [access public housing](#), (2) [obtain immigrant and nonimmigrant visas](#), and (3) [purchase and possess firearms](#).” The Report also states, “[t]hose who use medical marijuana lawfully may contend with fewer barriers to federal employment and eligibility to serve in the military.”

While these potential changes are substantial, it is also important to recognize that a person's use of medical marijuana pursuant to a state-legal program would not be legalized or allowed under the CSA, per se, if marijuana is rescheduled as recommended by the HHS. If marijuana is moved to Schedule III, its use would require a person to hold a prescription. The prescription would need to be obtained through the proper channels, such as through a doctor or other healthcare provider directly or from a pharmacy. In medical marijuana states, doctors currently recommend or authorize the use of marijuana; they do not write “prescriptions,” as that term is used in the context of the CSA.

The production, processing, sale, and use of medical marijuana outside of the CSA is, and will remain, illegal. Unless and until marijuana drugs are developed and distributed in compliance with the CSA, the use of medical marijuana can still impact access to public housing, immigration status, and the ability to possess firearms. The development of new marijuana-based drugs and compounds could take years. Due to this protracted timeline, federal rescheduling is not likely to make much of an impact on state-legal medical marijuana programs for many years.

The Takeaway

Congressional Research Service provides reports to Congress that are not binding. While cannabis insiders do not know for certain what the DEA will do or when it will do it, the Report is well-researched, and it does appear the DEA is on record stating that it will follow the FDA's recommendation. We will continue to monitor these developing issues on the Green Leaf Brief.

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