

From Schedule I to Schedule III: Potential Shift in Marijuana's Legal Status

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Major news broke on August 30, 2023, as the U.S. Department of Health and Human Services (HHS) announced that it would recommend changing marijuana's legal status from Schedule I to Schedule III, as first reported by Riley Griffin for [Bloomberg](#). HHS Secretary Xavier Becerra said earlier this year that the recommendation on marijuana rescheduling would be coming before the end of 2023, which resulted in our speculating that [Federal Legalization of Marijuana May Be Closer Than You Think](#). Secretary Becerra's comments were in response to a directive from Joe Biden in October of 2022 requesting that HHS and the U.S. Attorney General evaluate marijuana's current status as a Schedule I substance.

What Needs to Happen for Marijuana to Actually be Rescheduled to Schedule III?

The HHS recommendation will be made to the Drug Enforcement Administration (DEA); it is not binding, but will be very persuasive. The DEA, an agency within the Department of Justice overseen by the U.S. Attorney General, will make the final call with respect to the re- (or de-) scheduling of marijuana.

The Controlled Substances Act (CSA) grants the Attorney General rulemaking authority to reschedule a substance to another Schedule. To transfer a drug between Schedules (i.e., reschedule), the Attorney General must make findings that the drug or other substance fits into the criteria of a given Schedule. 21 USC 811(a)(1)(B).

In order to reschedule, HHS must evaluate the drug through the U.S. Food and Drug Administration (FDA) and report findings to the Attorney General based on scientific and medical considerations. This is where we are right now. The DEA has the ability to conduct its own research as well. The DEA has confirmed to Kyle Jaeger of [Marijuana Moment](#) that it has received the recommendation from HHS.

What is a Schedule III Substance?

Marijuana and delta-9 THC are currently listed in Schedule I of the CSA. The CSA places drugs in one of five Schedules, with Schedule I being the most restrictive. Schedule I substances are deemed to have no medical value and a high potential for abuse. Schedule III substances, in turn, are substances with moderate to low abuse potential, a currently accepted medical use, and a low potential for psychological dependence. Examples of Schedule III drugs include Tylenol with Codeine, Suboxone, Ketamine, and Anabolic steroid drugs. Use of a Schedule III requires a prescription, which may not be filled more than six months after its issuance date or more than five times total unless renewed by a practitioner.

If Marijuana is Rescheduled to Schedule III, What Will Change?

One of the largest impacts of rescheduling will be how marijuana businesses are taxed. If marijuana moves to Schedule III, [Internal Revenue Code 280E](#) (IRC 280E) would no longer apply to marijuana businesses. IRC 280E prohibits businesses trafficking Schedule I or II from taking credits or deductions other than those for costs of goods sold. This has resulted in a much higher tax burden for marijuana businesses compared to similar businesses in other industries. By way of example, the tax burden on a cannabis farmer is much higher than on a tomato farmer.

Additionally, if marijuana is rescheduled to Schedule III, it will be much easier to research the drug in the United States. As a Schedule I substance, marijuana is deemed too dangerous to research with human subjects, even under the supervision of doctors and health care professionals. The supply of marijuana for research purposes is also very limited. While Schedule III substances are still controlled, they are not controlled as tightly as Schedule I substances. This potential rescheduling of marijuana to Schedule III will open up many research pathways, allowing U.S. researchers to better understand the cannabis plant and the interactions it has with the human body and mind. This will likely lead to the development of additional marijuana-based drugs, which will require a prescription for use.

Rescheduling marijuana's legal status to Schedule III, however, will not legalize state-level marijuana programs. The CSA contains robust regulations and requirements for the manufacture and distribution of Schedule III substances. The FDA approves how these drugs are manufactured, focusing on specific means of administration. For example, if the FDA approves a marijuana-based drug – which it has in the past (e.g., Sativex, Marinol) – that does not mean the FDA would approve all other types of marijuana. In other words, approving a pill containing marijuana derivatives does nothing to change the legality of edibles or joints. State-legal marijuana programs will still exist, but rescheduling will not make them legal. Instead, it will make them a little less illegal, as the penalties associated with Schedule III substances are far less severe than Schedule I substances.

It is unclear if the change from Schedule I to Schedule III will impact the marijuana industry's ability to access financial services. Although many risks may be reduced, they are not fully eliminated. Time will tell if and how this change in marijuana re-scheduling will change the risk appetite of banks, credit unions, and other financial service providers.

For more information on the [legal impacts of rescheduling marijuana](#), consider reading our previous [post](#) on the topic. For additional insights into the risks faced by banks, credit unions, and other financial service providers, navigate to parts one ([Conflicting Legal Landscapes](#)) and two ([Compliance Challenges](#)) of our Marijuana & Banking series.

Bottom line

Marijuana has long been considered one of the most dangerous drugs known to man under federal law, despite years of medical and recreational marijuana use in the United States. California was the first state to fully legalize medical marijuana in 1996. Colorado and Washington first legalized marijuana for recreational use in 2012. Now, nearly 20 years after the first medical marijuana laws and more than 10 years since the first recreational laws were passed, the federal government is truly poised to change its tune on marijuana's legal status.

Regardless of the outcome, this is a historic day in the history of American drug policy. We will continue to monitor and update accordingly.

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