

Rescheduling Marijuana: Understanding the Legal Impacts

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Marijuana is currently listed as a Schedule I substance in the Controlled Substances Act (CSA); this scheduling means the federal government concluded marijuana has no currently accepted medical use in any setting. This could change as the Biden Administration evaluates marijuana's current legal status, potentially opening the door to rescheduling marijuana. In a prior [post](#), we analyzed how the Department of Health and Human Services (HHS), along with the Department of Justice, can opt for descheduling or rescheduling marijuana under the CSA. This is in light of HHS Secretary Xavier Becerra's recent statement that he intends to provide President Biden with a report on marijuana scheduling.

What is the Difference Between Rescheduling and Descheduling?

Rescheduling marijuana would move the substance from Schedule I to a less restrictive schedule. If marijuana is moved to Schedule III, IV, or V, [Internal Revenue Code 280E](#) would no longer apply to marijuana businesses, resulting in a much lower effective tax rate for businesses across the industry. Rescheduling is not the only possible method for the federal government to amend the treatment of marijuana under federal law, though. The Biden administration could also deschedule the plant, removing marijuana from the CSA altogether.

By way of metaphor, rescheduling is akin to switching from playing cello to playing violin. Descheduling is like changing from playing the violin to playing drums – plus transitioning from the orchestra to a free-form funk band. This post focuses on the legal impacts of rescheduling marijuana; a subsequent post in this series will focus on descheduling marijuana.

What is the Difference Between the CSA's Schedules?

The CSA places substances in schedules based on the federal government's conclusions regarding their potential for abuse and accepted medical use. Schedule I is the most restrictive schedule, reserved for the most "dangerous" substances, while Schedule V is the least restrictive schedule. Schedule I substances, by definition, have no approved medical use and a high potential for abuse. Substances included in the CSA's schedules II-V require a prescription and are subject to strict controls. Further, substances in Schedules III-V can be refilled, while a prescription must be renewed for any substance listed in Schedule II.

The following is a brief description of each of the other four schedules:

Schedule Description	Examples
<p>II Schedule II drugs have a high potential for abuse, but unlike Schedule I substances, they have some medically accepted use in certain circumstances with strict guidelines. Schedule II substances must be prescribed by a health practitioner and may not be dispensed or distributed for any other reason. Prescriptions may not be refilled.</p>	<ul style="list-style-type: none"> – Fentanyl – Adderall – Cocaine (for anesthetic use) – Methamphetamine – Methadone – Morphine – Oxycodone
<p>III Schedule III is reserved for substances with a moderate to low abuse potential, a currently accepted medical use, and a low potential for psychological dependence. Use of a Schedule III substance requires a prescription, which may not be filled six months after its date or more than five times total unless renewed by a practitioner.</p>	<ul style="list-style-type: none"> – Tylenol with Codeine – Suboxone – Ketamine – Anabolic steroids drugs
<p>IV These substances do have an accepted medical use and a lower potential of abuse compared to Schedule III.</p>	<ul style="list-style-type: none"> – Xanax – Valium – Lorazepam – Clonazepam
<p>V These substances have a low potential for abuse compared to Schedule IV and consist primarily of prescriptions containing limited quantities of certain narcotics.</p>	<ul style="list-style-type: none"> – Rofitussin AC – Ezogabine – Anticonvulsants – Epidiolex (cannabidiol)

How Would Rescheduling Impact the Ability to Research Marijuana?

Rescheduling marijuana – that is, moving marijuana from Schedule I to any other schedule – would result in expanded research, though the opportunities and allowances vary based on the specific schedule.

Historically, it has been nearly impossible to research marijuana, as a permit from the Drug Enforcement Administration (DEA) is required to research marijuana pursuant to federal law. Locating and possessing marijuana for research has also been extremely challenging while marijuana has remained in Schedule I. Until recently, the only supply of federally compliant marijuana, which could be studied pursuant to a DEA permit, came from [Ole Miss](#) (or the University of Mississippi), after winning a contract in the 1960s to be the sole supplier of marijuana to the federal government. (For more on the University of Mississippi’s somewhat surprising role in marijuana history, check out this [timeline](#)).

Ole Miss is no longer the only sanctioned marijuana grower, but the [process](#) to cultivate and distribute marijuana is onerous as the DEA has amended its regulations to allow for expanded cultivation. In 2022, President Biden signed the [Medical Marijuana and Cannabidiol Research Expansion Act](#), which aimed to expand the avenues to manufacture and research marijuana.

The research restrictions applicable to drugs outside of Schedule I are less onerous. If marijuana is rescheduled, scientists in the United States will have expanded opportunities to research the plant and its impact on and interactions with the human body.

Would Rescheduling Marijuana Actually Legalize Marijuana?

Companies developing drugs from marijuana pursuant to the CSA and the United States Food and Drug Administration's (FDA) framework would operate in full compliance with federal law as long as they followed the proper applicable protocols; Practitioners and pharmacies distributing the drugs would similarly need to follow all federal requirements. However, rescheduling would not have these same impacts on state-licensed marijuana growers, processors, distributors, dispensaries, and retailers who operated outside of the CSA and FDA's framework.

Drug companies generally identify single compounds and develop them into products that are subject to rigorous testing by the FDA. Marijuana contains many compounds called cannabinoids, including but not limited to tetrahydrocannabinol (THC), cannabidiol (CBD), and cannabinol (CBN), to name a few. According to [the National Center for Complementary and Integrative Health](#), over 100 cannabinoids have been identified as naturally occurring in cannabis. Cannabinoids can be extracted from marijuana, hemp, and some other plants, and certain cannabinoids can also be synthesized in select plants. Through isolating and testing cannabinoids and marijuana plant materials, drug companies could develop more marijuana-based drugs.

There are already several cannabinoids that are active ingredients in prescription drugs. The FDA has approved THC-based medications such as dronabinol (Marinol, Sativex, Syndros®) and nabilone (Cesamet®), prescribed in pill form for the treatment of nausea in patients undergoing cancer chemotherapy and to stimulate appetite in patients with wasting syndrome due to AIDS. The FDA has also approved CBD for the treatment of epilepsy in the form of Epidiolex.

Rescheduling marijuana would clear a path for pharmaceutical companies and drug manufacturers to create new drugs from cannabinoids found in marijuana. Once those drugs are developed, consumers could obtain marijuana-derived cannabinoids from pharmacies with a prescription from a doctor.

How Would Rescheduling Marijuana Impact Existing State-Legal Markets?

Rescheduling marijuana under the CSA would not legalize the sale of marijuana for recreational use, nor would it legalize marijuana products – such as flower, edibles, vapor products, topicals, or anything besides FDA-approved drugs in specific forms that have been tested and approved.

To illustrate this point, consider what would happen if a drug currently listed in the CSA Schedules were sold in the same manner as marijuana. For example, Xanax is a Schedule IV drug. To legally use Xanax, an individual

must receive a prescription from their doctor and then purchase the drug from a pharmacy. The pharmacy will provide the drug with a valid prescription and in the amounts provided in the prescription. If Xanax was sold like state-legal marijuana in this hypothetical scenario, Xanax would be sold in Xanax dispensaries. Those dispensaries would sell Xanax they obtained from state-legal Xanax manufacturers. The Xanax in one state might differ from the Xanax in another state. In some states, you would need a recommendation from a doctor to use medical Xanax, while in others, you would be free to use Xanax recreationally. This example is not an attempt to advocate for recreational Xanax use. Instead, it's a comparison intended to show that state-legal marijuana markets are not designed to comply with federal drug laws.

State-legal marijuana programs have developed under the restrictive classification of marijuana as a Schedule I substance under federal law, so it is unlikely that the rescheduling of marijuana would create a more hostile federal enforcement environment for state-legal marijuana industry participants. However, if marijuana is rescheduled under the CSA, state programs would remain in conflict with federal law.

In the context of hemp, a similar scenario has already played out in recent years. Hemp-derived CBD is frequently sold across the country as a dietary supplement, food, topical, or smokeable product. This is despite frequent protests from the FDA that CBD is only approved in commerce as the prescription drug Epidiolex. This pattern of federal non-enforcement has resulted in a full-fledged CBD industry operating in a legal gray area throughout the United States. If marijuana is rescheduled, then non-prescription marijuana products would also operate in a legal gray area, like hemp-derived CBD – but on a much larger scale.

The Takeaway

Moving marijuana from one schedule to another would allow further research and would likely increase the availability of marijuana-based pharmaceuticals but would not necessarily impact state-licensed entities. However, state-regulated marijuana programs – even medical marijuana programs – do not fit nicely into the controlled environment established for federally scheduled substances. In other words, rescheduling marijuana would not harmonize state and drug laws nor resolve the uncertainty with respect to federal enforcement priorities for state-legal marijuana industry participants.

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