What is the Timeline for Rescheduling Marijuana?

March 21, 2024

At the White House last Friday, Vice President Kamala Harris spoke at a meeting with people who received pardons from President Joe Biden for marijuana-related offenses. She signaled that the federal government, namely the Drug Enforcement Administration (DEA), is moving "as quickly as possible" towards rescheduling marijuana – that is, changing the way it is officially classified under federal law.

DEA's Path to Rescheduling

It is not yet known when the DEA will announce its recommendation or what the agency will recommend. Below, we explore the DEA's options and potential timelines, as well as what will happen once the DEA does make a determination as to how marijuana will be scheduled going forward.

For more information on this process, please see the following:

- 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

It is a historic time for marijuana reform in the United States. For the first time since marijuana was effectively outlawed in the 1930s, the federal government has acknowledged that marijuana has a currently accepted medical use. We know this because the Department of Health and Human Services (HHS) recently released its letter to the DEA recommending marijuana be moved from Schedule I to Schedule III. We do not yet know how the DEA will respond, but the industry is closely monitoring the agency's actions.

Understanding DEA's Rescheduling Process

In its response, the DEA must follow procedures outlined in the Controlled Substances Act (CSA) and the Administrative Procedures Act (APA). The CSA governs the production and distribution of drugs in the U.S. The APA governs how agencies operate and, relevantly, how agencies issue regulations.

An example of the process to reschedule is Hydrocodone Combination Products (HCPs), which were moved from Schedule III to Schedule II in 2014. The rescheduling of HCPs occurred on the following timeline:

> ***2004*** *– DEA received a petition requesting HCPs be controlled in Schedule II and requested that HHS provide DEA with a scientific and medical evaluation.*

> ***2008*** *– HHS recommended that HCPs remain in Schedule III.*
>
> ***2009*** *– DEA requested that HHS reevaluate their data and provide another scientific and medical evaluation based on additional data.*
>
> ***2012*** *– Obama signed the Food and Drug Administration Safety and Innovation Act, which in part directs the U.S. Food and Drug Administration (FDA) to hold a public meeting to "solicit advice and recommendations" pertaining to the scientific and medical evaluation in connection with the scheduling recommendation of HCPs.*
>
> ***January 2013*** *– FDA held a public meeting regarding HCPs and receives 768 comments.*
>
> ***December 2013*** *– HHS submitted medical evaluation recommending HCPs be placed in Schedule II.*
>
> ***February 27, 2014*** *– DEA issued notice of proposed rulemaking to propose rescheduling HCPs, allowing interested persons to file a request for a hearing in accordance with DEA regulations by March 31, 2014. No request was submitted. Interested persons could submit comments by April 28, 2014.*
>
> ***August 22, 2014*** *– DEA issued final rule on HCPs moving these drugs from Schedule III to Schedule II.*
>
> ***October 6, 2014*** *– HCPs rule went into effect.*

According to the U.S. Court of Appeals for the Second Circuit, the process to reschedule can take up to nine years.[1] In that nine-year process, it often takes HHS several years to provide a recommendation to the DEA regarding moving a substance from one schedule to another. In the case of marijuana, the HHS recommendation took only a few months, but there are still items that must be completed before rescheduling can occur.

Marijuana's Unique Journey Towards Rescheduling

In determining a timeframe within which the DEA's rescheduling of marijuana may occur, it is important to note how unique the situation with marijuana really is.

As illustrated above, in the HCPs example, it took four years for HHS to submit its recommendation regarding moving HCPs from Schedule III to Schedule II to the DEA. In the case of marijuana, it took less than one year for the HHS to recommend marijuana be rescheduled from Schedule I to Schedule II. Anyone may petition for the rescheduling of a substance under the CSA. In this case, the direction comes from the very top, with President Biden requiring HHS and DEA to consider marijuana's scheduling. This is a unique scenario and likely helps explain why HHS moved so quickly in making its recommendation to the DEA with respect to marijuana.

The Federal Government's Next Steps

Step 1: DEA Determines Whether to Reschedule Marijuana

First, the DEA must make a determination that marijuana should, in fact, be rescheduled. This is the most unpredictable piece of the puzzle. In the HCPs example, it took the DEA a year to ask HHS to reevaluate and then just a few months to initiate rulemaking after HHS submitted its new recommendation to ultimately move HCPs from Schedule III to Schedule II.

In the case of marijuana rescheduling, several months have already passed since the DEA received HHS's recommendation to move marijuana to Schedule III. There is no way to know exactly how long the process will take for the DEA to determine if it will initiate rulemaking. It could happen in days, weeks, months, or even years. However, the politics involved in rescheduling indicate that a decision will likely be made in the next few months, not years. President Biden has already campaigned on marijuana reform, and he'll likely want to highlight rescheduling when courting voters in 2024.

Step 2: DEA Initiates Rulemaking or Issues Order to Reschedule Marijuana

Following a determination by the DEA, the next step will be either a rulemaking proceeding or the issuance of an order to reschedule cannabis.

Federal law outlines the authority and criteria for the classification of substances. Section (a) of 21 USC 811 states that "rules relating to this statute subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by [the APA, specifically 5 USC 553]." The APA requires that the DEA provide interested persons an opportunity to submit comments, which the DEA must consider when issuing any rules related to the CSA. This is commonly referred to as the notice and comment period. The public must have at least 30 days to provide comments, with some exceptions, including when a matter relates to the foreign affairs functions of the U.S., which is relevant here.

There is precedent for the DEA to side-step the notice and comment period by claiming that the scheduling of a drug containing cannabis is a matter of foreign affairs. In 2018, the epilepsy drug containing cannabidiol became the first FDA-approved drug containing marijuana extract. The DEA placed Epidiolex in Schedule V without providing an opportunity for notice and comment because the DEA reasoned that it was required to place the drug in that schedule due to international treaty obligations. According to 21 USC 811(d)(1), the DEA administrator may place a substance in a schedule deemed most appropriate without requiring findings under the APA if such scheduling is required by the U.S. under international treaties, conventions, and protocols.

In other words, the DEA could determine that, due to treaty obligations, it can reschedule marijuana by order rather than through the standard rulemaking process. When taking this route with Epidiolex, the DEA referred to the Single Convention on Narcotic Drugs. The U.S. is a party to the Single Convention, which establishes control over the international and domestic traffic of controlled substances. The U.S. carries out its obligations under the Single Convention through the CSA. According to 21 USC 811(d)(1), if control of a substance is required "by United States obligations under international treaties, conventions, or protocols" in effect upon the passage of the CSA (1970), then the Attorney General, who delegates its powers under the CSA to the DEA, can issue an order without first going through the notice and comment period. In the case of Epidiolex, this was a new drug that contained marijuana derivatives. The FDA approved that specific compound, but it did not change the legality of marijuana. However, because Epidiolex contained a marijuana extract, the DEA still needed to establish a schedule for the newly approved drug.[2]

The Takeaway

HHS provided its recommendation to the DEA that marijuana be rescheduled from Schedule I to Schedule III in August 2023. Once the DEA makes a determination that marijuana should be rescheduled, the DEA could initiate rulemaking, or, based on its interpretation of treaty obligations, it could reschedule marijuana by order.

There is also a level of unpredictability due to the political nature of this specific rescheduling process. As we saw in the HCPs example, there could be legislation that impacts the timeline of marijuana rescheduling, or the DEA could request HHS to reconsider its recommendation regarding moving marijuana from Schedule I to Schedule III. There is also the potential for lawsuits that could impact the process.

We will continue to monitor rescheduling and write on this topic for the Green Leaf Brief. If you are looking to prepare for rescheduling now, contact the author or McGlinchey's Cannabis team.

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[1] Washington v. Barr (2019).

[2] Although outside the scope of this article, Porter Wright LLP and Vicente LLP recently issued a white paper refuting the DEA's position, as stated in 2016, that it could not reschedule marijuana based on treaty obligations. Additionally, recently, Congresswoman Sydney Kamlager-Dove (D-CA) wrote a letter to the DEA urging the agency not to opt out of moving marijuana to Schedule III based on treaty obligations.

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