

## Cannabis

# Limitations of Schedule III would likely require additional reform

Government Regulations

## Consequences of moving to Schedule III

On Tuesday the Congressional Research Service (CRS) released a legal sidebar, or short report for Congressional Committees that discusses the legal consequences of rescheduling marijuana. The Drug Enforcement Agency (DEA) is currently considering whether to maintain marijuana as a Schedule I drug of the Controlled Substances Act (CSA) or reschedule it to Schedule III as recommended by Health & Human Services (HHS). If the DEA follows the HHS' recommendation to reschedule to Schedule III without other law changes, such a move would not bring state-legal medical or recreational marijuana industries into compliance with federal controlled substance laws, likely requiring additional reform. Per the CRS report, the key difference between Schedule III and I would be that "marijuana would have an accepted medical use and may be lawfully dispensed by a prescription, while Schedule I drugs may not".

## Congressional riders + fed'l prescriptions would be needed

The CRS review further notes that a Schedule III drug would have to be approved by the Food & Drug Administration (FDA), of which marijuana has not been approved (although some cannabis derived drugs have been approved for medical use (seizures). In order for marijuana to be legally federally prescribed, the FDA would need to approve its use, and plant medicines do not typically go through the approval process. Users of medical marijuana would also need to get a valid prescription from medical providers under federal legal requirements - that may differ from current state regulatory requirements for medical marijuana. A Congressional rider would still be needed for medical marijuana users to be shielded from federal prosecution. (This rider currently does not cover recreational users from fed'l prosecution & any change to the CSA level would not alter recreational status.) Certain CSA laws related to marijuana would not change, such as quantity based mandatory minimum sentences if prosecuted. Notably, Section 280E of the IRS code would not apply as it only applies to Schedule I or II drugs. As a result, cannabis company costs below gross profit would be then eligible for tax purposes; thereby reducing the tax burden for cannabis-related companies.

## Congress/White House could make notable policy changes

The CRS reports that Congress or the executive branch has the authority to change the status of marijuana under the CSA, without DEA input. Congress could change the status through legislation. Congressional legislation could 1) remove marijuana from the CSA all together and regulate it similar to alcohol or tobacco; or 2) move marijuana to Schedule III and also consider changing some of the legal consequences that would remain unresolved by a CSA change such as banking laws, gun ownership & immigration consequences, among other laws. Congress could also consider whether to have the FDA maintain authority over certain cannabis products under the Federal Food, Drug & Cosmetic Act, or create an alternative regulatory framework. Further, Congress would also have to consider that if they relax certain CSA restrictions over marijuana they may also implicate US international treaty obligations.

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IRS= Internal Revenue Service

## Consequences of moving to Schedule III

Yesterday, the Congressional Research Service (CRS) released a legal sidebar, or short report that discusses the legal consequences of rescheduling marijuana. The Attorney General and the Drug Enforcement Agency (DEA) are currently considering whether to maintain marijuana as a Schedule I drug or reschedule it to Schedule III as recommended by Health & Human Services/FDA. See [HHS acknowledges some medical benefits of marijuana](#) for additional HHS commentary.

- The DEA is bound by the HHS's recommendations on scientific matters
- The DEA has also stated that it has the "final authority to schedule, reschedule or deschedule a drug under the Controlled Substances Act (CSA)."

## Constitution's Supremacy Clause

- To date, 24 states and the District of Columbia have passed laws removing certain state criminal prohibitions on recreational marijuana use by adults.
- However, The Supreme Court has recognized that states cannot actually legalize marijuana because states cannot change federal laws, and the Constitution's Supremacy Clause indicates that federal laws take precedence over state laws. This means as long as marijuana is considered a Schedule I drug under the CSA, all unauthorized activities involving marijuana are federal crimes in the US, even in states that have legalized medical or recreational marijuana.
- However, Congress has granted states some freedom to allow for the distribution of medical marijuana. Since fiscal year 2014, Congress has passed an appropriations rider in the annual budget that bars the Department of Justice (DOJ) from using taxpayer funds to prevent states "from implementing their own laws that authorize the use, distribution, possession and cultivation of medical marijuana". This rider does not remove the criminal liability, but limits the enforcement of the CSA while the rider is in effect.

## Other non CSA-related laws that could lead to legal issues

While Congress' rider and recent Presidential Administrations have not prioritized prosecution, other federal laws could impose legal consequences based on criminal activity, including:

1. On financial institutions who accept deposits or have other banking relationships. Currently banks would violate federal **anti-money laundering** laws;
2. On business taxes, due to Section 280E of the Internal Revenue Code, which considers marijuana-related business ineligible to deduct certain costs from their **taxes**;
3. Some **bankruptcy courts** may also have issues confirming a bankruptcy plan if there is income from a marijuana-related business;
4. and for individuals there could be adverse **immigration consequences** if they participate in state-legal marijuana industries.
5. It is also **illegal to own a gun** and possession by any person who is an "unlawful user of or addicted to any controlled substance". (no exception for users of state medical cannabis users).

## Moving to Schedule III from Schedule I

If the DEA follows the HHS' recommendation to reschedule to Schedule III of the CSA, without other law changes, this change would not bring state-legal medical or recreational marijuana industries into compliance with federal controlled substance laws.

Per the CRS review, the key difference between Schedule III and I would be that "marijuana would have an accepted medical use and may be lawfully dispensed by a prescription, while Schedule I drugs may not".

- The CRS review further notes that a Schedule III drug would have to be approved by the Food & Drug Administration (FDA), of which marijuana has not been approved (although some derived drugs from cannabis have been FDA approved for medical use for seizures, etc.) In order for marijuana to be legally prescribed, the FDA would need to approve its use, and plant medicines do not typically go through the approval process.
- Users of medical marijuana would need to get a valid prescription from medical providers under federal legal requirements that may differ from current state regulatory requirements for medical marijuana.
- A Congressional rider would still be required for medical marijuana users to be shielded from federal prosecution. This rider currently does not cover recreational users from federal prosecution. Any change to the CSA level would not change recreational user status.
- Certain CSA laws related to marijuana would not change, such as quantity based mandatory minimum sentences if prosecuted.
- The impact of Section 280E would not apply as it only applies to Schedule I or II drugs. As a result, costs below gross profit would be eligible for tax purposes..

## Congress or White House could get involved to make notable changes

The CRS reports that Congress or the executive branch has the authority to change the status of marijuana under the CSA, without DEA input. Congress could change the status through legislation, while the CSA empowers the DEA to make changes through the rulemaking process.

- Congress could remove marijuana from the CSA all together
- Congress could move marijuana to Schedule III and also consider changing some of the legal consequences discussed above the same time. Congress could also consider whether to have the FDA maintain authority over certain cannabis products under the Federal Food, Drug & Cosmetic Act, or create an alternative regulatory framework.
- Congress would also have to consider that if they relax certain CSA restrictions over marijuana they may also implicate US international treaty obligations.
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