DID YOU KNOW: THE RECLASSIFICATION OF MARIJUANA IS UPON US

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By: Regulated Products Section Chair Richard Blau

President Joe Biden and the U.S. Department of Justice (DOJ) have proposed a federal regulatory change that would reclassify marijuana from a Schedule I narcotic to a Schedule III drug in the Controlled Substances Act (CSA). This reclassification could facilitate a national market for marijuana and other cannabis-derived products.

The Details

Marijuana, which includes all cannabis other than hemp and its derivatives, seeds incapable of germination, and stalks of the plant, has been classified as a Schedule I drug since Congress enacted the CSA in 1970. That federal statute places each drug warranting control into one of five "schedules," with drugs in Schedule I subject to the strictest regulatory and criminal provisions and drugs in Schedule V subject to the least strict.

The CSA further authorizes the U.S. Attorney General to add, transfer, and remove drugs from the schedules using formal rulemaking procedures and otherwise grants the U.S. Attorney General broad authority to take regulatory action consistent with the Act. The Attorney General has, in turn, generally delegated these functions to the Administrator of the Drug Enforcement Administration (DEA).

To reschedule marijuana from Schedule I, the DEA would need to determine, among other things, that the drug has a "currently accepted medical use in treatment in the U.S." (CAMU). Since 1992, however, the DEA has determined that a drug has a CAMU only if either the Food and Drug Administration (FDA) has approved the drug for marketing in interstate commerce under the Food, Drug, and Cosmetic Act (FDCA) or the drug meets a five-part test that tracks the "core standards developed under the FDCA." Because the FDA to date has not approved marijuana and the DEA in the past has determined that marijuana does not meet its five-part test, the DEA has repeatedly rejected petitions to move marijuana to a less restrictive schedule.

On October 6, 2022, President Biden asked the Attorney General and the U.S. Secretary of Health and Human Services (HHS) to launch a scientific review of how marijuana is scheduled under federal law. After receiving HHS recommendations and the legal advice of the DOJ's Office of Legal Counsel (OLC), the Attorney General initiated the rulemaking process to transfer marijuana to Schedule III.

- The DOJ's notice of proposed rulemaking can be viewed online at: https://www.dea.gov/sites/default/files/2024-05/Scheduling%20NPRM%20508.pdf

- The OLC memorandum regarding questions related to the potential rescheduling of marijuana can be found online at: https://www.justice.gov/olc/media/1352141/dl?inline

Through the proposed federal rulemaking, the DOJ is seeking to transfer marijuana from Schedule I of the CSA to Schedule III, consistent with the view of HHS that marijuana has a currently accepted medical use as well as HHS's views about marijuana's abuse potential and level of physical or psychological dependence. The rescheduling of a controlled substance follows a formal rulemaking procedure that requires notice to the public an opportunity for comment, and an administrative hearing. This proposal starts the process, during which the DEA will gather and consider information and views submitted by the public in order to determine the appropriate scheduling. Note that during this process, and until a final rule is published, marijuana remains a Schedule I controlled substance.

Public comments on the reclassification proposal can be submitted through July 22, 2024.

Why Comment?

Submitting a comment helps inform this next step in the federal regulation of the cannabis industry. Reclassifying "marijuana" to Schedule III would signify the federal government's determination that cannabis has an accepted medical use and would remove the burden of Internal Revenue Code Section 280E from state-legal cannabis operators, so cannabis-related businesses have the same tax rights and deduction opportunities as other businesses.

On the other hand, input is needed because the proposed regulation has some important components that could be concerning to cannabis industry members. For example, under current federal law "marijuana" is defined by the CSA to include all cannabis other than hemp and its derivatives, seeds incapable of germination, and stalks of the plant. Because that definition is part of a federal statute, it can only be changed by Congress.

However, under the proposed reclassification rule, tetrahydrocannabinols (THC) would be defined as follows:

> (i) [T]etrahydrocannabinols, except as in paragraphs (d)(30)(ii) and (iii) of this section [the two subsections that follow], naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extracts of such plant, or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant.
> (ii) Tetrahydrocannabinols does not include any material, compound, mixture, or preparation that falls within the definition of hemp set forth in [the Farm Bill].
> (iii) Tetrahydrocannabinols does not include any substance that falls within the definition of marijuana set forth in [the CSA].

Moreover, the proposed regulation contains a new definition for "Marijuana Extract" and "Naturally Derived" Delta-9 THC:

"Marijuana Extract," meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, containing greater than 0.3% delta-9 THC on a dry weight basis, other than the separated resin (whether crude or purified) obtained from the plant.

"Naturally Derived Delta-9 THC," meaning those delta-9 THC, except as in paragraphs (ii) and (j)(iii) of this section [the two subsections immediately following], that are naturally contained in a plant of the genus cannabis (cannabis plant).

> (ii) Naturally derived delta-9-tetrahydrocannabinols do not include any material, compound, mixture, or preparation that falls within the definition of hemp set forth in [the Farm Bill].
> (iii) Naturally derived delta-9-tetrahydrocannabinols do not include any delta-9-tetrahydrocannabinols contained in substances excluded from the definition of marijuana as set forth in [the CSA].

The definition of marijuana extract may be especially problematic for members of the growing hemp-derivatives industry because it does not exempt hemp-derived extracts under its definition. Rather than stating that the extracts must come from "marijuana" as defined by the CSA, the regulation as proposed provides that marijuana extracts can be extracts from "any plant of the genus Cannabis."

In many states, hemp products that contain more than 0.3% delta-9 THC are being sold outside of tightly regulated state-legal systems under the argument that they are derived from hemp and, therefore, outside the scope of marijuana regulation and DEA jurisdiction. But if the proposed language of the new regulation is not amended, the broad definition of "marijuana extract" could be construed to bring those products into the purview of the DEA, which could produce a shift in the federal government's treatment of these products.

Also noteworthy: Rescheduling is a federal action; it does not legalize cannabis sales expressly prohibited under state programs. Industry members should still stay aware of applicable state laws governing cannabis businesses and their products. However, as with other regulatory matters, federal reclassification could influence future state law and policy matters regarding cannabis.

The Bottom Line

Comments to the DOJ's proposed reclassification of marijuana can be submitted online at: https://www.regulations.gov/commenton/DEA-2024-0059-0001

All public comments must be posted no later than July 22, 2024.

To learn more about the reclassification of marijuana, contact the GrayRobinson Cannabis Law Team at 866.382.5132 or cannabislaw@gray-robinson.com.

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