

Department of Justice Publishes Notice of Proposed Rulemaking to Reschedule Marijuana to Schedule III

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The Department of Justice (DOJ) published a [Notice of Proposed Rulemaking](#) to reschedule marijuana from Schedule I to Schedule III of the federal Controlled Substances Act (CSA) in the Federal Register on May 21, 2024. If the rule is finalized, marijuana would be considered a drug with “moderate to low potential for physical and psychological dependence” and would be available for medical use *only*, *not* legalized at the federal level.

Under the federal CSA, the Drug Enforcement Administration (DEA) classifies drugs into five distinct categories, or schedules, depending on the drug’s acceptable medical use and its potential for abuse or dependence. Schedule I drugs are defined as having no currently accepted medical use and a high potential for abuse. As the drug schedule changes, so does the abuse potential, with Schedule V representing the drugs with least potential for abuse. Schedule III drugs are defined as drugs with a moderate to low potential for physical and psychological dependence. Some examples of Schedule III drugs are Tylenol with codeine, ketamine, buprenorphine, and anabolic steroids.

Marijuana has been a Schedule I drug since the inception of the CSA in 1970. In August 2023, the Department of Health and Human Services (DHHS) recommended that marijuana be rescheduled to Schedule III. The CSA requires that such a change be made through formal rulemaking on the record after an opportunity for a hearing.

If the transfer to Schedule III is finalized, any drugs containing marijuana will be subject to the applicable prohibitions in the federal Food, Drug, and Cosmetic Act, enforced by the Food and Drug Administration (FDA).

Additionally, if marijuana is transferred to Schedule III, the manufacture, distribution, dispensing, and possession of marijuana would remain subject to the applicable criminal prohibitions of the CSA.

Eight-Factor Analysis

The Notice of Proposed Rulemaking set forth the following eight factors that are used when considering rescheduling. The conclusions reached by DHHS and DOJ suggest that they do not agree on all of these issues:

1. *The drug’s actual or relative potential for abuse.* DHHS concluded that marijuana does not lead to substance use disorder as frequently as other substances such as heroin, oxycodone, fentanyl, cocaine, alcohol and others. In 2016, DEA found that marijuana had a high potential for abuse and now recommends gathering additional data to assess marijuana’s actual or relative potential for abuse.
2. *Scientific evidence of its pharmacological effect, if known.* In the past 30 years, the

potency of marijuana's delta-9 THC has increased dramatically. While DHHS noted that marijuana use can produce pleasurable effects, it may also induce sedation and anxiety responses. Abuse can lead to addiction and the need for medical attention. DEA believes that additional data is necessary to assess this factor.

3. *The status of current scientific knowledge regarding the drug or other substance.*

DHHS found that inhaling marijuana produces immediate effects while oral administration produces a slower onset of psychological effects. DEA noted that additional data regarding routes of administration of marijuana and the impact on delta-9 THC potency may be appropriate for consideration.

4. *Its history and current pattern of abuse.* DHHS concluded that the prevalence of marijuana is less than that of alcohol and significantly more than that of other drugs. DEA found in 2016 that marijuana is the most widely used illicit drug and anticipates that additional information arising from this rulemaking will further inform the findings with regard to rescheduling.

5. *The scope, duration, and significance of abuse.* DHHS concluded that drugs other than marijuana, such as alcohol, heroin, and cocaine, are more likely to lead to substance use disorder. DEA found in 2016 that the abuse of marijuana was widespread and one of the primary drugs leading to admission for substance abuse treatment.

6. *What, if any, risk there is to the public health.* DHHS found that the risks posed by marijuana use to public health are low compared to other drugs. For overdose deaths, marijuana always is ranked lowest. DEA concluded in 2016 that marijuana poses a number of risks to public health, including impaired driving and physical and psychological dependence. DEA anticipates that additional data on public safety risks may be appropriate for consideration.

7. *Its psychic or physiological dependence liability.* DHHS found that marijuana can produce both psychic and physical dependence in humans, although the symptoms are usually mild. In 2016, DEA found that long-term heavy use of marijuana can lead to physical and psychological dependence and that this dependence is underdiagnosed and undertreated in the medical setting. DEA anticipates that additional information may be appropriate for consideration.

8. *Whether the substance is an immediate precursor of a substance already controlled.* DHHS and DEA both concluded that marijuana is not an immediate precursor of another controlled substance.

Rationale for Schedule III

Despite the apparent disagreement on many issues, DOJ ultimately concurs with the recommendation to reschedule marijuana to Schedule III. First, DHHS and DOJ both agree that marijuana has a potential for abuse less than other drugs and substances listed in Schedules I and II.

Second, DHHS recommended a finding that marijuana has a currently accepted medical use in the United States, specifically for medically supervised treatment of anorexia related to a medical condition, nausea and vomiting (e.g., chemotherapy-induced), and pain. DOJ

concur with DHHS's conclusion for purposes of the initiation of the rulemaking proceedings.

Finally, as to the level of physical or psychological dependence, DOJ agrees with DHHS's conclusion that the abuse of marijuana may lead to moderate or low physical dependence, depending on the frequency and degree of marijuana exposure.

Types of Marijuana to be Rescheduled

Rescheduling applies to marijuana as defined by the CSA, including delta-9 THC derived from the marijuana plant (other than the mature stalks and seeds) that falls outside the definition of hemp. Rescheduling does not apply to synthetic marijuana or hemp. Synthetic marijuana (e.g., delta-10) will remain on Schedule I.

Comments on the Notice of Proposed Rulemaking may be submitted electronically within 60 days of May 21, 2024. It will take months for DEA to review those comments, so it is unclear when or if the rule might be finalized.

Impact on Employers

Rescheduling marijuana to Schedule III will not clear up the questions and difficulties that employers face when enforcing their drug policies, particularly their drug testing policies. It may take a long time for the FDA to regulate marijuana. In the meantime, employees already are obtaining it under state laws at state-approved dispensaries. It is unclear how federal regulation will impact the current systems of state regulation in the states that have them.

Once marijuana begins to be regulated and available at the federal level, there may be legal claims asserted under the federal Americans With Disabilities Act (ADA) related to requests for reasonable accommodations. ADA claims related to marijuana use generally have been rejected by the courts because marijuana was illegal at the federal level.

Additionally, making marijuana a Schedule III drug still leaves a conflict with state recreational marijuana laws (adult-use laws) that permit use of marijuana without a medical prescription. For employers who conduct drug testing, there still will be many different state and local laws impacting marijuana drug testing; the change at the federal level will not make compliance with those laws any easier.

Please contact a Jackson Lewis attorney with any questions.

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