

NATIONAL CRAFT CANNABIS COALITION

MAY 25, 2024

NCCC Memo on Federal Cannabis Rescheduling



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On April 30, the AP reported that the DEA has moved to reclassify “marijuana” as a Schedule 3 drug, concurring with a prior recommendation from the federal department of Health and Human Services. Several weeks later, on May 16, President Biden announced the proposal at a press conference; and on May 21, proposed regulations were formally noticed, opening a public comment process with a deadline of July 22.

The proposal from the DEA is not a final decision, but instead will initiate a longer process that may result in cannabis being rescheduled over the coming months or years.

IF RESCHEDULING MOVES FORWARD, WHAT WILL IT DO?

The Congressional Research Service has offered a legal analysis on the consequences of rescheduling here.

If cannabis is moved to schedule 3, the clearest implication according to the CRS and other legal analysis is that IRS 280E tax penalties would no longer be applicable to state-legal cannabis operators, since 280E is written to apply only to Schedule 1 and 2 substances. Rescheduling is also likely to ease barriers to research on medical applications of cannabis.

Definitionally, Schedule 3 drugs are considered to have some medical value, as well as some potential for abuse. This differs from Schedule 1 drugs, which are considered to have a high potential for abuse and no accepted medical value.

WHAT WOULD RESCHEDULING NOT DO?

Schedule 3 status doesn't meaningfully change federal criminal penalties applied to cannabis, whether for simple possession or for commercial activity, or collateral consequences of criminalization such as vulnerability to deportation and denial of federal benefits.

Rescheduling also does little to resolve the incompatibility between federal cannabis prohibition and state-legal cannabis markets. Most expert and legal analysis suggests that rescheduling won't directly resolve other collateral consequences of federal prohibition such as banking availability, though it's



possible that rescheduling may somewhat increase access to these services due to an overall decreased perception of risk.

WHAT IS THE TIMELINE FOR A RESCHEDULING DECISION TO BE MADE?

Multiple additional steps will be necessary before any final decision is made on rescheduling. This includes a public comment period, administrative hearing, agency review, and the issuance of a final rule. Once a final rule is issued, it can be challenged in court, potentially further delaying any final decision. The overall process may take months or years to resolve.

DOES RESCHEDULING GIVE PHARMACEUTICAL COMPANIES CONTROL OVER CANNABIS?

From a legal perspective, Schedule 3 drugs, such as ketamine or anabolic steroids, can only be produced as an FDA-approved pharmaceutical formulation. These drugs are subject to DEA controls over manufacturing as well as FDA requirements for sale as a prescription drug.

For this reason, Schedule 3 classification is incompatible with existing state-legal cannabis markets. At the same time, however, Schedule 1 is equally incompatible with existing state-legal frameworks - and yet the federal government has mostly shown tolerance towards the existence of these markets.

Currently, there's no indication that moving cannabis to the less restrictive schedule 3 will change how the FDA or DEA enforce against state-legal cannabis markets. It's possible this approach could change; under Schedule 1, however, there has also always been a possibility that federal enforcement priorities could change. Any increased federal enforcement against state-legal markets under Schedule 3 would likely face substantial resistance from state governments, state-legal cannabis operators, consumers, and the public at large. These dynamics have led many legal analyses to conclude that rescheduling would be unlikely to directly lead to direct federal enforcement against state-legal cannabis markets, but federal enforcement will largely continue to be a matter of federal discretion.

HOW IS NCCC RESPONDING TO RESCHEDULING?

Schedule 3 may offer short-term benefits for legal cannabis operators of all sizes, such as the removal of 280E penalties. Over the longer term, however, we don't believe Schedule 3 is a rational, just, or sustainable classification for cannabis. From our perspective, the implications of rescheduling will depend on whether it serves as a first step towards full legalization, or whether it stalls out future progress because reclassification is considered to be "good enough" policy reform.



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The full legalization of cannabis will likely require action by Congress, but Congressional action doesn't appear to be immediately on the horizon. Additionally, federal proposals for the legalization of cannabis, such as the Cannabis Administration and Opportunity Act (CAOA) proposed in the U.S. Senate, do not include essential red-line priorities for small producers such as the regulation of cannabis as agriculture under USDA, and the opportunity for direct-to-consumer shipping for small producers.

Much more work is needed to both push legalization forward at the federal level, and to develop a federal legalization framework that will support small and independent cannabis businesses and prevent corporate consolidation. NCCC is committed to carrying forward this work in collaboration with other stakeholders fighting for social and economic justice, and to fighting for the classification of cannabis cultivation as agriculture and small producer direct-to-consumer shipping as a component of any federal legalization policy.

WHAT COMES NEXT?

Following the formal notice of rulemaking on May 21, NCCC will be working with our membership to submit formal public comment on the proposed rescheduling action before the public comment deadline on July 22. Join our next NCCC Coast to Coast Member Meeting on **Tuesday June 25th, 3:30-5pm PST; 6:30-8pm EST** to learn how to get more involved.