

FEBRUARY 2024

In October 2022, President Biden announced that his administration would “initiate the administrative process to review expeditiously how marijuana is scheduled under federal law.” The first step in that process was for the Food and Drug Administration (FDA), under the Department of Health and Human Services (HHS), to conduct a ‘medical and scientific’ review to determine if and how marijuana should be categorized (“scheduled”) under the Controlled Substances Act (CSA). Marijuana is currently categorized as a Schedule I substance.

In August 2023, HHS transmitted its recommendation to the Drug Enforcement Administration (DEA) that marijuana should be placed in Schedule III of the CSA. Moving a substance from one schedule in the CSA to another is known as “rescheduling.” A shift to Schedule III would lead to some changes, including:

- The government acknowledging that marijuana has a currently accepted medical use, a lower potential of abuse than drugs in Schedule I and Schedule II, and a moderate to low risk of physical dependence.
- Allowing marijuana businesses to make standard business tax deductions.

Now, the DEA is reviewing the HHS recommendation to make a final determination. This could either be through issuing a final order or proposed rule, in which case there would be a limited opportunity for the public to provide feedback before the DEA issues a final order.

Even if the DEA ultimately reschedules marijuana, very little will change in terms of criminal penalties for marijuana, criminal justice reform, or the ability

of people with previous marijuana convictions to access public benefits. State marijuana programs (and the activities of patients, consumers, the marijuana industry and its workers that are reliant on these programs) will remain completely illegal under federal law, and anyone possessing marijuana in violation of the CSA would remain subject to arrest under federal law. Notably, rescheduling would not impact the legal status of the state-sanctioned marijuana industry. If marijuana is rescheduled, financial institutions serving the industry are still at risk of violating federal law and efforts to create a fairer business environment for small and minority-owned businesses will continue to be hindered.

If the DEA merely reschedules marijuana and *does not* remove (or “deschedule”) marijuana from the CSA, Congress must act to:

- Pass legislation to decriminalize marijuana by descheduling it;
- Provide relief from previous marijuana convictions;
- Reinvest in communities disproportionately targeted by marijuana criminalization; and
- Create a regulatory framework that promotes fair competition.

In the unlikely event the DEA does deschedule marijuana, Congress will still need to pass legislation addressing the issues of reinvestment, regulation, and relief from previous convictions.

The following will answer several questions people may have about the impacts of moving marijuana from Schedule I to Schedule III.

DOES RESCHEDULING MARIJUANA TO SCHEDULE III FEDERALLY LEGALIZE OR DECRIMINALIZE MARIJUANA?

The answer in most instances is no. State marijuana programs (both medical and adult-use) will remain completely illegal under federal law, and anyone possessing marijuana in violation of the CSA would remain subject to arrest under federal law. Nearly all federal marijuana penalties in the CSA are tied to the quantity of marijuana rather than what schedule it is placed in.

IF MARIJUANA IS MOVED TO SCHEDULE III DOES THIS MEAN THE FEDERAL GOVERNMENT HAS LEGALIZED MEDICAL MARIJUANA?

No. Scheduling and FDA approval are two separate processes.

The term "currently accepted medical use" is used in the scheduling process to describe one of the findings required to make a scheduling recommendation. It is not the same as FDA approval. To date, the FDA has not approved a drug product containing botanical marijuana for marketing in the United States.

If marijuana is moved to Schedule III, only products that are FDA approved and patients that are using those products pursuant to a prescription would be considered legal under federal law.

Since 2014, Congress has prohibited the Department of Justice from federally prosecuting conduct in compliance with state medical marijuana laws. Notably, this protection exists even while marijuana is in Schedule I and would not be enhanced through rescheduling.

WHAT IS THE DIFFERENCE BETWEEN SCHEDULE I AND SCHEDULE III?

Schedule I is the most restrictive placement for substances under the CSA. The Federal government considers Schedule I substances to have no accepted medical use and a high potential for abuse. Schedule III substances are considered to have a currently accepted medical use and moderate-to-low potential for abuse. Schedule

I substances are completely illegal except for federally approved research while Schedule III substances are also legal for certain medical uses if approved by the FDA. Only entities registered with the DEA are lawfully able to work with controlled substances; this is true regardless of where marijuana is scheduled on the CSA.

WHAT IS THE DIFFERENCE BETWEEN "DESCHEDULING" AND "RESCHEDULING?"

Descheduling is the removal of marijuana from the CSA, while rescheduling moves marijuana from one schedule to another within the CSA. Descheduling decriminalizes most marijuana conduct at the federal level, including personal use and possession. Rescheduling maintains nearly all existing federal criminal penalties for marijuana, including penalties for personal use and possession. This is the case even if marijuana would be placed in the least restrictive schedule, Schedule V.

WILL ANYONE CURRENTLY INCARCERATED FOR MARIJUANA CHARGES BE RELEASED IF MARIJUANA MOVES TO SCHEDULE III?

Nobody currently federally incarcerated for marijuana will be released as a result of rescheduling alone. In fact, descheduling alone would also not accomplish this. President Biden should and must issue an order of clemency for those currently incarcerated to be released.

IF FEDERAL MARIJUANA PROSECUTIONS WILL CONTINUE, WILL THERE BE ANY REDUCTION IN PENALTIES UNDER SCHEDULE III?

Not in most instances. Because most marijuana penalties in the CSA are specific to marijuana itself rather than dependent on a particular schedule, rescheduling does not alter most of the penalties for marijuana. There would be a slight reduction in penalties for prosecutions of violations of 50 to 99 plants and a criminal tax penalty would no longer be applicable, but these are rarely prosecuted offenses. Rescheduling marijuana from Schedule I to Schedule III would not alter the mandatory minimums applicable to federal marijuana offenses.

WOULD RESCHEDULING TO SCHEDULE III EXPUNGE PREVIOUS MARIJUANA CONVICTIONS?

No, rescheduling would not expunge any previous marijuana convictions. Notably, neither of President Biden's pardon orders for federal simple marijuana offenses provide for expungement, meaning those pardoned are still subject to collateral consequences such as denial of public benefits and barriers to employment.

DOES RESCHEDULING MARIJUANA TO SCHEDULE III RESTORE PUBLIC BENEFITS TO THOSE WHO HAVE LOST THEM DUE TO A PREVIOUS MARIJUANA CONVICTION?

Rescheduling will not restore eligibility for public benefits such as housing and nutritional assistance. However, various agencies under the Biden Administration can issue guidance memos and use discretionary enforcement to limit denials of public benefits for both federal and state marijuana convictions even while marijuana remains in Schedule I. In fact, the Biden Administration could begin to do this work even with marijuana in Schedule I, just as the Treasury Department has issued policy guidance allowing for limited banking services to marijuana businesses.

DOES RESCHEDULING HELP PREVENT THE DEPORTATION OF NONCITIZENS WHO HAVE MARIJUANA ARRESTS OR WHO MERELY WORK FOR A STATE-LICENSED MARIJUANA BUSINESS?

No, rescheduling does not change any of the harsh marijuana-related penalties for noncitizens. As long as marijuana remains in the CSA, noncitizens can still face detention, deportation, ineligibility for citizenship or residency, and bars to asylum. However, the Biden Administration could use prosecutorial discretion to end marijuana-based deportations.

WHAT ARE THE NEXT STEPS IN THE PROCESS? WILL THE PUBLIC HAVE AN OPPORTUNITY TO WEIGH IN?

If the DEA concludes that a change in marijuana's status is warranted, it will either issue a final order or a proposed rule. If the DEA issues a proposed rule, there will be a limited opportunity for the public to provide feedback before the DEA issues a final order. The Drug Policy Alliance (DPA) urges the public to tell the Biden Administration marijuana must be decriminalized. Additionally, we urge the public to call on Congress to pass comprehensive legislation to decriminalize and deschedule marijuana, expunge past marijuana arrests and convictions, restore eligibility for public benefits, reinvest in communities directly impacted by racially discriminatory enforcement, and create a regulatory framework to promote the ability of small businesses to compete fairly with large corporations.

BEYOND THE REVIEW OF HOW MARIJUANA IS SCHEDULED UNDER THE CSA, WHAT OTHER ACTIONS CAN THE BIDEN ADMINISTRATION TAKE TO END CRIMINALIZATION AND ITS HARMS?

The Biden Administration should use the full extent of its executive authority to advance equity in marijuana policy. This should include supporting decriminalization and ending the harms of criminalization, restoring eligibility for public benefits, and promoting fairness in economic opportunities. Each agency under the Biden Administration should conduct a comprehensive review of the harms created by its marijuana-related policies and take action to limit these harms to the greatest extent possible.