



Recent Developments in Marijuana Law

November 16, 2022

Marijuana and other products derived from the cannabis plant are regulated under both federal and state law. In recent years, a [significant divide](#) has developed between federal and state regulation. Under the federal [Controlled Substances Act](#) (CSA), marijuana is strictly regulated and may not legally be used for medical or recreational purposes. In contrast, a [substantial majority of states](#) have relaxed state law prohibitions on medical or recreational marijuana.

The fall of 2022 saw two key developments in federal and state marijuana regulation. In October 2022, President Joe Biden [granted clemency](#) to certain low-level federal marijuana offenders and [directed the Attorney General](#) to review the status of marijuana under federal law. While some observers consider President Biden's grant of clemency to represent a [significant change](#) in federal marijuana policy, as a legal matter it did little to alter the growing disparity between federal and state marijuana regulation. Then, in November 2022, voters in five states considered [ballot initiatives](#) to legalize recreational marijuana at the state level, [two of which](#) were adopted. Legislators and commentators have proposed a number of legal reforms that would alter federal marijuana regulation and potentially reduce the divergence between federal and state law.

This Legal Sidebar provides an overview of the legal status of marijuana under federal and state law, then discusses recent developments including the grant of clemency for federal marijuana possession offenses and November 2022 state ballot initiatives related to marijuana. The Sidebar concludes with an overview of selected legislative proposals related to marijuana.

The Legal Status of Marijuana

Under federal law, unless a statutory exemption applies, most cannabis and cannabis derivatives are classified as *marijuana*, a Schedule I controlled substance under the [CSA](#). (The CSA generally uses an alternative spelling, “marihuana,” but this Sidebar uses the more common spelling.) The CSA imposes a [comprehensive regulatory framework](#) on certain drugs and other substances—whether medical or recreational, legally or illicitly distributed—that pose a significant risk of abuse and dependence. The framework broadly aims to protect public health from those risks while ensuring that patients have access to pharmaceutical controlled substances for medical purposes. To advance those goals, the CSA (1) requires entities engaged in legitimate activities involving controlled substances to [register with the government](#) and take steps to prevent diversion and misuse and (2) imposes [criminal penalties](#) for various unauthorized activities involving controlled substances.

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Substances become subject to the CSA through placement in one of five lists, known as [Schedules I through V](#). A [lower schedule number carries greater restrictions](#), so controlled substances in Schedule I are subject to the most stringent controls. Schedule I controlled substances have [no currently accepted medical use](#), and it is illegal to produce, dispense, and possess such substances except in the context of [federally approved scientific studies](#). By contrast, substances in Schedules II through V have accepted medical uses and may be dispensed for medical purposes, generally by [prescription](#).

A substance can be placed in a CSA schedule, moved to a different schedule, or removed from control under the CSA either by [legislation](#) or through an [administrative rulemaking](#) process overseen by the Drug Enforcement Administration (DEA) and based on criteria set out in the CSA. Congress [placed marijuana in Schedule I](#) in 1970 when it enacted the CSA. Since that time, [DEA has denied multiple petitions from stakeholders](#) seeking to move marijuana to a less restrictive schedule or remove the substance from control under the CSA. In 2018, Congress [amended the CSA](#) to provide that *hemp*—defined to include cannabis products containing no more than 0.3 percent of the psychoactive cannabinoid delta-9 tetrahydrocannabinol (THC)—is not a controlled substance subject to the CSA. (Hemp products remain subject to regulation under [other provisions of federal law](#).)

In addition to the federal CSA, each state has its own controlled substances laws. As a general matter, state controlled substances laws often mirror federal law and are relatively uniform across jurisdictions, but there is [not a complete overlap](#) between drugs subject to federal and state control. [Marijuana regulation](#) is one area where the gap between federal and state controlled substance laws is particularly salient. In contrast to the stringent federal control of marijuana, in recent decades [most of the states](#) have changed their laws to permit the use of marijuana (or other cannabis products) for medical purposes. In addition, at the time of writing, 21 states and the District of Columbia have removed certain state criminal prohibitions on recreational marijuana use by adults.

Notably, however, states [cannot fully legalize marijuana](#), because states cannot change federal law. So long as marijuana is a Schedule I controlled substance under the CSA, all activities involving marijuana prohibited by that statute are [federal crimes](#) anywhere in the United States, including in states that have legalized medical or recreational marijuana under state law.

While the current state-legal marijuana industry generally operates in violation of the CSA, certain factors mitigate the disparity between federal and state law. An [appropriations rider](#) enacted every year since FY2015 [prohibits the Department of Justice \(DOJ\)](#) from using taxpayer funds to prevent states from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” In addition, DOJ may exercise prosecutorial discretion to decline to prosecute marijuana offenses not covered by the appropriations rider. While official DOJ policy has [varied somewhat](#) across [Administrations](#), recent presidential Administrations [have not prioritized prosecution](#) of state-legal activities involving marijuana.

Federal Clemency for Marijuana Possession

On October 6, 2022, President Biden issued a [proclamation](#) granting “a full, complete, and unconditional pardon” to “all current United States citizens and lawful permanent residents” who had committed or been convicted of simple possession of marijuana under the [CSA](#) or a related provision of the [D.C. Code](#). President Biden’s invocation of the [clemency power](#) means that persons who committed simple possession of marijuana before the date of the proclamation may not be prosecuted or punished for the offense under the relevant provisions of the CSA or the D.C. Code. (Although the District of Columbia has its own criminal code, its criminal justice system has [some overlap with the federal system](#) and is [subject to the President’s clemency power](#).)

Several factors limit the scope of the pardon. First, it applies only to violations of federal and D.C. law and [does not affect](#) other state law marijuana offenses. In announcing the pardon, President Biden also

encouraged state governors to take similar steps but, under the United States' federalist system of government, the President has no direct power to change state law or compel the states to adopt federal policies. While some governors have taken similar steps or expressed willingness to do so, in some states, governors cannot independently grant clemency.

Second, the pardon applies only to simple possession of marijuana, not to other marijuana-related CSA offenses such as manufacture, distribution, or possession with intent to distribute or to other federal crimes. Federal prosecutions of simple possession of marijuana are relatively uncommon. The U.S. Sentencing Commission (USSC) reports that about 7,700 people subject to the pardon were convicted of only simple possession since FY1992, none of whom are currently in federal custody. (Additional individuals not subject to the pardon were convicted during that period.) In FY2021, 117 people subject to the pardon were convicted of only simple possession. A smaller number of people were convicted of possessing marijuana and possessing other illicit drugs or committing other crimes. Those people would remain liable for the other offenses. Shortly after the pardon was announced, the USSC issued policy priorities including "consideration of possible amendments to the [Sentencing] Guidelines Manual relating to criminal history to address ... the impact of simple possession of marijuana offenses."

Third, the pardon by its terms "does not apply to individuals who were non-citizens not lawfully present in the United States at the time of their offense." According to a 2016 USSC report, the vast majority of federal marijuana possession arrests occur at the border between the United States and Mexico. Among offenders sentenced for marijuana possession in FY2013, the USSC reports that over 94% of those arrested at the border were not U.S. citizens. To the extent those individuals were not lawfully present in the country, they would not benefit from the pardon.

Fourth, the pardon applies only to offenses committed before the proclamation. The Supreme Court has explained that the President may issue a pardon "at any time after [an offense's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." While DOJ is currently not prioritizing prosecuting low-level marijuana offenses, the October 2022 pardon does not prevent prosecution of future offenses if the current Administration or a future Administration adopts a different policy.

Fifth, the pardon may not remove all legal consequences of marijuana possession, because it does not expunge convictions. Moreover, some collateral consequences of marijuana-related activities do not depend on a person being charged with or convicted of a CSA violation.

Finally, and most fundamentally, the pardon does not change the status of marijuana under federal law. The President lacks the power to make such a change unilaterally. In announcing the grant of clemency, President Biden directed the Attorney General to review the classification of marijuana under the CSA, which is one way the federal government could change the status of the substance consistently with relevant separation-of-powers principles and the CSA's procedural requirements. Any agency action in response to that directive would likely occur through notice-and-comment rulemaking, subject to judicial review and applicable international treaty obligations.

Notwithstanding the foregoing limitations, some commentators have described the October 2022 pardon as a significant development in national marijuana policy that may restore some civic rights to those who benefit from it. Some have expressed concerns that the pardon might benefit offenders who committed more serious offenses but pleaded guilty to simple possession or that relaxing controls on marijuana may generally lead to an increase in crime. Others advocate for further pardons, expungements, and legal reforms to decriminalize marijuana.

State Ballot Initiatives

Recent years have seen numerous states repeal criminal prohibitions on medical and recreational marijuana use. Despite some failures, [marijuana legalization proposals](#) have regularly appeared in state legislatures and on state ballots and, where successful, have significantly changed the legal landscape. That trend continued in the 2022 elections, where on November 8, 2022, voters in five states considered ballot measures that would relax state controls on recreational marijuana.

Two of the measures were adopted. In [Maryland](#), voters approved a [ballot initiative](#) to amend the state constitution to legalize the use of marijuana by persons 21 or older and direct the state legislature to enact laws regulating and taxing marijuana-related activities within the state. In [Missouri](#), voters approved a [ballot initiative](#) to amend the state constitution to remove cannabis from the state schedules of controlled substances and provide that cannabis “shall hence forth be considered a food and not a controlled substance or a drug, by Missouri law.” Among other things, the Missouri measure provided that cannabis use could not be grounds for denial of housing, employment, or possession of a firearm.

Three of the November 2022 marijuana initiatives were unsuccessful. In [Arkansas](#), voters rejected a [ballot initiative](#) to amend the state constitution to legalize the use of recreational marijuana by persons 21 or older subject to licensing, regulation, and taxation by state authorities. In [North Dakota](#), voters disapproved a [ballot initiative](#) to amend state law to remove hashish, marijuana, and THC from the state schedules of controlled substances; allow persons over the age of 21 to use, possess, and transport up to two ounces of prepared marijuana; and provide for state regulation and taxation of marijuana businesses. In [South Dakota](#), voters rejected a [ballot initiative](#) to amend state law to, among other things, legalize the use, possession, or distribution of up to an ounce of marijuana by persons 21 or older. South Dakota voters previously voted in 2020 to amend the state constitution to legalize recreational marijuana, but state courts [struck down the measure](#) for failure to comply with procedural requirements.

All of the states where voters considered recreational marijuana ballot measures in November 2022 had previously enacted laws authorizing the use of [medical marijuana](#). Medical marijuana laws remain in effect in the three states where voters declined to adopt recreational marijuana measures. As noted above, state laws legalizing medical or recreation marijuana or other controlled substances at the state level do not affect the status of marijuana under federal law.

Federal Legislative Proposals

Numerous proposals before the 117th Congress would change how the federal government regulates marijuana. Congress has [broad power](#) to regulate marijuana or relax federal regulation of the substance as part of its authority over [interstate commerce](#).

Several recent proposals would remove marijuana from control under the CSA. For instance, the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act, [H.R. 3617](#)) would remove marijuana and THC from control under the CSA and require expungement of past convictions for many federal marijuana offenses. Among other things, it would also remove some collateral consequences for marijuana-related activities, impose a 5% tax on cannabis products, and use revenues from the tax to fund certain grant programs for disadvantaged individuals and “individuals most adversely impacted by the War on Drugs.” The MORE Act [passed the House](#) in April 2022 and is currently pending before the Senate.

Another descheduling proposal, the Cannabis Administration and Opportunity Act ([S. 4591](#)), would remove from Schedule I marijuana and THC derived from the cannabis plant. It would also provide for expungement of certain past marijuana convictions, but it would retain federal criminal liability for cannabis-related activities not authorized under the law of the states where they occur. In addition, among other things, it would provide guidance for regulation of cannabis products under the

Federal Food, Drug, and Cosmetic Act. It would also impose a 10%-25% tax on cannabis products and use revenues from the tax to fund programs including small business development, community reinvestment, and opioid abuse treatment. Other legislative proposals from the 117th Congress would also remove marijuana from control, allow for expungement or sealing of certain federal marijuana convictions, or facilitate expungement of state convictions.

In the alternative, some proposals would continue to regulate marijuana as a controlled substance but would move it to a less restrictive schedule, potentially allowing it to be dispensed by prescription for medical purposes. Several legislative proposals from the 116th Congress would have left marijuana in Schedule I but limited enforcement of federal marijuana law in states that legalize marijuana. In the 117th Congress, the Small and Homestead Independent Producers Act of 2022 (H.R. 8825) would allow shipment of marijuana within and between states that have legalized the substance.

Some proposals would address specific legal consequences of marijuana's Schedule I status. For example, the SAFE Banking Act of 2021 (H.R. 1996/S. 910), which passed the House in April 2021, seeks to protect depository institutions that provide financial services to cannabis-related businesses from regulatory sanctions. Other proposals would seek to ensure access to insurance and other financial resources, facilitate federally approved clinical research involving marijuana, or enable veterans to access information about or use medical marijuana. Additional proposals would remove collateral legal consequences of marijuana-related activities for individuals in areas such as immigration, gun ownership, and federally assisted housing.

While most recent proposals would relax federal regulation of marijuana, Congress could also impose more stringent controls. As one example, the Welfare for Needs not Weed Act (H.R. 4536) would prohibit the use of benefits under the Temporary Assistance for Needy Families block grant at any store that offers marijuana for sale. Other proposals would seek to address the issues of workplace impairment or driving under the influence of marijuana and other substances.

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