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Legislative Scheduling of Controlled Substances

The Controlled Substances Act (CSA) regulates drugs and other substances deemed to pose a risk of abuse and dependence. Drugs become subject to the CSA by being placed in one of five lists, known as Schedules I-V. A lower schedule number corresponds to greater restrictions, so substances in Schedule I are subject to the strictest controls, while substances in Schedule V are subject to the least strict. There are two ways in which substances can be scheduled under the CSA: Congress can schedule substances by enacting legislation, or the Attorney General (in conjunction with the U.S. Department of Health and Human Services, or HHS) can schedule substances via an administrative process laid out in the CSA. The Attorney General generally delegates CSA scheduling authority to the Drug Enforcement Administration (DEA).

This In Focus surveys instances in which Congress has scheduled a controlled substance or changed the status of a controlled substance under the CSA via legislation. It also briefly discusses considerations for Congress related to legislative scheduling. For more information about the CSA and scheduling procedures under the Act, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 118th Congress*, by Joanna R. Lampe.

Legislative Scheduling Actions

Congress placed numerous substances in Schedules I-V when it enacted the CSA in 1970. The schedules of substances controlled by legislation are codified at 21 U.S.C. § 812. Since the CSA's enactment, most subsequent scheduling changes have been made by DEA via the rulemaking process, but Congress has at times enacted legislation to schedule controlled substances or change the status of existing controlled substances.

CRS searched for instances of legislative scheduling, rescheduling, and descheduling by reviewing the amendment history of 21 U.S.C. § 812 and cross-checking it against DEA's list of scheduling actions. Through that process, CRS identified the following examples of legislative scheduling actions:

- Pub. L. No. 91–513, Title II, § 202, 84 Stat. 1236, 1247–52 (1970) (original enactment of the CSA, establishing the schedules of controlled substances and placing a number of substances in each schedule)
- Pub. L. No. 98–473, Title II, § 507(c), 98 Stat. 1837, 2071 (1984) (amending Schedule II(a)(4), which already applied to “coca leaves” to include application to “cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives”)
- Pub. L. No. 99–570, Title I, § 1867, 100 Stat. 3207, 3207–55 (1986) (minor amendment to Schedule II(a)(4), which applies to cocaine and other coca leaf derivatives)
- Pub. L. No. 99–646, § 84, 100 Stat. 3592, 3619–20 (1986) (further minor amendment to Schedule II(a)(4), which applies to cocaine and other coca leaf derivatives)
- Pub. L. No. 101–647, Title XIX, § 1902(a), 104 Stat. 4789, 4851–52 (1990) (adding anabolic steroids to Schedule III)
- Pub. L. No. 108–358, § 2, 118 Stat. 1661, 1661–63 (2004) (amending 21 U.S.C. § 802 to define “anabolic steroid” to include multiple specified chemicals)
- Pub. L. No. 112–144, Title XI, § 1152, 126 Stat. 993, 1130–32 (2012) (adding “cannabimimetic agents” and certain other substances to Schedule I)
- Pub. L. No. 115–334, Title XII, § 12619(b), 132 Stat. 4490, 5018 (2018) (removing low-THC “hemp” from the CSA definition of “marijuana” and amending Schedule I to exclude “tetrahydrocannabinols in hemp”)

Congress has also enacted legislation that did not directly add substances to the statutory schedules but instead required the Attorney General to schedule specific substances:

- Pub. L. No. 95–633, Title I, § 102(c), 92 Stat. 3768, 3772 (1978) (directing the Attorney General to place pipradrol and SPA in Schedule IV to comply with the United States' obligations under the Convention on Psychotropic Substances of 1971)
- Pub. L. No. 106–172, § 3(a), 114 Stat. 7, 8–9 (2000) (directing the Attorney General to schedule gamma hydroxybutyric acid [GHB] and providing that, if the Attorney General failed to do so within a specified time period, GHB “(together with its salts, isomers, and salts of isomers) is deemed to be scheduled”)

Temporary Scheduling of Fentanyl-Related Substances

In addition to the permanent legislative scheduling actions listed above, Congress has also enacted legislation to temporarily control a class of substances known as “fentanyl-related substances” (FRS).

When a substance is scheduled under the CSA, it usually remains in the same schedule unless Congress or DEA moves it to a different schedule or removes it from control. However, the CSA grants DEA the authority to place a

substance in Schedule I temporarily when “necessary to avoid an imminent hazard to the public safety.” Pursuant to that authority, DEA initially imposed temporary controls on FRS in February 2018 via an administrative temporary scheduling order (Fentanyl TSO). The Fentanyl TSO applied to a broad class of FRS that meet specific criteria related to their chemical structure. DEA did not initiate permanent scheduling of the class of FRS, likely because the class includes thousands of chemicals, and the effects, potential for abuse and dependence, and medical utility of many of those substances are unknown. The agency has continued to take administrative scheduling actions with respect to specific fentanyl analogues, including selected FRS subject to the Fentanyl TSO.

On February 6, 2020, Congress enacted the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, Pub. L. No. 116–114, 134 Stat. 103, which temporarily extended the Fentanyl TSO until May 6, 2021. Congress has since extended the Fentanyl TSO several times. The most recent extension expires December 31, 2024, see Pub. L. No. 117–328, div. O, § 601, 136 Stat. 4459, 5231 (2022). For additional information on the temporary control of FRS, see the “Fentanyl Analogues” section of CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 118th Congress*, by Joanna R. Lampe.

Considerations for Congress

Congress designed the CSA to delegate scheduling decisions to agencies with relevant expertise and has often deferred to DEA on scheduling controlled substances. The CSA rulemaking process involves input from HHS on scientific and medical matters, an opportunity for interested parties to comment on proposed regulations, and a final decision on the record by DEA, subject to possible judicial review. As noted above, since the enactment of the CSA, most scheduling actions have been taken by DEA through that administrative rulemaking process.

Congress has broad authority to amend the CSA, including by scheduling, rescheduling, or descheduling substances. In recent years, some Members of Congress have introduced legislation that would change the status under the CSA of substances including marijuana (currently in Schedule I—the Department of Justice and DEA have proposed to move it to Schedule III), FRS (temporarily in Schedule I), and xylazine (an animal sedative that is regulated by the U.S. Food and Drug Administration and not currently controlled under the CSA).

There are several reasons why Congress might decide to schedule or reschedule substances via legislation. For

instance, compared to administrative scheduling, legislative scheduling may offer greater speed and flexibility. Administrative scheduling under the CSA proceeds via formal rulemaking, which generally takes months or years to complete. In making scheduling decisions, DEA is required by statute to make certain findings with respect to each substance’s potential for abuse and accepted medical use. DEA scheduling orders (other than temporary scheduling orders) are subject to judicial review, including consideration of whether the agency properly applied the relevant statutory standards.

By contrast, Congress is not bound by the CSA’s substantive or procedural requirements. This means that it can schedule a substance immediately, regardless of whether the substance meets the statutory criteria. While scheduling legislation may also be challenged in court, the scope of judicial review of legislation is typically more limited than judicial review of regulations. Legislative scheduling may be the only way to permanently schedule large classes of substances, such as FRS, where it is not feasible for DEA to conduct the required statutory analysis for all substances in the class. Congress might also schedule, reschedule, or deschedule a substance via legislation if it disagreed with DEA’s evaluation of the substance.

Relatedly, the CSA provides DEA with limited options for regulating controlled substances. The CSA established Schedules I–V, with each schedule carrying a defined set of regulatory controls and penalties for unauthorized activities. If DEA decides to control a substance under the CSA, it must place the substance in one of the existing schedules. The agency has asserted some authority to tailor controls to specific substances, but it cannot create new schedules or implement regulations or exceptions from control that are not authorized under the CSA. If Congress wishes to regulate a controlled substance in a way that does not fit within the existing CSA framework, or allow DEA to do so, it must enact legislation.

The CSA also directs DEA to control substances as required pursuant to the United States’ international treaty obligations. While those obligations may limit DEA’s discretion to relax controls over certain substances, U.S. treaty commitments do not prevent Congress from exercising its constitutional authority to enact new laws, even when doing so might cause the United States to violate its treaty obligations.

Joanna R. Lampe, Legislative Attorney

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