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Rescheduling Marijuana: Implications for Criminal and Collateral Consequences

Marijuana is the most commonly used illicit drug in the United States. The number of adults that use marijuana continues to increase, as does the number of states that allow for its use.

Under the Controlled Substances Act (CSA), marijuana and its derivatives are classified as Schedule I controlled substances, meaning their manufacture, possession, and distribution are illegal except for the purposes of federally sanctioned research. While many states have enacted laws allowing for marijuana use, and the federal government has generally not interfered with their implementation, violations of federal marijuana laws continue to have criminal and civil consequences. In addition to criminal penalties, past and current marijuana use or marijuana-related convictions may subject individuals and businesses to a number of consequences under various policies and federal laws.

In May 2024, the Department of Justice (DOJ) proposed to move marijuana from Schedule I to Schedule III under the CSA. While Schedule III is less restrictive than Schedule I and allows for medical use of marijuana—only if approved by the Food and Drug Administration (FDA) and dispensed pursuant to a valid prescription—most of the current consequences of marijuana use or marijuana-related convictions would remain if marijuana moves to Schedule III. This In Focus discusses those consequences and what would change if marijuana is rescheduled to Schedule III, as well as options for Congress.

Criminal Penalties for Federal Marijuana Crimes

Federal marijuana crimes may subject individuals to a number of criminal penalties that vary depending on the circumstances of the case:

- A first offense of trafficking (i.e., manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense) 1,000 kg or more of marijuana or 1,000 or more marijuana plants carries a penalty of not less than 10 years in prison or more than life; and a criminal fine of not more than \$10 million if an individual and \$50 million if other than an individual (e.g., a drug trafficking organization);
- A first offense of trafficking 100 to 999 kg of marijuana or 100 to 999 marijuana plants carries a penalty of not less than 5 years or more than 40 years in prison; and a criminal fine of not more than \$5 million if an individual and \$25 million if other than an individual; and
- A first offense of trafficking less than 50 kg of marijuana or 1 to 49 marijuana plants carries a penalty

of not more than five years in prison; and a criminal fine of not more than \$250,000 if an individual or \$1 million if other than an individual.

These offenses carry more severe penalties if death or serious bodily injury occurs or if it is not the defendant's first felony drug conviction.

In practice, most individuals (74.8% in FY2023) sentenced in federal court for marijuana trafficking convictions are sentenced to less than five years in prison. Over the last five years (FY2019–FY2023), the number of individuals sentenced for marijuana trafficking in federal court has declined by 66%, from 1,674 per year to 561. This decline is even sharper when considering longer term trends. In FY2014, 3,876 individuals were sentenced in federal court for marijuana trafficking (almost seven times higher than FY2023). By contrast, the total number of individuals sentenced for all federal drug trafficking offenses has declined more gradually over the past 10 years, from 21,152 in FY2014 and 19,765 in FY2019 to 18,939 in FY2023.

As with other controlled substances obtained without a valid prescription, simple possession of marijuana carries a penalty of up to one year in prison and/or a minimum fine of \$1,000. Possession of a “personal use amount” of marijuana and certain other controlled substances is subject to a civil penalty of up to \$10,000. Relatively few offenders are sentenced for marijuana possession in federal court, and the majority of cases originate from the Southwest border.

Federal crimes (and associated penalties) involving controlled substances, including marijuana, are not limited to the CSA, and can be found in other areas of the U.S. Code. For example, laundering money from controlled substance violations (see 18 U.S.C. §1956) and smuggling controlled substances into the country via aircraft (see 19 U.S.C. §1590) carry sentences of up to 20 years in prison.

Changes to Criminal Penalties if Marijuana is Rescheduled to Schedule III

Many CSA penalties for marijuana violations are written specifically for marijuana and are not tied to its Schedule I classification. If marijuana moves to Schedule III, those penalties would remain the same. Many CSA and other federal offenses associated with marijuana's general status as a controlled substance would also remain the same. For example, it is unlawful for any person knowingly or intentionally to possess a controlled substance *unless* such substance was obtained pursuant to a valid prescription from a medical practitioner. If marijuana moves to Schedule III, this does not mean that all marijuana products would be lawful to manufacture, distribute, or possess. The

manufacture, distribution, dispensing, and possession of marijuana would remain subject to applicable criminal prohibitions under the CSA (21 U.S.C. §§841–844). In addition, marijuana would remain subject to applicable provisions of the Federal Food, Drug, and Cosmetic Act (FDCA). Under the FDCA, a drug containing marijuana would need FDA approval to be lawfully introduced into interstate commerce.

Some CSA penalties for marijuana are specific to its Schedule I classification. For example, CSA advertising offenses (21 U.S.C. §843(c)) are written specifically for Schedule I. It is unlawful to knowingly place in any newspaper, magazine, handbill, or other publications any written advertisement that has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance. The penalties for doing so are up to four years in prison and/or a criminal fine. These penalties would no longer apply if marijuana moves to Schedule III.

Federal Tax Treatment

Marijuana producers and retailers may not deduct the costs of selling their product (e.g., payroll, rent, advertising) for the purposes of federal income tax filings. The Internal Revenue Code Section 280E states that:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business ... consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act)[.]

Media reports indicate that the Internal Revenue Service has enforced Section 280E in audits of marijuana-related businesses by refusing to accept these businesses' deductions.

Changes to Federal Tax Treatment if Marijuana is Rescheduled to Schedule III

If marijuana is rescheduled to Schedule III, it would make Section 280E inapplicable to marijuana businesses. These businesses would be able to deduct the costs of selling their product.

Collateral Consequences for Marijuana Use or Marijuana-Related Convictions

As with other controlled substances, past and current marijuana use or marijuana-related convictions may subject an individual to a number of collateral consequences under federal laws and policies. Aside from criminal penalties, these consequences include, but are not limited to,

- ineligibility for or termination from employment (including federal employment and the military);
- inability to purchase and possess a firearm;
- ineligibility for federal housing and other social assistance programs;
- ineligibility for certain federal benefits including the issuance of any grant, contract, loan, and professional or commercial license provided by a U.S. agency or by federal funds;

- ineligibility for certain visas and other immigration-related consequences; and
- a range of implications for postsecondary students and employees on college campuses, as institutions of higher education must implement a program to prevent use of illicit drugs and alcohol by students and employees.

Some of these consequences can be the result of past or current use of marijuana (or other controlled substances) as well as criminal convictions involving marijuana. These disqualifying circumstances come to light in a range of ways including when an individual is filling out a form or application or undergoing drug testing, or when an organization conducts background checks.

Changes to Consequences for Marijuana Use or Marijuana-Related Convictions if Marijuana is Rescheduled to Schedule III

If marijuana moves to Schedule III, most of the consequences for its use or for marijuana-related convictions would remain the same. While the use of marijuana by prescription for medical purposes would become lawful, marijuana products that are available in dispensaries in many states across the country are not currently available via lawful prescription. It is uncertain if or when these products might be approved for such use and available via lawful prescription if marijuana is rescheduled to Schedule III. Under federal law, a drug must be approved by the FDA before it may be marketed or prescribed in the United States. To date, FDA has approved one cannabis-derived drug and three marijuana-related drugs that are available by prescription.

Selected Legislation in the 118th Congress

Since DOJ proposed to reschedule marijuana, two bills have been introduced in Congress that would seek to ease the criminal and collateral consequences of marijuana use and marijuana-related convictions. One bill would create an expungement mechanism and a process to petition for expungement for low-level violations of the CSA as it relates to marijuana. The other bill would limit federal agencies' consideration of marijuana use when making an employment suitability or security clearance determination. Prior to the rescheduling proposal, Members of Congress introduced other bills that would ease consequences of marijuana use and marijuana-related convictions, including one bill that would allow those who lawfully (under state law) use marijuana to stay in federally funded housing, and another bill that would exempt certain individuals who use medical marijuana from federal firearms-related restrictions.

Some Members of Congress do not support easing marijuana-related prohibitions. One bill introduced in the 118th Congress would increase consequences for states that allow for recreational use of marijuana by withholding 10% of their federal funds under the National Highway Performance Program.

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