DEA's historic move to reschedule cannabis is no panacea

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As first reported (https://bit.ly/4dGN5wU) by the Associated Press, the U.S. Drug Enforcement Administration (DEA) has agreed with the earlier recommendation of the Department of Health and Human Services (HHS), and at the urging (https://bit.ly/4biSGYM) of President Biden, has signaled its intent to move Cannabis from Schedule I to Schedule III of the Controlled Substance Act (CSA), putting it on par with ketamine, anabolic steroids and some acetaminophen-codeine combinations.

This means that, even at the conclusion of what is sure to be a lengthy process, absent congressional action, federal policy towards Cannabis will still be at odds with the 24 states that allow the sale of recreational cannabis.

While a contentious election year — which may reshape the face of the legislative and executive branch — is hardly the time to make definitive predictions about what federal policy might look like in the coming years, it is a good time to take stock of what the DEA's move may mean in the short term, and what policy considerations advocates (on either side of the legalization debate) should keep track of.

The rescheduling process

The (at this point unofficial) announcement is the first step in an administrative process that will take months (or maybe years) to complete. It is unknown whether the DEA already crafted a proposed rule, or whether the announcement is just the beginning of that process.

Those familiar with the administrative rulemaking process know this can be a rather lengthy process. For perspective, the rulemaking concerning hemp-derived CBD, legalized as part of the 2018 Farm Bill, is entering its sixth year.

Any proposal for rescheduling by the DEA will first need to be reviewed by the White House Office of Management and Budget (OMB). Upon OMB approval, the proposed rule would be released for public comment, feedback from which may result in a round of revisions.

Any rule adopted by the DEA is likely to be subject to review under the Congressional Review Act (CRA, 5 U.S.C. §§801-808), as it is likely to meet the definition of a "major" rule because it is likely to result in an annual effect on the economy of $100 million or more. 5 U.S.C. § 804(2). Thus, even in the context of purely administrative review, Congress will still have a role to play (if it so chooses).

A move to Schedule III will put Cannabis, which contains both THC and CBD, squarely in the crosshairs of the U.S. Food and Drug Administration (FDA), which has its own lengthy and thorough rulemaking process focusing on safety, efficacy and quality. That is because Schedule III drugs may only be dispensed by prescription which requires the drug to be approved by the FDA. While Epidiolex — the approval of which was the basis for the FDA asserting jurisdiction over CBD regulation after hemp's legalization in 2018 — was approved by the FDA, "Cannabis" (which is an entire family of plants) has not been.

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Even if approval is subsequently obtained, manufacturers and distributors would need to register with the DEA and comply with regulatory requirements applicable to Schedule III substances. None of the state-level medical cannabis programs currently comply with such standards to the authors' knowledge.

Considering the fact that the FDA's CBD rulemaking is now entering its sixth year, and that the FDA has explicitly requested congressional intervention, the FDA's rulemaking with respect to Cannabis writ-large would not be a quick process. In the meantime, as was the case with CBD, a patchwork of laws and state-level regulations is likely to proliferate.

What rescheduling without congressional action would look like

If one were to be a pessimist and assume that congressional gridlock is the *status quo* for the foreseeable future, rescheduling (together with some additional relief from executive agencies) will still be a net-positive for the industry. But it will not be a panacea.

The first, and most important, change would be from the criminal justice perspective. Although cannabis is already treated differently

(https://bit.ly/3V1PsDu) from other Schedule I drugs for the purpose of penalties, its movement to Schedule III is likely to result in calls to further ratchet down the penalties, as well as re-examine the sentences of those individuals already incarcerated. If nothing else happens, this is a worthy result that is too often overlooked.

In addition, movement to Schedule III would take cannabis out of the exclusion of Internal Revenue Code Section 280E, which only precludes tax deductions for trafficking in Schedule I and Schedule II (but not Schedule III) substances. This would be welcome relief to participants in both medical and recreational cannabis programs, which carry a tax burden no other business does.

However, as the non-partisan Congressional Research Service's "legal sidebar" report (https://bit.ly/4bsarVg), titled "Legal Consequences of Rescheduling Marijuana" explains, "[m]oving marijuana from Schedule I to Schedule III, without other legal changes, would not bring the state-legal medical or recreational marijuana industry into compliance with federal controlled substances law." This includes a bevy of federal rights, including federal trademark protection, immigration, and import and export of cannabis and cannabis derivatives, to name just a few.

It is worth noting that moving Cannabis to Schedule III may also encourage additional challenges to state-level "closed" regulatory schemes under the U.S. Constitutional Dormant Commerce Clause (DCC). In recent years, those programs were challenged on the basis that states attempt to discriminate against out-of-state applicants by favoring in-state applicants (and in some cases barring out of state applicants).

The challenges have seen success, but in some instances the argument that Cannabis remains totally illegal on the federal level (and therefore outside of the scope of the DCC) resulted in federal courts turning away such challenges. Rescheduling of cannabis would undercut such defenses.

In addition, it is likely to encourage a new type of DCC litigation: focusing on restrictions on the importation of cannabis between states (which has resulted in closed regulatory systems where cannabis must be grown in the state it is consumed). The genesis of this siloed approach is the now-rescinded Cole memorandum, which outlined interstate-commerce as one of the considerations in federal prosecution. That 2014 memorandum, rescinded by subsequent Attorney General Jeff Sessions, proceeded from the premise that Cannabis was on Schedule I (and therefore completely illegal).

Congressional legislation still needed

Full legalization, in conjunction with and to facilitate regulatory clarity, still requires action from Congress. Some legislation, like the SAFER Banking Act, has strong support in Congress. As we previously wrote, as drafted, it provides some protections to financial industry participants (like banks and credit unions) by creating safe-harbors, but stops short of considering the broader capital markets ecosystem.

Other legislation, like various iterations of the STATES Act (which would like to leave regulation of the cannabis market to the various states), has not advanced as far.

Whatever the ultimate result of the rescheduling process is, it remains clear (both to industry observers and the Congressional Research Service), that Congress still has a role to play. Hopefully, they are up to the task.

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