

# Update on the DEA's efforts to reschedule cannabis: what you need to know

By Alex Malyshev, Esq., and Sarah Ganley, Esq., Carter Ledyard & Milburn LLP

SEPTEMBER 11, 2024

As readers of this column know, earlier this year the Drug Enforcement Administration (DEA) finally acted on President Biden's call to reschedule cannabis from Schedule I to Schedule III of the Controlled Substances Act (CSA), which is seen as the biggest step towards federal legalization in more than half a century. We previously summarized these changes and their potential implications in our September 2023 (<https://reut.rs/4cRbePN>) and May 2024 (<https://reut.rs/3MAODMN>) articles.

Although the process – which the DEA is pursuing via a rulemaking – will not be completed before the Presidential Election in November (which may bring a shift in priorities at the DEA), it is worthwhile to provide an update on the current status of these efforts.

## Current status of rescheduling and next steps

Since the announcement in April 2024 that it had agreed with the Department of Health and Human Services' (HHS) earlier recommendation to reschedule cannabis, the DEA opened a 60-day public comment period for the public to weigh in on the proposed rule. That window closed on July 22, 2024. Close to 43,000 comments were submitted from an array of stakeholders, including anti-legalization activists, cannabis industry advocates, state cannabis regulators, medical professionals, researchers, and law enforcement officials.

Barely a month later, on Aug. 27, the DEA announced that it will hold a hearing before an administrative law judge on the cannabis rescheduling proposal – a process effectively resembling a trial that could take months, if not years, to complete. The hearing is currently set for Dec. 2, 2024, after the election.

Stakeholders interested in speaking at the hearing, have until Sept. 25, 2024, to register their request in accordance with the Notice of Hearing (<https://bit.ly/3MvMGBO>). The length of the hearing will depend on how many parties are permitted to testify. Considering the tens of thousands of comments received, this could be a fairly large number.

Once the hearing is completed, the presiding administrative law judge will write and file a report on the testimony provided. Then, the DEA still needs to review the report and write its final rulemaking, which must take into consideration all relevant materials presented during the public comment period.

It must also address significant issues raised in the comments and provide a reasoned explanation for its decisions. Once that is completed, the final rulemaking will be published in the Federal Register. It is entirely possible that the final rulemaking could face legal challenges prior to its effective date (which, at a minimum, will be 30 days following publication). Alternatively, the DEA may feel the need to reopen the public comment period based on new information received during the hearing, which would result in further delays.

## Growing support for rescheduling and legalization

While the rescheduling proposal grinds its way through the administrative review process, research continues to bolster the case for rescheduling, showing the efficacy of cannabis in treating chronic pain, epilepsy, and other conditions, and suggesting a lower risk of abuse than previously assumed – points highlighted by federal health regulators as part of their recommendation to reschedule cannabis.

---

*On Aug. 27, the DEA announced that it will hold a hearing before an administrative law judge on the cannabis rescheduling proposal – a process effectively resembling a trial that could take months, if not years, to complete.*

---

For example, a recent study (<https://bit.ly/4gdWKw9>) published in the journal PLoS One found that patients with chronic health conditions, including anxiety, depression, or chronic pain, saw significant improvements in their overall quality of life during the first three months of medical cannabis use.

There has also been a notable increase in bipartisan support for rescheduling cannabis, reflecting broader societal changes. As we've noted in previous articles, a growing number of lawmakers, medical professionals, and advocacy groups have voiced their support, pressuring the DEA to act.

Indeed, a recent analysis (<https://bit.ly/4g9jopB>) of the public comments conducted by cannabis data firm Headset highlights this fact. Headset's analysis found that 92.45% of the comments were in favor of reclassifying cannabis under federal law, while only 7.55% of responses were against reclassification.

### Ongoing challenges and uncertainties

Despite the potential benefits, several challenges persist, including regulatory hurdles, complex implementation logistics, and continued opposition from certain law enforcement groups and conservative lawmakers.

For example, the House Appropriations Committee recently approved an amendment to a funding bill that would essentially block the current Administration's ongoing efforts to reschedule cannabis and ease restrictions on the drug under federal law. Under the amendment approved by the Republican-led committee, the Department of Justice would be blocked from spending federal funds to reschedule or (de-schedule) cannabis under federal law. U.S. Representative Rosa DeLauro (D-CT 3rd District) introduced an amendment to remove the provisions seeking to block rescheduling, but the committee defeated the proposal by a vote of 20-30.

Moreover, given the slow pace of the rescheduling process, there is a risk that the incoming Presidential Administration could change course or otherwise insert themselves in the process. It seems unlikely that a Harris Administration would significantly change course, as rescheduling cannabis during her first term in office would be a significant achievement, leaving the possibility for further reform in a second term.

For Donald Trump, the possibilities are less clear, as the former President's position on cannabis keeps changing. Most recently, in a Sept. 8, 2024, Truth Social post, <https://bit.ly/4d0810g>, Trump expressed support for a ballot initiative in his home state of Florida that would legalize cannabis for adults (although he stopped short of formally endorsing the measure). However, if he once again chooses a conservative attorney general along the lines of Jeff Sessions, that could pose significant challenges.

### About the authors



Alex Malyshev (L) is a partner at Carter Ledyard & Milburn LLP and the chair of its cannabis, hemp and CBD industry group. He contributed the chapter, "Banking and Investment Considerations for Cannabis Businesses" in "Health Care and the Business of Cannabis: Legal Questions and Answers" (American Health Law Association 2021). He can be reached at [malyshev@clm.com](mailto:malyshev@clm.com). Sarah Ganley (R) is an associate in the litigation department of the firm and can be reached at [ganley@clm.com](mailto:ganley@clm.com). Both authors are based in New York.

In addition, the complexities of aligning federal policy with state-level cannabis regulations remain a significant challenge. While rescheduling could streamline research and access, Schedule III drugs are regulated (and tested) more stringently than cannabis under many existing state laws (saying nothing of the unlicensed, but often tolerated, market). Many cannabis advocates are also concerned with the long-term implications for smaller players who cannot compete with well-financed new entrants from the pharmaceutical, tobacco, and alcohol markets.

Finally, while rescheduling would bring some immediate relief to participants in the state-legal medical and recreational cannabis programs by taking cannabis out of the exclusion of Internal Revenue Code Section 280E (which precludes tax deductions for trafficking in Schedule I and Schedule II substances, but not Schedule III), Congressional action is still needed overall to bring federal cannabis policy in line with state policy.

For example, a recent Legal Sidebar (<https://bit.ly/3MvofUq>) published by the Congressional Research Service concluded that rescheduling cannabis is unlikely by itself to eliminate the legal risks of financial institutions serving cannabis businesses and is, thus, not likely to increase most state-legal cannabis companies' access to financial services without other legal changes.

### Conclusion

The DEA's efforts to reschedule cannabis mark a significant shift in federal drug policy. While reclassification represents a move towards aligning federal policy with contemporary scientific understanding, public sentiment and, to some extent, state laws, it also introduces new complexities and challenges.

As the DEA finalizes its review, stakeholders from across the political spectrum are closely monitoring developments. The outcome of this process will likely have profound implications for cannabis research, medical access, and regulatory frameworks, shaping the future of cannabis policy in the United States.

*Alex Malyshev and Sarah Ganley are regular, joint contributing columnists on legal issues in the cannabis industry for Reuters Legal News and Westlaw Today.*

This article was first published on Reuters Legal News and Westlaw Today on September 11, 2024.