

How to End Marijuana Prohibition with Regard to the Controlled Substances Act

NORML Memorandum: Federal Marijuana Prohibition Can Only Be Repealed By Descheduling, Not Rescheduling, Cannabis From the Controlled Substances Act

More than two-thirds of US states and territories regulate the possession of marijuana for medical or adult-use purposes, and one-third of the US population resides in jurisdictions where the possession and use of cannabis is legal for those ages 21 and older. Under the existing structure of the Controlled Substances Act, there is no federal classification that is able to accommodate the existence of these programs and laws as they exist today. This is because these state-legal regulatory structures were not designed in a manner that was intended to be consistent with the Controlled Substances Act. As a result, they currently operate in a manner that is in clear defiance of federal prohibition.

The Mechanics of the Controlled Substances Act

The Controlled Substances Act of 1970 established five distinct classifications – or schedules – for various controlled substances. Substances classified as Schedule I, the most prohibitive classification, must meet three criteria:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for the use of the drug or other substance under medical supervision.

Substances classified in categories other than Schedule I have been deemed by the US Food and Drug Administration to possess some “currently accepted medical use.” These substances also possess varying degrees of abuse potential – from a “high potential of abuse” (Schedule II) to a “low potential of abuse” (Schedule V) – as well as varying degrees of potential “psychological or physical dependence” – from “severe” (Schedule II) to “limited” (Schedule V). These substances are only available legally under a doctor’s prescription and obtained at a licensed pharmacy. These substances are not allowed to be either marketed or used for non-medical purposes.

Cannabis Is More Analogous to Substances Not Included in the CSA

Dietary supplements and vitamins, which are marketed as general wellness products, lack FDA approval and thus are not classified in any schedule. These products are regulated by separate, specific federal regulations, e.g.: The Dietary Supplement Health and Education Act of 1994. Similarly, alcohol and tobacco are not scheduled under the CSA. These two substances are descheduled. Therefore, state governments and the federal government both possess the authority to regulate these substances.

Concerning alcohol, the federal government has established various rules and regulations – such as the imposition of a standard warning label on the product with The Alcohol Beverage Labeling Act and limitations on how the product may be marketed or advertised. The federal government can also enforce prohibitions on the production and sale of certain types of alcohol products, such as caffeine-infused alcohol products. Federal laws also provide regulations governing home distilling (prohibited without possession of a federal permit) and the home brewing of alcohol (a maximum of 200 gallons per household per year). The federal government also possesses the authority to impose excise taxes on alcoholic goods and can impose regulations regarding the interstate trafficking/sale of alcohol products.

States also possess wide latitude when establishing their own localized regulations governing alcohol production and sales. For example, states set their own regulations regarding where alcoholic goods may or may not be sold (e.g., state liquor stores, grocery stores, pharmacies, grocery stores, gas stations, etc.), as

well as on what days of the week (e.g., no Sunday sales), and even what hours during the day alcoholic beverages may be sold (e.g., no sales after 2 AM, no sales before 12pm, etc). States possess the authority to raise or lower the legal drinking age for alcohol. States impose their own taxes on alcoholic beverages, and some states also impose unique limits on the potency of alcohol legally sold in the state (e.g., beer that is no more than 3.2 percent alcohol). States possess the authority to ban home brewing. Local jurisdictions, if they wish to, also possess the authority to prohibit alcohol sales entirely (e.g., “dry counties”).

Why Marijuana Must Be Removed from The Controlled Substances Act

NORML believes that a similar descheduling option – where the federal government and state governments both possess varying degrees of regulatory authority over the production, marketing, and taxation of the product, is appropriate for cannabis. We take this position for various reasons:

- Many states have already established specific statewide laws and rules regulating cannabis production, taxation, and sales. Descheduling provides these states (and others) with the authority to continue to move forward with these regulations, while also authorizing those states that wish to continue to prohibit cannabis production and sales the flexibility to do so.
- Rescheduling is intellectually dishonest. Just as cannabis does not meet the strict criteria of a Schedule I controlled substance, it also does not meet the specific criteria that define schedules II through V.
 - As a botanical plant, it currently lacks FDA approval and it is likely to continue to lack such approval going forward.
 - It also lacks the abuse potential typically associated with substances categorized in Schedules II and III.
 - Further, substances in these scheduling categories are only available to patients under the prescription of a physician – therefore making such a classification inapplicable to cannabis in those states that regulate its adult use.
- Rescheduling cannabis will not necessarily facilitate clinical research. The federal policies in place that make clinical trial work with cannabis more onerous than it is for other controlled substances — such as the requirement that all source material be purchased from the US National Institute on Drug Abuse (NIDA’s) University of Mississippi marijuana cultivation program — are regulatory requirements that are specific to cannabis, not to Schedule I drugs generally. Rescheduling cannabis to another classification does not necessarily change these regulations, at least in the short-term. By contrast, descheduling cannabis would allow private companies to develop their own specific and proprietary formulations of cannabis and allow them to legally test these products in FDA-approved controlled trials – with the goal of bringing such products to market.
- Congress has recently descheduled low-THC cannabis plants. In December 2018, Congress enacted legislation removing low-THC (below 0.3 percent) cannabis crops from the jurisdiction of the Controlled Substances Act. This change in policy established dual regulatory authority over the regulation of hemp to both the federal government (e.g., the United States Department of Agriculture) and the individual states. Descheduling cannabis altogether would be consistent with this existing policy and many of the state/federal regulations already established by this policy change.

Conclusion

Further analysis, market research, and discussions must address regulatory practices for the eventual interstate commerce of cannabis. NORML looks forward to constructively engaging in this dialogue.

In the meantime, in order to rectify the state/federal conflict that currently exists over marijuana policy, and in order to best maintain the market controls that a majority of states have enacted to promote public health, prevent the distribution of marijuana to minors, ensure safe business practices, and improve public safety, cannabis must be descheduled -- not rescheduled -- from the Controlled Substances Act.