

# A New Push To Clear Up Marijuana's Foggy Legal Status

By **Joseph Cioffi and Louis DiLorenzo** (March 7, 2024)

Although marijuana is now legal for recreational or medical use in 37 states, it is still a federal crime to grow, sell or possess marijuana.

With Congress unable to come to an agreement on marijuana's legal status, the Biden administration has been considering other means at its disposal to change its legal status. Following the recommendation from the U.S. Food and Drug Administration last summer, the U.S. Drug Enforcement Administration is considering whether to reschedule marijuana.

Rescheduling would essentially make marijuana a highly controlled prescription drug, but calls from Congress have recently grown to deschedule marijuana, effectively ending the federal prohibition. The difference means everything for the U.S. marijuana industry, including the amount of capital drawn to it.

## Background

Marijuana is a Schedule I controlled substance under the Controlled Substances Act, meaning that it is deemed a drug with no currently accepted medical use and a high potential for abuse. It is legally treated the same as heroin, LSD and ecstasy — and more strictly than cocaine, fentanyl and methamphetamine.

This means that even where marijuana is legalized under a given state's laws, growers, distributors and retailers of marijuana — even if they are licensed — are committing a crime by participating in the marijuana industry.

Though marijuana is still federally illegal, the federal government, through a patchwork of official and unofficial policies, has largely avoided intervening in the state-legal marijuana industry.

Despite this hands-off approach, the current legal status of marijuana has acted as a drag on the industry, substantially hampering the industry's ability to receive financing, access banking, accept credit cards or other digital forms of payment from consumers, obtain tax deductions, and even take advantage of federal bankruptcy protections.

Efforts to legalize marijuana legislatively have thus far failed. Although the U.S. House of Representatives passed a legalization bill in 2022, the bill failed to garner enough support in the U.S. Senate, and subsequent efforts were similarly unsuccessful. Congress has alternatively considered various versions of the Secure and Fair Enforcement, or SAFE, Banking Act to promote funding and reduce the industry's reliance on cash, which has resulted in local security and safety issues.

The SAFE Banking Act would significantly decrease federal restrictions on banking for the marijuana industry, enabling financial institutions to work with marijuana companies without having to navigate red tape imposed by the Bank Secrecy Act.



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The House of Representatives has passed a number of iterations of the bill, and although the Senate has previously been a stumbling block for the law, the Senate Committee on Banking, Housing and Urban Affairs recently approved a version of the SAFE Banking Act for a floor vote. But even though the SAFE Banking Act would significantly reduce regulatory hurdles for marijuana companies, it would not legalize marijuana.

## **What's Happening**

Under the direction of President Joe Biden, the FDA in 2023 evaluated the available medical evidence and recommended that marijuana be rescheduled to Schedule III, a designation that includes ketamine, anabolic steroids and testosterone, and an August 2023 memorandum containing the FDA's full research and rationale was recently released.[1]

Core to the FDA's recommendation was the conclusion that marijuana is less addictive and less prone to abuse than other Schedule I controlled substances, and has more potential medical benefits. But ultimately, the DEA, as the agency with final authority to reschedule or deschedule a drug under the CSA, must formally adopt the FDA's recommendation before marijuana is legalized.

Although the DEA has confirmed that it is reviewing the FDA's findings, it has not given any indication as to when it would reach a final decision. The decision was rumored to be coming sometime during the first full week of February, something that the DEA has since denied. With the fate of the marijuana industry in the balance, speculation and disagreement has swirled over the FDA's pending decision.

Any schedule change by the DEA will have broad implications, but the devil is in the details as to what will actually change. Rescheduling marijuana to Schedule III would not result in broad legalization. Rather, marijuana would remain a controlled substance that requires a prescription, in addition to a number of other restrictions, in order to be sold.

This would mean that the sale and possession of recreational marijuana would still be a federal crime, and even for medical marijuana, the current system for issuing prescriptions may not pass muster under the CSA. Accordingly, while marijuana would no longer be a banned substance, the majority of marijuana sales would remain illegal.

It is for this reason that many members of Congress have urged the DEA to deschedule — or fully legalize — marijuana altogether. Following a bipartisan letter[2] from 31 members of the House in October, in late January a group of Democratic senators issued a letter[3] to the DEA and U.S. Department of Justice, urging that marijuana be descheduled and made legal under federal law.

Although the Senate letter required the DEA to provide a response by Feb. 12, that date came and went without any further clarity from the DEA. In addition, while the most vocal legislators are pushing for rescheduling or descheduling, there remain some holdouts, with Rep. Andy Harris, R-Md., recently issuing a letter[4] to the DEA indicating that the FDA came to a "misguided conclusion" in recommending that marijuana be rescheduled.

So, despite recent developments, the status as to the DEA's decision remains hazy.

## **Bottom Line**

2024 may well be the most pivotal year for marijuana since Washington and Colorado

legalized recreational marijuana in 2012. Due to marijuana's current legal status, most mainstream businesses — including banks, media companies, payment processors, investors and advertising agencies — have avoided participating in the marijuana industry.

A change in marijuana's legal status would not only mitigate the legal risks for the marijuana industry itself, but could also drastically increase the resources available to marijuana industry participants. But, as is always the case in the marijuana world, the path forward will not be clear cut, and even with rescheduling, the marijuana industry may still have to exist in a gray area of federal law with advantages and disadvantages lurking in the fog.

For example, although marijuana companies may continue to be denied access to federal bankruptcy relief, following rescheduling, cannabis-adjacent companies may stand a better chance of resisting challenges to bankruptcy filings, which would allow them and their creditors to avoid the uncertainty of state-based proceedings.

This would be a first step to improving funding prospects for companies serving the industry. And a greater inflow of funds and broader participation in the industry could bring marijuana closer to descheduling.

Moreover, even in the absence of a decision on rescheduling, the discourse over rescheduling and the uncertainty of its effects will bring the legal status of marijuana into sharp focus among regulators, legislators and the general public. Whichever way the wind blows, this is the closest that the marijuana industry has come to federal legalization.

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[1] <https://s3.documentcloud.org/documents/24359427/hhs-marijuana-rescheduling.pdf>.

[2] <https://www.cannabisbusinesstimes.com/news/bipartisan-house-lawmakers-urge-dea-to-end-failed-cannabis-prohibition/>.

[3] <https://www.warren.senate.gov/imo/media/doc/2024.01.29%20Letter%20to%20DEA%20on%20descheduling%20marijuana.pdf>.

[4] <https://harris.house.gov/media/press-releases/congressman-harris-writes-letter-dea-urging-them-consider-true-harms-marijuana>.