

Marijuana Rescheduling: A Partial Prescription for Policy Change

Grace Wallack* & John Hudak**

As marijuana policy reform in the U.S. has evolved over the past twenty years, one proposal keeps gaining attention: drug rescheduling.¹ State officials, members of Congress, the media, scholars, and the advocacy community have—to varying degrees—held up rescheduling as a solution to some of the challenges current federal law imposes on marijuana policy. Despite the near-celebrity status of rescheduling as a reform, it is among the most misunderstood proposals—both in terms of the process and its consequences.

This article seeks to clarify this conversation. Section I will describe precisely how rescheduling works, through legislative and administrative processes. The section will go on to detail the history of marijuana rescheduling in the U.S., including formal rescheduling petitions filed with the U.S. and some of the legislative proposals to do the same. Section II will detail both the consequences and limits of marijuana rescheduling. Section III will describe some alternative, additional proposals that could have more meaningful impacts on marijuana policy. Section IV will briefly conclude.

I. HOW RESCHEDULING WORKS

The Controlled Substances Act [CSA] designates different “schedules” for substances the federal government seeks to regulate. The federal government designates a schedule for each substance based on its medical value, abuse potential, and safety. The highest level of control—Schedule I—is reserved for substances the government determines have “a high potential for abuse . . . no

* Grace Wallack is a former Senior Research Assistant at the Brookings Institution and current student at Harvard Law School.

** John Hudak, Ph.D., is a senior fellow and deputy director at the Center for Effective Public Management at the Brookings Institution.

¹ This article is based on a longer report we authored in October 2015 titled “Ending the U.S. government’s war on medical marijuana research.” See JOHN HUDAK & GRACE WALLACK, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS INST., ENDING THE U.S. GOVERNMENT’S WAR ON MEDICAL MARIJUANA RESEARCH (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Ending-the-US-governments-war-on-medical-marijuana-research.pdf>.

currently accepted medical use in treatment in the United States . . . [and] a lack of accepted safety for use.”

Schedule I substances include marijuana, heroin, LSD, MDMA, GHB, ecstasy, bath salts, and Quaaludes, among others. By comparison, Schedule II—a government designation of a substance having some medical value—includes cocaine, methamphetamines, OxyContin, morphine, and opium.

Reform advocates argue that marijuana should be placed on a different schedule that better reflects the medical, safety, chemical, and pharmacological realities of the substance. In fact, as we have argued elsewhere, marijuana’s Schedule I status “creates a circular policy trap Research on the medical value of cannabis is limited by the Schedule I designation of cannabis, which asserts that the substance has no medicinal value.”² The process of moving a substance from one schedule to another is commonly known as rescheduling.³

Efforts to reschedule marijuana are not new. There have been multiple calls for Congress to amend the CSA with regard to marijuana. Although some marijuana advocates have argued that the President can reschedule marijuana with a stroke of the pen—by executive action, however, he cannot. Instead, marijuana rescheduling via administrative process is a long, complex, multi-agency process. We will describe legislative and administrative rescheduling processes in turn.

A. Legislative Rescheduling

Congressional rescheduling of a drug is a straightforward process. Congress can amend the CSA to move cannabis to Schedule II (or to another schedule, or off the schedules entirely [“descheduling”]).⁴ Over the years, many bills have been introduced that would either reschedule or deschedule marijuana. Each proposal has died in committee.⁵ Elected officials perceive the politics of marijuana policy

² *Id.* at 8.

³ Rescheduling is used in rulemaking by the DEA to mean the transfer of a substance from one schedule to another. *See Schedules of Controlled Substances: Rescheduling of Buprenorphine from Schedule V to Schedule III*, 21 C.F.R. § 1308 (2016).

⁴ John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why It’s Unlikely Anytime Soon*, BROOKINGS INST.: FIXGOV (Feb. 13, 2015), <https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/>.

⁵ In 1975, Rep. Edward Koch introduced the Marihuana Control Act, H.R. 8984, 94th Cong. (1975), which was referred to committee with no further action. In 1979, Morris K. Udall repeatedly introduced H.R. 3950, 96th Cong. (1979) to decriminalize marijuana, also with no further action. In 1985, Rep. Stewart McKinney introduced H.R. 2232, 99th Cong. (1985), a bill to amend the CSA to provide for the therapeutic uses of marihuana, which would move the substance to Schedule II. This bill was also referred to committee with no further action. The bill was reintroduced in 1995, also to no further action. More recently, Rep. Barney Frank introduced the Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (2011), which was referred to committee with no further action. Rep. Jared Polis introduced a similar bill in 2013, the Ending Federal Marijuana

to be toxic, despite polls of Americans that show robust support for marijuana reform—particularly around medical marijuana.⁶ Once Congress catches up with public opinion, it could pass an amendment to the CSA, and a presidential signature would reschedule marijuana.

B. *Administrative Rescheduling*

Rescheduling is not a simple process for the executive branch.⁷ A petition, initiated from an outside party or from within the administration, must be reviewed first by the Department of Health and Human Services [HHS] (via the Food and Drug Administration [FDA]) and the Attorney General, who typically delegates that task to the Drug Enforcement Administration [DEA]. Together, each agency reviews the petition according to eight key factors to determine if there is a scientifically accepted medical use for the drug, its potential for and history of abuse, and any risk to the public health.⁸ DEA and HHS make recommendations to the Attorney General with regard to the proper scheduling of the substance. The Attorney General then makes a determination about proper scheduling. If the Attorney General finds the substance is properly scheduled, the process stops and the status quo remains. If the Attorney General determines a change in scheduling is founded, she initiates the rulemaking process, consistent with the CSA and the Administrative Procedure Act.

C. *The History of Rescheduling Proposals*

Formal Congressional efforts to reschedule marijuana began in 1981 when Congressman Stewart McKinney (R-CT) introduced House Bill 4498, “a bill to provide for the therapeutic use of marijuana in situations involving life-threatening illnesses and to provide adequate supplies of marijuana for such use.” The bill would have endorsed marijuana supply expansion and access. It also sought to move marijuana to Schedule II. This bill garnered eighty-four cosponsors,

Prohibition Act of 2013, H.R. 499, 113th Cong. (2013), which also died in committee. In the current session (114th Congress) Sen. Bernie Sanders has introduced the Ending Federal Marijuana Prohibition Act of 2015, S. 2237, 114th Cong. (2015), on which no action has been taken, and Rep. Jared Polis reintroduced the Regulate Marijuana like Alcohol Act, H.R. 1013, 114th Cong. (2015). In addition, Sen. Cory Booker introduced the Compassionate Access, Research Expansion, and Respect States (CARERS) Act of 2015, S. 683, 114th Cong. (2015), which would, among other things, place marijuana in Schedule II. Despite much attention, this bill has also not moved out of committee. This is not a comprehensive list of all the marijuana-related bills in Congress, only the most pertinent examples.

⁶ JOHN HUDAK, *MARIJUANA: A SHORT HISTORY* 89–97 (2016).

⁷ Hudak & Wallack, *supra* note 4.

⁸ 21 U.S.C. § 811(a)–(c) (2012).

including conservatives like future House Speaker Newt Gingrich, and liberals like Michigan's John Conyers and California's George Miller.⁹

Additional rescheduling proposals sprung up in Congress over the years, including an effort by Ron Paul and Barney Frank in 2011. The latest efforts include the comprehensive CARERS Act—the first proposal originating in the US Senate—and a recent bill by Sen. Bernie Sanders (I-VT) to deschedule marijuana.

Administrative efforts have spanned decades as well. Four petitions have been initiated to reschedule marijuana or remove it from the schedules entirely since 1972. Each has been denied or stalled by DEA with disposition times ranging from five to more than twenty years.¹⁰ The first petition, initiated by the National Organization for the Reform of Marijuana Laws (NORML) in 1972, was not acted upon by DEA until 1986, after three different federal court rulings required DEA to review the petition.¹¹ It was ultimately denied in 1994, twenty-two years after its submission. The second petition was initiated in 1995 and denied in 2001, and the third, submitted in 2002, was denied in 2011, despite the multitude of states with medical marijuana programs by that time.¹² The most recent petition (submitted by then-Governors Christine Gregoire (WA) and Lincoln Chaffee (RI) in 2011) is still under review.¹³

In general, moving a drug between schedules has been an uncommon occurrence since the CSA was passed in 1970. Some noteworthy cases of rescheduling include Marinol (now Schedule III) and Hydrocodone Combination Products (HPCs), which are now Schedule II. Marinol—the trade name for the synthetic cannabinoid, dronabinol—was first moved from Schedule I to II in 1986, and then from II to III in 1999.¹⁴

II. CONSEQUENCES AND LIMITS OF MARIJUANA RESCHEDULING

A. *What Would Rescheduling Do?*

The distinction between Schedule I and Schedule II centers on whether a substance has medical value. Schedule I drugs have “no currently accepted

⁹ Cosponsors: H.R.4498—97th Congress (1981–1982), U.S. CONGRESS, <https://www.congress.gov/bill/97th-congress/house-bill/4498/cosponsors>.

¹⁰ DRUG POLICY ALL. & MAPS, THE DEA: FOUR DECADES OF IMPEDING AND REJECTING SCIENCE (2012), https://www.drugpolicy.org/sites/default/files/DPA-MAPS_DEA_Science_Final.pdf.

¹¹ *Id.* at 6.

¹² *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994); *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 76 Fed. Reg. 40,552, 40,562 (July 8, 2011).

¹³ *DEA Set to Act Imminently on Five-Year-Old Rescheduling Petition*, NORML, <http://norml.org/news/2016/04/07/dea-set-to-act-imminently-on-five-year-old-rescheduling-petition> (last visited Oct. 18, 2016).

¹⁴ Schedules of Controlled Substances, 64 Fed. Reg. 35,928 (July 2, 1999).

medical use in treatment in the United States” while Schedule II drugs have “currently accepted medical use in treatment in the United States or . . . with severe restrictions.”¹⁵ Substances under both schedules I and II are believed to have “high potential for abuse.” Rescheduling marijuana—with the government acknowledgement of its medical value—would have the most direct effects on the perception of marijuana, both in the government and for the public, which could have secondary policy effects.

The biggest policy impact of rescheduling marijuana from Schedule I to Schedule II, III, IV or V would be in the area of medical research, particularly with regard to researcher certification and licensure. The precise schedule matters, but regardless, the policy effects of rescheduling would be limited.

Researchers hoping to conduct research with Schedule I drugs undergo a multi-agency review and registration process. First, researchers must submit the FDA’s Investigational New Drug (IND) application, and NIH-funded projects also undergo an additional, three-step NIH review. Researchers then obtain a DEA registration for possessing the substance for research. Researchers then submit their proposal and request for study drugs to the National Institute on Drug Abuse (NIDA) for review and to approve the supply of the drugs they need.¹⁶ For marijuana, unlike all other Schedule I drugs, there is a single production facility licensed by the DEA to produce research grade material—a farm at the University of Mississippi—which is overseen by NIDA.¹⁷ Both the DEA-mandated NIDA monopoly on research marijuana and DEA registration represent hurdles to research that would not be present if marijuana were a Schedule II drug.¹⁸

Under DEA’s licensing system, there are categories of activities for which a medical professional must register in order to work with any scheduled drug (I–V).¹⁹ For example, there are independent registrations for manufacturing, distribution, and research. Research into substances in Schedule II–V requires a license for “[d]ispensing or [i]nstructing,” which is available for hospitals,

¹⁵ 21 U.S.C. § 821(b) (2012).

¹⁶ NAT’L INST. ON DRUG ABUSE, NIH, *Ordering Guidelines for Research Chemicals and Controlled Substances* (revised Jan. 2016), <http://www.drugabuse.gov/ordering-guidelines-research-chemicals-controlled-substances> (last visited Oct. 18, 2016).

¹⁷ Steven Nelson, *The End of Ole Miss’ Pot Monopoly?*, U.S. NEW & WORLD REPORT (Aug. 28, 2014), <http://www.usnews.com/news/articles/2014/08/28/the-end-of-ole-miss-pot-monopoly>.

¹⁸ There would need to be an additional formal step by DEA or Congress to remove the NIDA monopoly on the production of research grade marijuana, particularly if marijuana were rescheduled to II. However, there should be substantial political support for such a move post-rescheduling.

¹⁹ DEA’s licensing system—tethered to a substance’s location on federal schedules—would have an immediate effect on state licensing as well. Under the Uniform Controlled Substances Act, most states have an automated, state-level rescheduling process once the federal government reschedules. State rescheduling proceeds unless a challenge is filed. See Uniform Controlled Substances Act § 201(f).

pharmacies, practitioners, etc.²⁰ This is commonly called the “practitioner” registration, and covers the entire medical practice, not just an individual trial, and can be renewed every three years.

Clinical trials with any Schedule I substance, however, always require a separate researcher registration, and is subject to more stringent controls and reporting requirements than any licensure required for research into non-Schedule I substances. Thus, rescheduling marijuana from I to II (or another schedule) would remove a significant barrier to research in the form of more relaxed registration requirements for practitioners.²¹

B. *What Rescheduling Would Not Do*

Contrary to common misconceptions, reclassifying cannabis from Schedule I to Schedule II would not open the floodgates of dramatic change. Unless descheduled marijuana would still be treated as a medicine, maintaining the legal limbo for states with recreational and medical marijuana programs (because state-level medical marijuana is still not FDA approved). Pharmaceuticals produced from scheduled substances still require FDA approval—a long, circuitous, and expensive path that cannabis products would be free to navigate once Schedule I prohibitions are removed.

Rescheduling would not immediately remove the NIDA monopoly—a significant barrier, separate from Schedule I status, that hinders the integrity and conduct by research.²² Removing the NIDA monopoly would require an additional step, either by Congress or the DEA. The DEA still maintains production quotas for Schedules I and II, and licenses producers for all scheduled drugs. So, rescheduling would not immediately impact the available supply of marijuana available for research.

As we will detail below, rescheduling marijuana to Schedule III, IV, or V could have tax relief implications sought out by the cannabis industry and minor benefits for criminal justice advocates, but only under additional, specific circumstances. Only removal from the CSA’s schedules entirely would facilitate full legalization in the U.S. At present, this option is politically unlikely. If it did

²⁰ Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances, 21 C.F.R. § 1301.13 (2014).

²¹ The practitioner license would not allow practitioners to conduct clinical trials with the marijuana currently available in state-legal recreational or medical marijuana programs. *See* 21 C.F.R. § 1301.13 (2014); OFFICE OF DIVERSION CONTROL, DEA, PRACTITIONER’S MANUAL: AN INFORMATIONAL OUTLINE OF THE CONTROLLED SUBSTANCES ACT (2006), https://www.deadiversion.usdoj.gov/pubs/manuals/pract/pract_manual012508.pdf.

²² Nelson, *supra* note 17.

occur, it would likely come with separate, robust regulatory restrictions, just as legalizing states have implemented.²³

C. Rescheduling, Taxes, and Banking

Beyond licensure and registration for medical research, rescheduling could have effects on financial matters relevant to the cannabis industry. Under section 280E of the Internal Revenue Code, “[n]o deduction or credit shall be allowed . . . 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).”²⁴ For some marijuana businesses, this increases their effective tax rate to 100% or higher. Rescheduling marijuana to Schedule III would mean that marijuana enterprises would be eligible for the same federal tax deductions that traditional businesses are eligible for.

Aside from 280E, the impact of rescheduling on financial matters related to marijuana is limited. All banks, national or state-based, must comply with all federal laws in order to maintain their charter and federal deposit insurance and avoid criminal and civil sanctions.²⁵ Providing services to marijuana businesses put banks in violation of federal anti-money laundering statutes, the Bank Secrecy Act (BSA), and federal regulations.²⁶ The BSA requires banks to file suspicious activity reports (SARs) on any depositor whose behavior they suspect may violate federal law. In practice, this means banks must file an SAR on all activity involving a marijuana-related business because all financial transactions from that business produce funds derived from federally-illegal activity.²⁷ In addition, anti-money laundering statutes (18 U.S.C. sections 1956 and 1957) make clear that all financial and monetary transactions using proceeds from “specified unlawful activities” are considered money laundering. Failure to comply with any

²³ In addition, descheduling of marijuana would violate the United States’ obligations under the United Nations’ Single Convention on Narcotic Drugs. *See generally* UNITED NATIONS, SINGLE CONVENTION ON NARCOTICS DRUGS (1961), https://www.unodc.org/pdf/convention_1961_en.pdf.

²⁴ 26 U.S.C. § 280E (2012).

²⁵ The Bank Secrecy Act, 31 U.S.C. § 5322 (2012) (criminal penalties); 31 U.S.C. § 5321 (2012) (civil sanctions); 12 C.F.R. § 326, 353 (2015) (FDIC regulations for the Bank Secrecy Act compliance); 31 C.F.R. § 536 (2015) (Treasury regulations for compliance).

²⁶ JAMES M. COLE, U.S. DEP’T OF JUSTICE, MEMORANDUM FOR ALL U.S. ATT’Y GUIDANCE REGARDING MARIJUANA RELATED FINANCIAL CRIMES (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf>.

²⁷ Financial Crimes Enforcement Network (FinCEN) has issued guidance allowing banks who serve marijuana businesses that follow applicable state law to submit a more limited SAR, but this has had little effect on the industry. *See* U.S. DEP’T OF THE TREASURY, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

of these laws could form the basis of prosecution against a bank, even if the underlying activity (i.e., a marijuana business) is state-legal. Because rescheduling marijuana would *not automatically legalize* marijuana for medical (or recreational) use, it would have virtually no impact on the status of banking services for marijuana enterprises.

D. Rescheduling and Criminal Penalties

While many states have passed recreational, medical, or decriminalization laws, the fear of federal prosecution for marijuana use still exists. Under federal law, possession of small amounts of marijuana on first offense is punishable by prison time, and penalties escalate dramatically based on the amount, related criminal activities (sale, cultivation, etc.) and the number of offenses.²⁸ Considering the widespread use of marijuana,²⁹ it is no wonder many advocates point to mandatory sentences for marijuana offenses as a basis for criminal justice reform. Unfortunately, marijuana rescheduling would do very little to solve this issue.

Because rescheduling would not change the federal status of the marijuana grown, processed, and sold in state-legal enterprises, it would have very little impact on criminal penalties. Generally, penalties for possessing drugs in lower schedules are less harsh than those in Schedule I or II.³⁰ However, Section 841 of the Controlled Substances Act outlines minimum and maximum penalties for marijuana specifically, as enacted at various times in the 1980s. It is unlikely that rescheduling would have any impact on these mandatory penalties, and therefore congressional action amending the CSA would be necessary to reduce them.

III. COMPREHENSIVE CANNABIS REFORM

Those interested in marijuana policy reform approach it from different perspectives or with different motivations. Some consider criminal justice aspects to be crucial. Others see reform through the lens of public health.³¹ Still others see

²⁸ U.S. DRUG ENF'T ADMIN., FEDERAL TRAFFICKING PENALTIES FOR MARIJUANA, HASHISH & HASHISH OIL, SCHEDULE I SUBSTANCES, <http://www.dea.gov/druginfo/ftp3.shtml> (last visited Oct. 18, 2016).

²⁹ Surveys show almost half of Americans have tried marijuana at least once in their lives, and the National Survey on Drug Use and Health reports that 19.8 million Americans used marijuana in the previous month. See NAT'L INST. ON DRUG ABUSE, NIH, DRUGFACTS: NATIONWIDE TRENDS (revised June 2015), <http://www.drugabuse.gov/publications/drugfacts/nationwide-trends> (last visited Oct. 18, 2016).

³⁰ See 21 U.S.C. § 841 (2012).

³¹ One option raised by public health advocates is reopening the Compassionate Investigational New Drug Program (CIND). Beginning in the 1970s, the program distributed marijuana to a limited number of people, mostly suffering from chronic conditions or end-of-life

free market values and business interests as the core concerns. Frankly, some people just like smoking pot. For every one of these groups, rescheduling is not a complete fix.

Beyond rescheduling, other policy changes are necessary to satisfy most reformers. In large part, those changes *must* come from Congress, as they rest beyond the reach of unilateral executive power. Reform possibilities are numerous.

The removal of the DEA-mandated NIDA monopoly on the production of marijuana is essential for the expansion of medical research and availability of diverse product. Removal of the NIDA monopoly could happen administratively or by an act of Congress and could also happen with or without rescheduling.³²

As mentioned previously, rescheduling marijuana to Schedule II would do little for the economic challenges that face cannabis enterprises. Moving marijuana to Schedule III or lower would ease the tax burden on businesses under IRC section 280E, but full banking access would likely require additional congressional action.³³

One solution to the question of legal status would be for Congress to pass a marijuana-specific bill that essentially codifies the 2013 Cole Memos.³⁴ Such legislation could, in effect, create a carve out for marijuana from the traditional restrictions placed upon controlled substances under CSA, so that entities could operate so long as they meet specific federal and/or state regulatory guidelines. That move could be viewed as the equivalent of descheduling marijuana in states that have legalized it, while providing the necessary political cover for elected officials who desire the effect of that outcome without hanging a green albatross around their necks.

It is important to note that a commercial-oriented carve-out for marijuana still would not, in itself, solve criminal justice concerns—at least for those caught purchasing and possessing a controlled substance without proper authorization. An additional provision or standalone piece of legislation would be needed to reduce or eliminate criminal penalties.

maladies. The program was closed to new applicants in 1992. Reopening this program would be a severely restricted, but nevertheless meaningful reform for medical marijuana patients. Because the program does not implicate scheduling, we do not discuss it at length in this paper.

³² HUDAK & WALLACK, *supra* note 1, at 10. See CARERS Act, S. 683, 114th Cong. (2015); Lyle E. Craker, Dep't of Justice Docket No. 05-16 (Feb. 12, 2007) (opinion and recommended ruling).

³³ The Treasury has considered making regulatory changes to the BSA to remove or reduce reporting requirements for banks when their accounts implicate a suspicious activity. This would ease some banks' nervousness, but would not be a whole-scale reform. AM. BANKERS ASSOC., FREQUENTLY ASKED QUESTIONS: MARIJUANA AND BANKING 1 (Feb. 2014), <https://www.aba.com/Tools/Comm-Tools/Documents/ABAMarijuanaAndBankingFAQFeb2014.pdf>.

³⁴ COLE, *supra* note 26.

IV. CONCLUSION

While rescheduling has been popular among advocates, the press, and some members of Congress, it offers—at best—limited hope for reform. Such a move would not automatically bestow legal status on existing medical marijuana enterprises, and marijuana would still have to go through the lengthy process of FDA approval before being legally marketable. For tax purposes, placing marijuana in Schedule III would be the biggest boom to business, but beyond that, rescheduling would have limited effects on criminal penalties, banking services, and state-level recreational programs. The most notable effect of rescheduling would be to remove some research barriers for medical marijuana, but would lack the comprehensive effects many supports seek.