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FEDERAL SCHEDULING REVIEW

Please consider the following perspective on the federal cannabis [scheduling](#) review that is currently being performed by the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) following President Biden's [directive](#) on October 6, 2022.

On March 9, 2023, sixteen members of Congress (none from Hawaii) sent a [letter](#) to HHS and DOJ, urging that cannabis be removed from the federal Controlled Substances Act (CSA) (descheduled) and asking for transparency during the scheduling review process.

"It is time to address marijuana's existing reality as a state regulated substance."

Once HHS finishes its scientific and medical review under [21 USC 811\(b\)](#), HHS will make a scheduling recommendation to DOJ.

"The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance."

DOJ will then move to [21 USC 811\(d\)\(1\)](#), to evaluate, as a legal matter, how the recommendation from HHS corresponds with United States international drug treaty obligations under the [Single Convention](#).

"If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section."

On December 2, 2020, the UN's Commission on Narcotic Drugs (CND) [voted](#) to [remove](#) Cannabis from Single Convention Schedule IV (similar to CSA [Schedule I](#)), while keeping it in Single Convention Schedule I (similar to CSA Schedules II and III), thereby recognizing the potential medicinal and therapeutic use of cannabis while also maintaining the need for control because of its potential for abuse.

"Meanwhile, the United States voted to remove cannabis from Schedule IV of the Single Convention while retaining them in Schedule I, saying it is "consistent with the science demonstrating that while a safe and effective cannabis-derived therapeutic has been developed, cannabis itself continues to pose significant risks to public health and should continue to be controlled under the international drug control conventions"."

If HHS recommends that cannabis be descheduled, then DOJ could say that cannabis must go into CSA Schedule II or III to satisfy our international treaty obligations and because cannabis still requires control.

Aside from the impact of rescheduling upon banking and business tax deductions, moving cannabis into a schedule other than Schedule I will still require DEA [registration](#) for FDA-approved clinical research of a controlled substance and, if successful, for manufacturing of an approved drug product for interstate marketing and distribution.

None of the cannabis produced and distributed exclusively in Hawaii will ever be FDA approved, which means that the intrastate [production](#) and [possession](#) of cannabis will still be in violation of federal drug law as long as cannabis is a controlled substance.

This is where the federal exemption option ([21 USC 822\(d\)](#)) will still be necessary for establishing a source of cannabis in Hawaii that can be lawfully regulated under state and federal law and for creating a parallel market under the State's authority over the purely intrastate use of cannabis that can provide protection from mainland corporate takeover and excessive federal regulation, regardless of if and when the federal descheduling of cannabis occurs.

It may actually be beneficial for DOJ to say that it cannot deschedule cannabis because of international treaty obligations. Descheduling cannabis without corresponding changes to federal law would leave cannabis completely unregulated.

The Single Convention recognizes domestic law, meaning national law, so keeping cannabis scheduled until federal adult use regulation can be put in place would provide a smoother transition while maintaining international treaty obligations and control.

But all of this takes time. A federal production waiver would be a way to protect our patients and dispensaries during the transition, while also supporting intrastate use.

A descheduling recommendation from HHS would be very similar to state lawmakers introducing a bill that they know will never get a public hearing. HHS can enter a descheduling recommendation knowing that DOJ cannot follow this recommendation. It's the perfect face-saving maneuver that sets the stage for congressional intervention.

It's important to keep in mind that all the key [federal scheduling players](#) were appointed by President Biden. These federal agencies know exactly what they can and cannot do. Once DOJ recommends rescheduling instead of descheduling, it will be up to Congress to handle the ensuing backlash.

So, which is faster to achieve, a federal exemption or congressional descheduling?

A federal exemption is potentially faster because it is an [administrative process](#) involving only one agency, rather than a statutory process requiring approval of both chambers of Congress and the President.

DOJ could certainly resist issuing a federal waiver for the state-licensed production of cannabis that is consistent with the public health and safety, but they must see the direction our country is heading with regards to cannabis. It may be easier for DOJ to work with states that understand and want to [comply](#) with federal drug law and international drug control.

Regardless of how the federal descheduling of cannabis ultimately occurs, states and stakeholders have a moral obligation to pursue all possible solutions for the ongoing discrimination that our patients and dispensaries are suffering.