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Marijuana Rescheduling is Happening Sooner Rather Than Later

By: Jonathan Loeb

The U.S. Drug Enforcement Administration approved an earlier opinion of the Department of Health and Human Services that would reclassify marijuana from a Schedule I drug to a Schedule III drug. While this is a necessary and important step towards rescheduling, there are still more steps to take before marijuana can be rescheduled.

The process for rescheduling marijuana started with a recommendation of the Secretary of Health and Human Services ("HHS") to the Drug Enforcement Administration ("DEA"). Such a recommendation must be based on scientific evidence of a drug's pharmacological effect, the state of current scientific knowledge regarding the drug, the risk to public health, the drug's psychic or physiological dependence liability, and whether the drug is an immediate precursor of a substance already controlled by the Controlled Substances Act. The recommendation must also consider the scientific or medical considerations of actual or relative potential for abuse, the drug's history and current pattern of abuse, and the scope, duration, and significance of abuse. The Secretary of HHS's recommendation must include where they believe the drug should be scheduled.

After receiving the recommendation of HHS, the Attorney General through the DEA, was required to consider all of the facts presented and the potential for abuse of the drug, and either initiate rescheduling procedures, or leave the drug scheduled as is. In this case, the recommendation to reschedule marijuana to Schedule III has led to the initiation of rescheduling procedures. The next step, which the Attorney General took on May 16, 2024, is for the Attorney General to send his recommendation to the Office of Management and Budget to commence a public comment period. This public comment period allows for any challenges to the proposed rescheduling and could alter the proposed change. The comment period was officially opened on May 21, 2024 and will close on July 22, 2024.

If the DEA decides to move forward with rescheduling marijuana after the public comment period, Congress could overturn that decision under the Congressional Review Act. However, in order to do so, two-thirds of both the House and Senate would need to vote to keep marijuana as a Schedule I drug. Based on the current makeup of Congress, this is

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unlikely to happen.

If marijuana is rescheduled as a Schedule III drug, the rescheduling would have an immediate impact on marijuana businesses across the Commonwealth.

Rescheduling marijuana from a Schedule I to a Schedule III drug would allow marijuana to be studied and researched to identify medical benefits. Any medical drug developed using marijuana would still need to be approved by the FDA, but it could lead to pharmaceutical companies in the Commonwealth getting involved in the medical marijuana industry.

It could also have a major impact on tax burdens for marijuana businesses. For example, under 26 U.S. Code § 280E, deductions and credits are not allowed for any business that consists of trafficking in Schedule I or II substances. By rescheduling marijuana as Schedule III, marijuana businesses may be able to take advantage of deductions and credits previously unavailable to them. If you run a marijuana business, you should discuss this with your accountant to see if and how you may be able to benefit from this change.

Rich May, P.C. is monitoring the rescheduling process closely. If you have any questions about how the rescheduling of marijuana could impact your business, please contact Jonathan Loeb.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Jonathan Loeb.

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