

Cannabis Business Blog

DEA Rejects Petitions to Reclassify Marijuana, but Opens the Door to Expanded Marijuana Research Efforts

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In a long-awaited decision released this morning, the United States Drug Enforcement Administration announced that it has denied two petitions to reschedule marijuana under the Controlled Substances Act (the “CSA”). The DEA concluded that marijuana should remain a Schedule I controlled substance because it does not meet the criteria for currently accepted medical use in treatment in the United States; there is a lack of accepted safety for use of marijuana under medical supervision and it has a high potential for abuse. The DEA’s decision relies on a scientific and medical evaluation and scheduling recommendation from the United States Department of Health and Human Services (“HHS”), based on studies conducted by the United States Food and Drug Administration and National Institute on Drug Abuse (“NIDA”).

The DEA’s decision represents a blow to proponents of federal legalization of marijuana for medical and recreational use, and marks the continuation of the uncomfortable status quo of conflicting state and federal classification of marijuana that marijuana businesses and consumers face in states that have legalized the production, sale and consumption of marijuana. Accordingly, access to banking and other financial services, the threat of federal prosecution and the application of Internal Revenue Code Section 280E to marijuana businesses will continue to be issues faced in this emerging industry.

The DEA also announced a policy change that opens the door to expanded marijuana research efforts by increasing the number of DEA-registered marijuana manufacturers. Currently, only the University of Mississippi, acting through a contract with NIDA, holds DEA authorization to supply marijuana to researchers, who must also be registered with the DEA, in the United States. This has led some of the 350 currently registered marijuana researchers to complain about a shortfall of supply and lack in the variety of marijuana strains available to them.

Under the new policy, the DEA will register marijuana growers outside of the NIDA-contract system to supply researchers with marijuana if the growers agree that marijuana will be distributed only with the DEA’s prior written approval. Additionally, growers will be authorized to supply only DEA-registered researchers whose research protocols have been determined

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by HHS to be scientifically meritorious. Notably, these limitations would appear to exclude licensed growers in states such as Washington who currently produce marijuana for recreational and medical markets from obtaining DEA authorization.

The DEA's policy also appears to highlight uncertainty regarding DEA authorization and state laws regulating the production and sale of marijuana. For example, in Washington, an individual or business is allowed to grow marijuana only if it holds a license issued by the Washington State Liquor and Cannabis Board, and one of the conditions of the license is that state-licensed producers are allowed to sell marijuana only to other state-licensed producers or processors. Accordingly, any individual or business seeking DEA registration to produce and supply marijuana for research purposes will need to pay careful attention to applicable state laws when structuring their business.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government's jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

Tags: accepted medical marijuana use, application of Internal Revenue Code Section 280E, banking and other financial services, Controlled Substances Act, CSA, DEA, DEA authorization, DEA registration, DEA-registered marijuana manufacturers, expanded marijuana research efforts, federal legalization of marijuana, federal prosecution, HHS, LCB, marijuana businesses, marijuana consumers, marijuana growers, marijuana researchers, NIDA, NIDA-contract system, production and sale of marijuana, reclassify marijuana, registered marijuana researchers, reschedule marijuana, Schedule I, Schedule I Controlled Substance, state laws, state-licensed processors, state-licensed producers, structuring of businesses, United States Department of Health and Human Services, United States Drug Enforcement Administration, United States Food and Drug Administration and National Institute on Drug Abuse, University of Mississippi, Washington State Liquor and Cannabis Board