CLIENT ALERTS & INSIGHTS

HERE. WE. GO. Cannabis to be Rescheduled under the CSA

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Authors: Bryna Dahlin

The moment we have all been waiting for has finally happened. Today, the AP reported that the Drug Enforcement Administration (DEA) has accepted the recommendation of the U.S. Department of Health and Human Services (HHS) to reschedule cannabis under the federal Controlled Substances Act (CSA)[1], from Schedule I, where it sits next to heroin, LSD and Ecstasy; to Schedule III, where it will sit next to prescription-only substances like Tylenol with codeine, ketamine, and anabolic steroids. While rescheduling does not legalize cannabis under federal law or allow for the sale of cannabis across state lines, this process has been closely watched by the cannabis industry because it will eliminate the massive tax burden imposed by IRS 280E and loosen up sorely needed capital.

So, what happens from here? First, we need an official announcement from DEA with the interim rule. Then, the Office of Management and Budget (OMB) will review the interim rule, after which it will be published in the Federal Register for the public to review. The interim rule will then be subject to a notice-and-comment rulemaking process (the "Public Comment Period"), likely to last 60-90 days.[8] DEA could also hold hearings with interested parties during this time. These hearings would proceed before administrative law judges with the goal of gathering input, evidence, and arguments from stakeholders. Upon the conclusion of the Public Comment Period, and assuming DEA does not seek to revisit the interim rule (which it could do), DEA will then review the entire record and issue its final rule. Should DEA move forward with rescheduling cannabis to Schedule III, the parties who opposed rescheduling during the Public Comment Period would be considered "aggrieved" and would therefore have standing to request judicial review (essentially, an appeal) of DEA's decision. Congress could also get involved under the Congressional Review Act. This means politicking and lawsuits, and as anyone reading the news is well aware, lawsuits are unpredictable. All in all, it will still be quite a bit of time before we know what the actual rule will say.

That said, even the *unofficial* report of the *announcement* of the *pending* (and *yet to be reviewed* by the OMB) rescheduling rule - with which many disagree in favor of descheduling - is cause for celebration.

One has to look no farther than the stock rally today, which included Curaleaf Holdings Inc. **CURLF, 21.20%** (up 16.5%), Green Thumb Industries Inc. **GTBIF, +21.91%** (up 23.4%), and Verano Holdings Corp. **VRNOF, +20.79%** (up 19.8%), to see just how badly the industry needed this announcement.

Helping the cause is the Secure and Fair Enforcement Regulation (SAFER) Banking Act, which is still very much in the legislative mix. This week, two Republican House Representatives, confirmed their support, with Rep. Nancy Mace (South Carolina) tweeting

, “Hey, @SenSchumer, stop holding #SAFEBanking as a campaign carrot, and PASS. THE. BILL”; and Rep. French Hill (Arkansas) telling Bloomberg, “I have supported the SAFE Banking Act for nine years in Congress now…I think it’s a lot easier to catch bad actors and illegal activity if those companies are participating in the banking system.” And, today, amongst all the noise over rescheduling, Senate Majority Leader Chuck Schumer (D-NY) discussed his legislative priorities for 2024, which include “trying to deal with” the SAFER Banking Act “and cannabis reform,” both of which have bipartisan support.

It’s hard to know whether the momentum behind the rescheduling announcement will help get the SAFER Banking Act passed. After all, the vast majority of Americans (~9/10) say cannabis should be legal for medical or recreational use. *See* 2024 Pew Research Center survey. The bigger question is whether the rescheduling process keeps up with American public sentiment or gets bogged down in politics, red tape, and litigation in the lead up the Presidential election this fall. Only time will tell.

For more information on what Schedule III classification could mean for the industry, see our previous Client Alert here.

For more information, please contact a member of Benesch’s Cannabis Industry Group.

Bryna Dahlin at bdahlin@beneschlaw.com or 312.624.6340.