Marijuana Status Quo Maintained: What's Next?

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The U.S. Drug Enforcement Administration delivered a long-awaited decision about the medical use of marijuana on Aug. 11. In the first reaffirmation of marijuana’s Schedule I status since 2011, the DEA maintained the status quo of marijuana under the U.S. Controlled Substances Act — alongside heroin and LSD[1].

Notably the DEA took two additional actions — clearing the way for additional medical marijuana research studies, and clarifying the limitations and regulations involving hemp production and distribution. How will these decisions impact the legal and health care industries, and what should we expect in the coming months and years involving marijuana?

Marijuana a Schedule I Drug for Foreseeable Future

Based on the research provided by the U.S. Department of Health and Human Services, the DEA rejected two identical petitions requesting marijuana to be rescheduled as “Schedule II.” These requests have been pending since 2009 and 2011, and their rejection reflects the DEA’s determination that marijuana “has a high potential for abuse,” “has no currently accepted medical use in treatment in the United States,” and “lacks accepted safety for use under medical supervision.”[2]

Now that 25 states have adopted a recreational or medical marijuana program, there was some optimism that the DEA might reschedule marijuana to Schedule II, or even III-V, as a reflection of increasingly accepted medical uses. Based on review of available research for conditions such as neuropathic pain and HIV/AIDS, the U.S. Food and Drug Administration and HHS made the recommendation that the DEA not reschedule marijuana. Interestingly, these studies did, in fact, suggest beneficial impact on these medical conditions. Yet the overall severe shortage of research studies, the data suggesting negative impacts of marijuana, and a lack of universally adopted medical purposes for marijuana were insurmountable barriers during this review process.

The unambiguous ruling by the DEA means marijuana will continue to fall under Schedule I for the time being. With a presidential election in November, executive branch agencies like the DEA may or may not undergo significant changes. Both major presidential nominees have expressed support for at least status quo, with the state-by-state “experiments of democracy,” with regards to marijuana. The Democratic party nominee indicated she would follow through on the Schedule II change[3] if she is elected president. The Republican nominee has indicated support for state discretion with regard to medical marijuana[4], yet is also closely affiliated with anti-marijuana New Jersey Gov. Chris Christie[5].
The Status Quo Will Keep Lawyers Busy

For lawyers advising governments and businesses regarding compliance with state marijuana laws, the DEA decision means the status quo, which translates to endless legal obstacles when implementing a state law that directly conflicts with a federal law. Although rescheduling marijuana would not have solved all the related complexities and challenges, it would have allowed for greater synergies between federal and state laws.

The expansion of recreational and medical marijuana shows no signs of slowing, and every new legal-marijuana state faces a variety of legal challenges. Ranging from advising investors on the perils of contributing to a business inherently in violation of the U.S. Controlled Substances Act, to attorney professional conduct limitations[6], lawyers have found themselves enmeshed in the complexities of implementing state marijuana programs.

Health Care Stuck Between Politics and Policy

A glaring contradiction of the medical marijuana industry is the lack of HHS-approved research supporting medical marijuana use, which is only reinforced by decades of FDA and National Institutes of Health roadblocks and limits for marijuana-based research studies. Despite the strong anecdotal evidence of marijuana benefits, and extensive international cannabis research, the health care provider industry struggles with its role (and lack thereof) in developing medical marijuana programs.

In some states, such as Connecticut, medical marijuana programs require the involvement of pharmacists. In other states, such as New York, Florida and Illinois, providers encounter delays and confusion when mandating physician involvement in the patient registration process. When the first line of healthcare defense — physicians and nurses — lacks any education or training with regards to the administration of medical marijuana, it is not surprising that this cottage industry still lacks a place in the traditional health care system.

Health care professionals and researchers are slowly changing the landscape as more research on conditions such as PTSD[7] are sanctioned by the federal government. New medical cannabis states are finding creative solutions to involve medical professionals in their programs, with Illinois allowing medical research studies to count towards bonus points in its competitive application process; Pennsylvania creating eight dedicated cultivation/dispensing licenses for academic clinical research centers; and Hawaii expanding those eligible to certify patients to include nurse practitioners.

Will More Research Mean More Changes?

The medical marijuana industry will receive a boost from the news that the DEA will end the NIH monopoly to grow marijuana available for federally sanctioned research studies. One of the obstacles for researchers has been the limited availability, and diversity of strains and potency, of marijuana that can only be sourced from the University of Mississippi. The DEA’s announcement indicated more locations will be approved to cultivate marijuana for purposes of research studies.

While the DEA did not commit to process, a time frame or maximum number of locations, this is undoubtedly good news for those interested in marijuana studies. There is hope that the DEA will approve marijuana cultivation through institutions other than just universities — perhaps through health systems, or even private enterprises with a long history of cultivating consistent and diverse types of marijuana. Finally, there also appears to be a growing appetite among agricultural states to
conduct hemp research studies, which could serve as a boon for states struggling economically from a decrease in cash crop sales.

**Without A Coherent Federal Policy On Marijuana, Look to States**

The coming months and years will bring more changes to the state and federal landscape with regards to the marijuana industry. Despite the DEA closing the door to unilaterally rescheduling or descheduling marijuana, the U.S. Congress or the next president could step in to modify this bureaucratic prohibition on marijuana in research, commerce and health care. Regardless of any federal action, expect states to expand the scope and sophistication of cannabis regulatory programs. Not far behind, cannabis industry attorneys will continue to navigate the state and federal legal landscape in one of the most fascinating developing practices of law.

— By Bob Morgan, Much Shelist PC

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