

# Report and Recommendations of the Subcommittee on Rescheduling/Descheduling of Cannabis to the Cannabis Advisory Commission

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## 1. Introduction<sup>1</sup>

During its 82nd session, the Nevada Legislature passed Senate Bill 277 (“SB277”). Section 16 of SB277 mandates that the Cannabis Advisory Commission (“CAC”) “conduct a study concerning the potential effects on the [Nevada] cannabis industry . . . if cannabis were to be removed from the list of controlled substances included in Schedule I” in the federal Controlled Substances Act or the Uniform Controlled Substances Act.<sup>2</sup> SB277 also requires an examination of the cannabis laws on a federal and state level and a discussion of the effects on those cannabis<sup>3</sup> laws if cannabis were to be removed from the list of controlled substances included in Schedule I in the federal Controlled Substances Act or the Uniform Controlled Substances Act.<sup>4</sup>

The bill further requires recommendations from the CAC concerning “changes to the manner in which cannabis is regulated and taxed in [Nevada] that may be necessary to ensure the continued growth and success of the cannabis industry.”<sup>5</sup> SB277 mandates the CAC to report its findings on or before March 1, 2024.<sup>6</sup> The Chair of the CAC and Executive Director of the Cannabis Compliance Board (“CCB”) created a five member Subcommittee on Rescheduling/Descheduling (“Subcommittee”) to conduct the study, prepare the report, and make recommendations to the CAC as mandated by SB277.

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<sup>1</sup> This report reflects the collective efforts of the Subcommittee as a whole. All Subcommittee members participated in the research and/or drafting of this report. The opinions and recommendations in this report do not constitute legal advice nor do they reflect the opinions or recommendations of any elected official, law firm, or local government.

<sup>2</sup> S.B. 277, Sec. 16, 2023 Leg., 82nd Sess. (Nv. 2023).

<sup>3</sup> The terms “cannabis” and “marijuana” are used interchangeably throughout this report but are intended to be synonymous. At times, we use “marijuana” because federal and state laws still use this word, but we acknowledge that spelling variations of this word carry negative connotations.

<sup>4</sup> S.B. 277, Sec. 16, 2023 Leg., 82nd Sess. (Nv. 2023).

<sup>5</sup> S.B. 277, Sec. 16, 2023 Leg., 82nd Sess. (Nv. 2023).

<sup>6</sup> S.B. 277, Sec. 16, 2023 Leg., 82nd Sess. (Nv. 2023).

The Subcommittee conducted seven public hearings wherein the Subcommittee discussed SB277 with the bill sponsor, Senator Dallas Harris, and other topics with subject matter experts, including but not limited to Howard Sklamberg, a former Deputy Commissioner of the Food and Drug Administration (“FDA”), Shane Pennington, an attorney and partner at Porterwright LLP, and Gillian Schauer, Ph.D., Executive Director of the Cannabis Regulators Association, also known as (“CANNRA”),<sup>7</sup> in addition to conducting independent research to meet the mandates of SB277 prior to the March 1, 2024 deadline.

Due to time constraints, the Subcommittee focused the study on the following three potential scenarios: a) the administrative rescheduling of cannabis from a Schedule I controlled substance to a Schedule III controlled substance under the federal Controlled Substances Act; b) descheduling cannabis under the federal Controlled Substances Act by Congress; and c) descheduling cannabis from Nevada’s Controlled Substances Act. Additionally, the Subcommittee included a recommendation for further studies on other potential scenarios and effects.

## **2. Rescheduling cannabis from a Schedule I controlled substance to a Schedule III controlled substance under the federal Controlled Substances Act**

### **a. Overview of the federal scheduling process**

There are two procedures by which cannabis can be rescheduled (or descheduled). First, Congress could technically reschedule cannabis of its own volition by introducing and passing legislation. Any such legislation would need to be approved by both houses of Congress and signed by the President of the United States. There are no statutory requirements if Congress were to choose to act legislatively. However, in this politically divisive legislative environment, it is hard to envision Congress taking any such action to reclassify cannabis. In fact, the new Speaker of the House has not previously demonstrated support for the cannabis industry and would be an unlikely champion for rescheduling. Because he will determine the legislative agenda for the majority, it is unlikely that Congress will consider any marijuana-related bills in the near term.

Second, marijuana can be rescheduled through an administrative process. This process can be initiated by any person through a petition, and the procedure is managed by the executive branch, namely the U.S. Food and Drug Administration (“FDA”), the U.S. Department of Health and Human Services (“HHS”), the Drug Enforcement Administration (“DEA”), and the U.S. Department of Justice (“DOJ”).

There are multiple steps in the administrative drug-scheduling process:

First, any person can petition the DEA to reschedule a drug. On September 6, 2022, President Biden initiated such an administrative scheduling review.

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<sup>7</sup> The Subcommittee would like to thank all guest speakers for their contributions. The Subcommittee would also like to thank the following subject matter experts who were consulted during the study, including Ian Stewart, an attorney and partner at Wilson Elser Moskowitz Edelman & Dicker LLP; Mark Bolton, Head of Global Public Policy and Senior Legal Counsel for Jazz Pharmaceuticals; and Rachel Gillette, an attorney and partner at Holland & Hart.

The second phase of the administrative process is for the DEA to request a scientific and medical evaluation and a scheduling recommendation from FDA/HHS. That step concluded on August 30, 2023,<sup>8</sup> with Bloomberg reporting that the HHS recommended to the DEA that marijuana be rescheduled as a Schedule III controlled substance.

The next step is for the DEA to complete its own scheduling evaluation and publish a proposed rule in the Federal Register specifying how it intends to act on the scheduling petition.<sup>9</sup> That process is currently underway, and it is widely expected that the DEA will announce its decision in the early part of 2024. The public then has 60 days to submit comments on the proposed rule, and “interested parties” are entitled to request a hearing before an administrative law judge, submit evidence, and raise objections to the proposed rule. Once the public participation period is complete, the DEA will publish a final rule in the Federal Register, resolving any issues that arose during the hearing process and announcing its final decision related to the substance’s appropriate scheduling placement under the Controlled Substances Act (“CSA”).<sup>10</sup>

Anyone “adversely affected” by the DEA’s final decision has 30 days to seek judicial review in the U.S. Court of Appeals for the District of Columbia Circuit or for the circuit in which their principal place of business resides. It is anticipated that many people will file public comments and that those in opposition to the policy change may file lawsuits to attempt to enjoin the action.<sup>11</sup>

## **b. Potential effects on Nevada cannabis industry**

### **(1) Banking**

Rescheduling marijuana, either administratively or legislatively, will likely have no effect on access to banking in the state of Nevada or elsewhere. The reasons that large banks continue to refuse to provide traditional banking services to the cannabis industry is because the sale of cannabis is a violation of the CSA and a federal crime, given marijuana’s placement on the list of controlled substances. That calculus will likely not change by moving marijuana from Schedule I to Schedule III. That is because marijuana will remain a controlled substance and a violation of

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<sup>8</sup> The letter from HHS to the DEA was dated August 29, 2023 and included a report of HHS’s findings and recommendation. Julia Anderson, *Cannabis Rescheduling: HHS Findings and Legal Implications*, The National Law Review (Feb. 5, 2024) <https://www.natlawreview.com/article/cannabis-rescheduling-hhs-findings-and-legal-implications>.

<sup>9</sup> On January 12, 2024, Nevada Attorney General Aaron D. Ford signed on to a letter with eleven (11) other state Attorneys General “encouraging the U.S. Drug Enforcement Agency to reschedule cannabis to Schedule III under the federal Controlled Substances Act.” Lawrence Pacheco, *Attorney General Phil Weiser leads multistate effort in support of federal rescheduling of cannabis*, News from Attorney General Phil Weiser (Jan. 12, 2024), <https://coag.gov/press-releases/weiser-dea-rescheduling-cannabis-1-12-24/>.

<sup>10</sup> The United States is a party to the 1961 Single Convention on Narcotic Drugs, which was amended by the 1971 Protocol, the 1971 on Psychotropic Substances, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“Treaties”). Shane Pennington, et al., *U.S. International Treaty Obligations and Marijuana Rescheduling*, SchedulingReform.org (Feb. 7, 2024) <https://schedulingreform.org/treaty-memo>. The CSA and regulations ensure the United States prevents diversion and abuse of illicit drugs and substances by citizens as obligated by the Treaties. *Id.*

<sup>11</sup> It is also possible that DEA could issue a final order, negating the need for public comment.

the CSA to “traffic” in the drug, even in Schedule III. It is likely that banks will continue to seek a legislative solution like the Secure and Fair Enforcement Regulation (“SAFER”) Banking Act to comfortably serve the state-legal marijuana industry.

The SAFER Banking Act was introduced on September 21, 2023. The bill passed through the U.S. Senate Committee on Banking, Housing, and Urban Affairs by a bipartisan vote of 14-9 on September 27, 2023. Originally branded as the Secure and Fair Enforcement Banking Act (“SAFE”), the new version of the legislation was introduced by Sen. Steve Daines (R-MT) and Sen. Jeff Merkley (D-OR). Sen. Chuck Schumer (D-NY), the Democratic majority leader, has vowed to bring the bill to a floor vote in the full Senate. The legislation gives the treasury secretary one year to publish updated guidance for banks that serve the cannabis industry. The bill also contains revised language on how cannabis-related financial transactions should not be considered “proceeds from an unlawful activity.”

The U.S. House of Representatives most recently passed the Secure and Fair Enforcement (“SAFE”) Banking Act for the fifth time (this time in the defense authorization bill) on September 23, 2021, incorporating language introduced by Rep. Ed Perlmutter (D-CO) in March 2021.<sup>12</sup> The congressman’s bill previously passed the House in April 2021 by a vote of 321-101. House Republican leadership, however, has not signaled that marijuana banking will be a priority in the 118th Congress. The new House Speaker Mike Johnson (R-LA) has not historically been a supporter of marijuana reform,<sup>13</sup> and it is not yet clear that he will be willing to work with key House Republicans like Rep. David Joyce (R-OH) to bring SAFER to the House floor. Therefore, it is probable that the status quo will remain for banking services in the near term.

## **(2) Criminal justice reform**

Rescheduling cannabis from a Schedule I controlled substance to a Schedule III controlled substance within the federal Controlled Substances Act could have some limited implications for criminal justice reform. Because federal criminal penalties for marijuana are tied to weight or quantity and not schedule placement, criminal penalties for marijuana crimes encapsulated in the CSA would not change with rescheduling.<sup>14</sup> However, other residual impacts could include a reduction in cannabis-related arrests, with the potential for a reduction in violent police-citizen encounters and an overall reduction of incarceration and other governmental costs.

The rescheduling of cannabis to a lower schedule would still result in the substance being considered a controlled substance, with distribution to remain a “trafficking” offense.<sup>15</sup> However, the perceived decreased severity of the substantive offense could result in a decrease in cannabis-

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<sup>12</sup> Secure and Fair Enforcement Banking Act of 2021 Act, H.R. 1996, 117th Cong., <https://www.congress.gov/bill/117th-congress/house-bill/1996/text#toc-H600A4C02A3EB430BAD498FEFD45D4CC>.

<sup>13</sup> Chris Roberts, *New US House Speaker Mike Johnson has opposed marijuana reform*, MJBizDaily (Oct. 25, 2023), <https://mjbizdaily.com/new-us-house-speaker-mike-johnson-has-opposed-marijuana-reform/>.

<sup>14</sup> 21 U.S.C. § 841(b)(1)(A)(vii); 21 U.S.C. § 841(b)(1)(B)(vii).

<sup>15</sup> “Under federal law, rescheduling would not affect penalties for trafficking convictions, said Shane Pennington, a D.C. attorney who specializes in cannabis law.” Fenit Nirappli, et al., *Why marijuana rescheduling may not be reform win*, The Washington Post (Nov. 23, 2023) <https://www.washingtonpost.com/health/2023/11/22/marijuana-rescheduling-research-penalties/>.

related arrests. Of course, a decrease in arrests would necessarily result in a decrease in incarceration and related costs. Rescheduling would have no impact on prior criminal records, the ability to access a firearm, the right to vote, and other rights commonly denied to felons.

If Nevada reschedules cannabis to a Schedule III controlled substance to mirror federal rescheduling, this could impact the seizure and forfeiture of illicitly grown, possessed, or manufactured cannabis products, as NRS 453.311 currently provides only for the automatic seizure and forfeiture of Schedule I controlled substances. Schedule III controlled substances may be subject to forfeiture under NRS 179.1156 to 179.1205 but would require a separate civil forfeiture action that would be contingent upon a successful criminal prosecution.

### (3) Insurance

Rescheduling of cannabis from a Schedule I to a Schedule III controlled substance would not automatically result in health insurance carriers covering medical cannabis as a prescription medication for any medical condition or targeted population. This is because cannabis is not an approved drug by the FDA to treat any medical condition and targeted population. “Schedule III drugs require a prescription and their distribution is regulated.”<sup>16</sup>

For a drug to be approved, and thus covered by insurance, an applicant would need to conduct clinical trials and file a petition with the FDA to have a cannabis-based drug approved for a medical condition and targeted population, such as Jazz Pharmaceuticals did with Epidiolex™ to treat Lennox-Gastaut Syndrome, Dravet syndrome, and seizures associated with Tuberous Sclerosis Complex. Unless a cannabis-based drug becomes approved by the FDA for a particular medical condition and targeted population, health insurance carriers are unlikely to cover medical cannabis, even if cannabis is rescheduled on the federal CSA to a Schedule III drug.

However, rescheduling of cannabis from a Schedule I to a Schedule III controlled substance could result in more insurance coverage available to cannabis businesses.<sup>17</sup> Policies offered by admitted insurers typically exclude coverage for cannabis and related activities because cannabis is a Schedule I controlled substance.<sup>18</sup> Generally, the state approves the admitted insurers’ forms and rates.<sup>19</sup> As a result, the admitted insurers offer lower rates and “solid policy terms for standard business risks” than those provided by surplus lines insurers.<sup>20</sup>

Where admitted insurers excluded/avoided insuring cannabis businesses, surplus lines insurers have provided insurance coverage at a higher cost. Surplus lines insurers abide by fewer state regulatory requirements and “retain significant control and flexibility with regard to both the policy forms they use and the rates that they charge.”<sup>21</sup> In California, surplus lines insurers

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<sup>16</sup> Ian Stewart, *Potential Marijuana Status Change Would Shift Industry Risk*, Lexology (Sept. 5, 2023), <https://www.lexology.com/library/detail.aspx?g=2e814fe0-3d90-4d96-8863-0840f13c0d85>.

<sup>17</sup> *Id.*

<sup>18</sup> Francis J. Mootz III & Jason Horst, *Cannabis and Insurance*, 23 Lewis & Clark L. Rev. 893, 898, 919–20 (2019).

<sup>19</sup> *Id.* at 921 (citing *Applications, Forms & Filings*, CAL. DEP’T INS., <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/index.cfm> (last visited Mar. 1, 2019); *Rate Filings*, CAL. DEP’T INS., <http://www.insurance.ca.gov/0250-insurers/0800-rate-filings/> (last visited Mar. 1, 2019)).

<sup>20</sup> *Id.* at 921–22.

<sup>21</sup> *Id.* at 919.

exclusively sold insurance to cannabis businesses until the end of 2017. Beginning in 2018, the then-California Insurance Commissioner encouraged admitted insurers to offer insurance to “introduce competition and stability to the state cannabis insurance market.”<sup>22</sup> This effort resulted in Golden Bear Insurance Company offering as an admitted insurer a policy to cannabis businesses in California with several dozen admitted insurers following suit.<sup>23</sup>

Currently, “[t]here are more than 30 insurance companies and managing general underwriters that write many lines of coverage for the cannabis industry, primarily on a surplus lines basis.”<sup>24</sup> “The market capacity for property, commercial general liability, product liability, commercial auto and workers’ compensation has expanded to the extent that it is now relatively easy for more licensed cannabis operators to find multiple options for good coverage.”<sup>25</sup>

Hesitation on offering insurance coverage by the major insurance carriers still exist primarily because of the Schedule I status of cannabis and the potential reputational harm.<sup>26</sup> Thus, rescheduling of cannabis from the federal CSA to a Schedule III controlled substance may result in more admitted insurers offering insurance policies to cannabis businesses at standard and lower rates than the surplus lines insurers.

#### (4) Research

In 2022, passage of the Medical Marijuana and Cannabidiol Research Expansion Act (“MMCREA”) eased restrictions on researching medical marijuana.<sup>27</sup> Prior to MMCREA’s passage, the DEA only permitted the National Center for Natural Products Research to cultivate cannabis for research.<sup>28</sup> Nonetheless, the rescheduling of cannabis could further facilitate research of medical marijuana and clinical trials of cannabis-based drugs for medical conditions and targeted populations to seek FDA approval.

Rescheduling could result in more interest by pharmaceutical companies to conduct clinical trials on cannabis-based drugs to treat specific medical conditions and targeted populations. However, applicants for approval of cannabis-based drugs would still need to follow the process

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<sup>22</sup> *Id.* at 920 (citing Laura Zaroski, *Resolving the Confusion About “Admitted” and “Non-Admitted” Carriers*, INS. THOUGHT LEADERSHIP (Sept. 24, 2013), <https://www.insurancethoughtleadership.com/regulation-public-policy/resolving-confusion-about-admitted-and-non-admitted-carriers>).

<sup>23</sup> *Id.* (citing Press Release, Cal. Dep’t Ins., First Commercial Insurer to File Cannabis Business Insurance Is Approved by Insurance Commissioner, (Nov. 2, 2017), <http://www.insurance.ca.gov/0400-news/0100-press-releases/archives/release119-17.cfm>); *How to Cover the Cannabis Sector from a Broker Who's Deep in the Weeds*, GOLDEN BEAR (May 18, 2018), <https://www.goldenbear.com/news/how-to-cover-the-cannabis-sector-from-a-broker-whos-deep-in-the-weeds/>).

<sup>24</sup> Stewart, *supra* n. 13.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Aram Ordubegian, et al., *New Law Eases Federal Restrictions on Medical Marijuana Research and Cultivation*, NATIONAL LAW REVIEW (Dec. 7, 2022), <https://www.natlawreview.com/article/new-law-eases-federal-restrictions-medical-marijuana-research-and-cultivation>.

<sup>28</sup> Abbey F. Carr, et al., *The Medical Marijuana and Cannabidiol Research Expansion Act*, PHARMACY TIMES (Oct. 23, 2023), <https://www.pharmacytimes.com/view/the-medical-marijuana-and-cannabidiol-research-expansion-act>.

to obtain FDA approval if those applicants wanted to sell such products in pharmacies.<sup>29</sup> Universities could also engage in more cannabis research without fear of losing federal funding from the U.S. Department of Education and federal student aid.<sup>30</sup>

## (5) Taxes

Rescheduling marijuana to a Schedule III from a Schedule I controlled substance would end Internal Revenue Code (“IRC”) Section 280E’s effect on the cannabis industry, allowing state-regulated companies to “deduct, for federal income tax purposes, all their ordinary and necessary business expenses,”<sup>31</sup> the same as any other company would do. If rescheduled, Nevada cannabis establishments could deduct the following:

- (1) Advertising/marketing,
- (2) Rent,
- (3) Utility costs (such as electricity, internet, and telephone),
- (4) Payroll,
- (5) Payments to contractors,
- (6) Travel,
- (7) Insurance,
- (8) Equipment maintenance and repair,
- (9) Business mileage, and
- (10) Other business expenses.

However, the non-applicability of IRC Section 280E would not likely be retroactive. Thus, past taxes paid under IRC Section 280E are unlikely to be refunded, and unpaid past taxes due under IRC Section 280E would probably still be owed. If rescheduling is completed sometime in 2024, it is possible that IRC Section 280E taxation on the marijuana industry could be retroactive to January 1, 2024. A cannabis business that has a net operating loss from prior years due to IRC Section 280E may be able to carry it forward to a year where cannabis is reclassified to Schedule III, but the Internal Revenue Service (“IRS”) will need to provide guidance on this.<sup>32</sup>

Additionally, relief from Section 280E would allow legal cannabis businesses to compete with the illicit market, which pays zero taxes.<sup>33</sup> Cannabis businesses may need to restructure their tax posture<sup>34</sup> and should review accounting methods to evaluate whether changes should be made and if accounting method changes will need to be filed with the IRS. Cannabis businesses with

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<sup>29</sup> John Hudak, et al., Clearing up misconceptions about marijuana rescheduling: What is means for existing state systems, Brookings (May 27, 2016), <https://www.brookings.edu/articles/clearing-up-misconceptions-about-marijuana-rescheduling-what-it-means-for-existing-state-systems/>.

<sup>30</sup> Barbara Lee, Ph.D., et al., *General Counsel’s Corner: Cannabis and Research on Campus*, JD Supra (July 12, 2022) <https://www.jdsupra.com/legalnews/general-counsel-s-corner-cannabis-and-1133249/>.

<sup>31</sup> 26 U.S.C. § 280E.

<sup>32</sup> Thomas W. Ostrander, *Tax Implications of Reclassifying Cannabis as a Schedule 3 Controlled Substance*, Lexology (Sept. 21, 2023), <https://www.lexology.com/library/detail.aspx?g=36d7635f-5330-42ac-b07d-bbd0dec7cbce>.

<sup>33</sup> Layke Martin, *What federal rescheduling would mean for Nevada’s cannabis businesses*, The Nevada Independent (Sept. 29, 2023), <https://thenevadaindependent.com/article/what-federal-rescheduling-would-mean-for-nevadas-cannabis-businesses>.

<sup>34</sup> Marc A. Claybon, et al., *Rescheduling marijuana could provide 280E tax relief*, Crowe LLP (Sept. 14, 2023), <https://www.crowe.com/insights/tax-news-highlights/rescheduling-marijuana-could-provide-280e-tax-relief>.



complex legal entity structures due to IRC Section 280E could simplify these structures. However, cannabis business may need to plan for increased tax compliance costs as they transition to being able to claim deductions and credits for business expenses.

Rescheduling could have additional benefits for publicly traded cannabis companies and their shareholders. Cannabis businesses could have less of a tax burden, resulting in extra cash flow every year for growth, research, and development.<sup>35</sup> Cannabis businesses may gain new sources of capital and new lenders. However, with the rescheduling of cannabis, cannabis may be subject to federal cannabis excise taxes.<sup>36</sup> Cannabis businesses will need to incorporate federal cannabis excise taxes into their point-of-sale systems. Cannabis businesses may also have the burden of reporting the federal cannabis excise taxes to the IRS. Federal cannabis excise taxes could be applied differently than state cannabis excise taxes, causing confusion for both cannabis businesses and consumers. Applying both federal and state cannabis excise taxes could result in higher prices for cannabis, which could reduce Nevada cannabis sales and result in a competitive advantage to illicit sales. The state of Nevada therefore needs to decide if the cannabis excise tax rates should remain constant or be reduced in the advent of federal taxation. To help reduce the rising prices for cannabis if both a federal and state excise tax was imposed on cannabis, Nevada could consider including medical cannabis in the definition of “medicine” in NRS 639.007 and NRS 372.283. Medical cannabis is already exempt from retail cannabis tax. In Nevada, medicine is exempt from sales tax; thus, if the definition of “medicine” includes cannabis, cannabis would also be exempt from Nevada sales tax.

**c. Federal laws effected by rescheduling from the federal CSA**

- (1) 21 U.S.C. § 801.
- (2) 26 U.S.C. § 280E.

**d. Nevada laws effected by rescheduling from the federal CSA**

- (1) Chapter 179 of NRS, specifically NRS 179.1156 to 179.1205.
- (2) Chapter 453 of NRS, specifically NRS 453.311, NRS 453.336, NRS 453.339, NRS 453.3393, NRS 453.401, NRS 453.554, NRS 453.560, and NRS 453.566.<sup>37</sup>
- (3) Chapters 678C and 678D of NRS, specifically NRS 678C.300 and NRS 678D.300.

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<sup>35</sup> Kris Krane, *HHS Call to Reschedule Marijuana Is A Big Deal: Here's Why*, Forbes (Aug. 31, 2023), <https://www.forbes.com/sites/kriskrane/2023/08/31/hhs-call-to-reSchedule-marijuana-is-a-big-deal-heres-why/?sh=67a321352a4a>.

<sup>36</sup> Ulrik Boesen, *New Tax in Town? Federal Proposal to Deschedule and Tax Marijuana*, Tax Foundation (Jul. 14, 2021), <https://taxfoundation.org/blog/schumer-marijuana-bill/>.

<sup>37</sup> If Nevada followed and rescheduled cannabis to a Schedule III controlled substance (NRS 453.2182), Nevada could require sales of medical marijuana through a licensed pharmacy. (NRS 453.226); Jen Christensen, *Georgia will be first US state where pharmacies sell medical cannabis*, CNN (Oct. 20, 2023), <https://www.cnn.com/2023/10/20/health/georgia-pharmacies-medical-marijuana/index.html>.



**e. Recommendations if cannabis is rescheduled from the federal CSA**

- (1) Consider amending Chapter 453 of NRS to mandate rescheduling of “marijuana,” “tetrahydrocannabinols,” and “CBD” from Nevada’s Controlled Substances Act.
- (2) Consider amending Chapter 453 of NRS to reduce criminal offenses and penalties for marijuana and/or cannabis related offenses.
- (3) Consider legislation to expunge criminal records for arrests and/or convictions related to certain cannabis offenses in Nevada, but also consider impact on social equity applicants’ ability to provide proof of a cannabis related conviction.
- (4) Consider legislation to modify sentences of those currently incarcerated for certain cannabis arrests/offenses in Nevada.
- (5) Consider amending the definition of “medicine” in NRS 639.007 and NRS 372.283 to include medical cannabis to exempt medical cannabis sales from sales tax.
- (6) Consider reducing Nevada’s cannabis excise tax rate if the federal government imposes a federal cannabis excise tax.
- (7) Consider additional studies on other potential scenarios and effects if cannabis rescheduled from the federal CSA.

**3. Descheduling cannabis from the federal CSA by Congress**

**a. Potential effects on Nevada cannabis industry**

**(1) Banking**

Federal descheduling of cannabis would immediately fix the lack of banking, payment processing, insurance, and other associated problems. The trafficking of marijuana products that are “unapproved” drugs by the FDA currently remains a crime under federal law. Under the strict letter of the law, providing financial services (including banking or payment processing) to marijuana-related businesses is a violation of the CSA,<sup>38</sup> federal money laundering statutes,<sup>39</sup> conspiracy statutes,<sup>40</sup> and aiding and abetting<sup>41</sup> statutes. Thus, the DOJ could arguably charge a bank with facilitating financial transactions that involve proceeds from marijuana-related businesses. While some banks and credit unions are currently participating in the state-legal marijuana industry, the national banks have stayed decidedly on the sidelines, determining that the

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<sup>38</sup> The Controlled Substances Act (“CSA”), 21 U.S.C. § 801 et seq., is the federal law that regulates “controlled substances.” Controlled substances are drugs for which the federal government has determined that the unregulated creation, distribution, sale, and use pose a threat or danger to public health and/or safety.

<sup>39</sup> The DOJ could charge a bank with money laundering under 18 U.S.C. § 1956 or for engaging in monetary transactions in property derived from specified unlawful activity under 18 U.S.C. § 1957.

<sup>40</sup> 21 U.S.C. § 846 makes unlawful any conspiracy to distribute or sell marijuana in violation of the CSA.

<sup>41</sup> One who aids or abets an offense that violates a substantive provision of criminal law violates 18 U.S.C. § 2(a), which states that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”

risks are too great. That calculus would immediately change upon federal legalization. Of course, the prospect of federal legalization in the near term is highly unlikely.

## **(2) Criminal justice reform**

Descheduling cannabis from the federal Controlled Substances Act could have massive implications on the criminal justice system at the federal level with the most prominent including: (1) cannabis no longer being a controlled substance, (2) a possible reduction in people incarcerated for cannabis related convictions, (3) possible reductions in arrests, criminal records, and convicted felons, and (4) a possible reduction in police violence. These implications are potentially significant for the country because of the decrease in costs and the societal impact of fewer felony convictions. Removing cannabis from the list of controlled substances could reduce legal and incarceration costs for these crimes. It could also serve to reduce the current prison population, in turn reducing even more costs, by releasing offenders of cannabis related convictions and no longer adding to this population.

Because cannabis would no longer be a controlled substance, there would be fewer police interactions through cannabis arrests. Less police interaction, overall, could result in a decrease in police violence, especially for black Americans that have been disproportionately impacted by both police violence and the history of cannabis prohibition. Further, drug testing for cannabis for employment purposes might no longer be required. This could result in an increase in job opportunities for those who have had those opportunities restricted in the past. The possible increased accessibility to jobs may also reduce crime.

If Nevada descheduled cannabis to mirror federal descheduling, this could impact the seizure and forfeiture of illicitly grown, possessed, or manufactured cannabis products, as NRS 453.311 currently provides only for the automatic seizure and forfeiture of Schedule I drugs. A separate civil forfeiture action would need to be filed that would be contingent upon a successful criminal prosecution.

## **(3) Insurance**

Like rescheduling, descheduling of cannabis would not automatically result in health insurance coverage to medical card patients for medical marijuana. Sponsors of cannabis-based drugs would need to follow the process to obtain FDA approval to treat medical conditions and targeted populations.

Descheduling cannabis from the CSA could result in more admitted insurers offering standard policies and rates to cannabis businesses. This, in turn, could result in more affordable and comprehensive insurance policies for cannabis businesses.

## **(4) Research**

Descheduling, like rescheduling, would further facilitate and encourage more research of cannabis and cannabis-based drugs, which could result in the development of more FDA-approved cannabis-based drugs to treat medical conditions and targeted populations.

## **(5) Taxes**

Descheduling marijuana from the federal CSA would have the same effect on taxes as rescheduling. Again, cannabis businesses could deduct all ordinary and necessary business expenses. However, the federal government could also include an excise tax on the sale of cannabis.<sup>42</sup> Nevada cannabis sales from licensed cannabis businesses would still be subject to the excise tax under NRS 372A.290 and sales tax under NRS 372.105; however, once descheduled and if interstate commerce is permitted, Nevada would not have any tax law in place to capture tax on those sales. Nevada tax law, specifically Chapter 372A of the Nevada Revised Statutes, does not currently capture out-of-state sales into Nevada. This could result in an unfair advantage to out-of-state cannabis businesses over in-state cannabis businesses. Out-of-state cannabis businesses would have a lower sales price since tax would not be included.

**b. Federal laws effected by descheduling from federal CSA**

- (1) 21 U.S.C. § 801.
- (2) 26 U.S.C. § 280E.
- (3) 18 U.S.C. § 922(g).

**c. Nevada laws effected by descheduling from federal CSA**

- (1) Chapter 179 of NRS, specifically NRS 179.1156 to 179.1205.
- (2) Chapter 453 of NRS, specifically NRS 453.311, NRS 453.336, NRS 453.339, NRS 453.3393, NRS 453.401, NRS 453.554, NRS 453.560, and NRS 453.566.<sup>43</sup>
- (3) Chapters 678C and 678D of NRS, specifically NRS 678C.300 and NRS 678D.300.

**d. Recommendations if cannabis is descheduled from federal CSA**

- (1) Consider amending Chapter 453 of NRS to mandate descheduling of “marijuana,” “tetrahydrocannabinols,” and “CBD” from Nevada’s Controlled Substances Act.
- (2) Consider amending Chapter 453 of NRS to remove references to marijuana generally and/or marijuana and cannabis related offenses, specifically NRS 453.311, NRS 453.033, NRS 453.042, NRS 453.0825, NRS 453.096, NRS 453.139, NRS 453.336, NRS 453.339, NRS 453.3393, NRS 453.401, and NRS 453.554.
- (3) Consider amending Title 56 of NRS to remove references to Chapter 453 of NRS.
- (4) Consider legislation to expunge criminal records for arrests and/or convictions related to cannabis offenses in Nevada, but also consider impact on social equity applicants’ ability to provide proof of a cannabis

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<sup>42</sup> Boesen, *supra* n. 33.

<sup>43</sup> If Nevada followed and rescheduled cannabis to a Schedule III controlled substance (NRS 453.2182), Nevada could require sales of medical marijuana through a licensed pharmacy. (NRS 453.226); Jen Christensen, *Georgia will be first US state where pharmacies sell medical cannabis*, CNN (Oct. 20, 2023), <https://www.cnn.com/2023/10/20/health/georgia-pharmacies-medical-marijuana/index.html>.

- related conviction.
- (5) Consider legislation to modify sentences of those currently incarcerated for cannabis arrests/offenses in Nevada.
  - (6) Consider amending the definition of medicine in NRS 639.007 and NRS 372.283 to include medical cannabis to exempt medical cannabis sales from sales tax.
  - (7) Consider amending NRS 372A.290 to include:
    1. The imposition of the excise tax when an unlicensed person unlawfully imports, sells, exchanges, barter, supplies, prescribes, dispenses, gives away or administers unregulated and unsanctioned cannabis, and
    2. The imposition of the excise tax when cannabis is sold by an out of state business into Nevada.
  - (8) Consider reducing Nevada’s cannabis excise tax rate if the federal government imposes a federal cannabis excise tax.
  - (9) Consider impacts on the continued need for a distance separation requirement between a cannabis establishment and a nonrestricted gaming license establishment in NRS 678B.210 and NRS 678B.250.
  - (10) Consider additional studies on other potential scenarios and effects if cannabis is descheduled from federal CSA.

#### **4. Descheduling cannabis as a Schedule I controlled substance from Nevada’s Controlled Substances Act**

##### **a. Overview of the Nevada scheduling process**

Nevada Revised Statute 453.146(1) grants the Nevada Board of Pharmacy (the “Board”) the authority to schedule controlled substances. The Board schedules the controlled substances by regulation, which the Board has a duty to review on an annual basis and “maintain a list of current schedules.” NRS 453.211. The Board considers NRS 453.166-206 to determine where to place the controlled substance.

Under NRS 453.2182, unless the Board or an interested party objects, the Board has a duty to designate, reschedule or delete a controlled substance on Nevada’s Controlled Substance Act “after the expiration of 60 days from publication in the Federal Register of a final order . . . or from the date of issuance of an order of temporary scheduling under Section 508 of the federal Dangerous Drug Diversion Control Act of 1984, 21 U.S.C. § 811(h) . . . .” NRS 453.2182.

The Board may also reschedule a Schedule I controlled substance by extraordinary regulation “if the Board finds that scheduling of the substance by extraordinary regulation is necessary to avoid an imminent hazard to the public safety and the substance is not in any other schedule and no exemption or approval is in effect for the substance under. . .” federal law. NRS 453.2184.

The Board currently schedules “marijuana,” “tetrahydrocannabinols,” and “CBD” (exceeding 0.1 percent residual THC by weight) as Schedule I controlled substances. NAC 435.510(4), (9)-(10). However, the Eighth Judicial District Court has ordered the descheduling of marijuana from Nevada’s Controlled Substances Act. At the time of this study and report, the Eighth Judicial District Court’s order descheduling cannabis in Case No. A-22-851232-W was stayed pending a decision by the Nevada Supreme Court in Case Nos. 85756 and 86128.

## **b. Potential effects on Nevada cannabis industry**

### **(1) Banking**

Banking would not change if the state of Nevada were to deschedule cannabis. That is because banking marijuana businesses is a violation of the federal CSA (see above).

### **(2) Criminal justice reform**

Descheduling cannabis from Nevada’s Controlled Substances Act could have massive implications on the criminal justice system at the state level with the most prominent including: (1) cannabis no longer being a controlled substance, (2) a possible reduction in people incarcerated for cannabis related convictions at the state level, (3) possible reductions in arrests, criminal records, and convicted felons, (4) a possible reduction in police violence, and (5) an example for other states on descheduling. Drug testing for cannabis for employment purposes might no longer be required. This could result in an increase in job opportunities for those who have had those opportunities restricted in the past. The possible increased accessibility to jobs may reduce crime in Nevada.

Descheduling could also impact the seizure and forfeiture of illicitly grown, possessed, or manufactured cannabis products, as NRS 453.311 currently provides only for the automatic seizure and forfeiture of Schedule I drugs. A separate civil forfeiture action would need to be filed that would be contingent upon a successful criminal prosecution.

### **(3) Insurance**

Health insurance carriers will likely continue to not cover medical marijuana because this would need to change on a federal level. This is because prescription drugs made from cannabis would need to be FDA-approved for health insurance to provide coverage.

Like health insurance, insurance coverage for cannabis businesses to insure cannabis and/or cannabis-related activities would require change on a federal level. However, descheduling of cannabis from Nevada’s Controlled Substances Act could result in more admitted insurers offering insurance in Nevada to cannabis businesses.

### **(4) Research**

Research would not significantly expand if Nevada descheduled cannabis from Nevada’s Controlled Substances Act unless more changes occurred on a federal level.

## **(5) Taxes**

If cannabis is descheduled in Nevada, cannabis regulation will likely bear resemblance to the regulation of alcohol.<sup>44</sup> However, this will have no impact on Nevada state taxes since excise and sales tax is already imposed on the sale of cannabis like alcohol.

### **c. Federal laws effected by descheduling from Nevada’s Controlled Substances Act**

- (1) 21 U.S.C. § 801.

### **d. Nevada laws effected by descheduling from Nevada’s Controlled Substances Act**

- (1) Chapter 179 of NRS, specifically NRS 179.1156 to 179.1205.
- (2) NRS 372 and NRS 372A will continue to apply, but Nevada may see an increase in unlawful sales, which could have the effect of reducing legal sales. The reduction of legal sales could decrease the revenue collected from tax, since NRS 372A does not capture taxes on illegal sales.
- (3) Chapter 453 of NRS, specifically NRS 453.311, NRS 453.336, NRS 453.339, NRS 453.3393, NRS 453.401, NRS 453.554, NRS 453.560, and NRS 453.566.
- (4) Chapters 678C and 678D of NRS, specifically NRS 678C.300 and NRS 678D.300.

### **e. Recommendations if cannabis is descheduled from Nevada’s Controlled Substances Act**

- (1) Consider amending Chapter 453 of NRS to remove references to marijuana generally and/or marijuana and cannabis related offenses, specifically NRS 453.033, NRS 453.042, NRS 453.0825, NRS 453.096, NRS 453.139, NRS 453.311, NRS 453.336, NRS 453.339, NRS 453.3393, NRS 453.401, and NRS 453.554.
- (2) Consider amending Title 56 of NRS to remove references to Chapter 453 of the Nevada Revised Statutes.
- (3) Consider legislation to expunge criminal records for arrests and/or convictions related to cannabis offenses in Nevada, but also consider impact on social equity applicants’ ability to provide proof of a cannabis related arrest/conviction in Nevada.
- (4) Consider legislation to modify sentences of those currently incarcerated for cannabis offenses in Nevada.
- (5) Consider amending the definition of medicine in NRS 639.007 and NRS

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<sup>44</sup> Whitt Steineker, et al., *To Reschedule or to Deschedule: That Is the (Marijuana) Question*, National Law Review (Sept. 20, 2023), <https://www.natlawreview.com/article/to-reSchedule-or-to-deSchedule-marijuana-question>.

372.283 to include medical cannabis to exempt medical cannabis sales from sales tax.

- (6) Consider amending NRS 372A.290 to include an excise tax when an unlicensed person unlawfully imports, sells, exchanges, barter, supplies, prescribes, dispenses, gives away, or administers unregulated and unsanctioned cannabis.
- (7) Consider conducting a study on the benefits and risks of a potency tax because of Cannabis Potency Tax Feasibility Study: A Report for the Washington State Liquor & Cannabis Board.
- (8) Consider additional studies on other potential scenarios and effects if cannabis is descheduled from Nevada's Controlled Substances Act.

## **5. Conclusion**

Descheduling cannabis from the federal CSA by Congress would have the greatest effect on Nevada's cannabis industry. Rescheduling cannabis from the federal CSA or descheduling cannabis from Nevada's Controlled Substances Act would have less of an effect. Rescheduling cannabis from the federal CSA would allow for federal tax benefits to cannabis businesses not currently permitted nor available if cannabis is descheduled from Nevada's Controlled Substances Act. Rescheduling cannabis from the federal CSA could result in more admitted insurers, expand research, and facilitate increasingly criminal justice reform. Descheduling from Nevada's Controlled Substances Act could result in more admitted insurers and criminal justice reform.