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The Federal Status of Marijuana and the Expanding Policy Gap with States

Marijuana is a psychoactive drug that generally consists of leaves and flowers of the cannabis sativa plant and is a Schedule I controlled substance under the federal Controlled Substances Act (CSA; P.L. 91-513). Because of that status, marijuana is strictly regulated by federal authorities. Despite such regulation, over the last several decades, most states and territories have deviated from a comprehensive prohibition of marijuana and have laws and policies allowing for some cultivation, sale, distribution, and possession of marijuana.

Marijuana is the most commonly used illicit drug in the United States. According to data from the National Survey on Drug Use and Health, in 2020 an estimated 32.8 million individuals aged 12 or older used marijuana in the past month. The percentage of past-month users gradually increased from 2008 (6.1%) to 2020 (11.8%)—a time frame during which a majority of states legalized marijuana in some form. The rate of past-month marijuana use among youth (aged 12-17) during this time period, however, declined—from 7.0% in 2008 to 6.5% in 2017 and 2018—before rising to 7.4% in 2019 and then dropping to 5.9% in 2020, while adult (aged 18 and older) use steadily increased—from 6.3% in 2008 to 12.4% in 2020.

Marijuana Control Under Federal Law

Due to its status as a Schedule I substance, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana except for federal government-approved research studies. While the CSA definition of marijuana changed in 2018, which resulted in the removal of hemp (cannabis containing no more than a 0.3% concentration of delta-9-tetrahydrocannabinol [delta-9-THC]—the psychoactive component) from the definition of marijuana, the status of marijuana as a Schedule I substance has remained unchanged for more than 50 years. For a discussion of the history of marijuana control and a broader discussion of current issues, see CRS Report R44782, *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*.

Marijuana use may subject an individual to a number of consequences under federal law in addition to the penalties for a conviction of a marijuana-related offense. Consequences for marijuana use can include, but are not limited to, the inability to purchase and possess a firearm and being ineligible for federal housing, certain visas, and federal employment and military service.

State Cannabis Law and Policy Trends

It is now increasingly common for states to have laws and policies allowing for medical and/or recreational use of marijuana—activities that violate the CSA. Evolving state-

level positions on marijuana include decriminalization measures as well.

Medical Marijuana in States

In 1996, California became the first state to amend its drug laws to allow for the medicinal use of marijuana. As of December 1, 2022, 37 states, the District of Columbia (DC), Puerto Rico, Guam, and the U.S. Virgin Islands have comprehensive laws and policies allowing for the medicinal use of marijuana. Ten additional states allow for “limited-access medical cannabis,” which refers to low-THC cannabis or cannabidiol (CBD) oil. Idaho, Kansas, Nebraska, and American Samoa do not allow for the use of medical marijuana or low-THC cannabis.

The CSA does not recognize the distinction states are making between the medical and recreational use of marijuana. Marijuana’s continued classification as a Schedule I controlled substance reflects a finding from the Drug Enforcement Administration (DEA) and Food and Drug Administration (FDA) that marijuana has a high potential for abuse and no currently accepted medical use in the United States.

Recreational Marijuana in States

Recreational marijuana legalization measures remove all state-imposed penalties for specified activities involving marijuana. As of December 1, 2022, 21 states, DC, Guam, and the Northern Mariana Islands have enacted measures to allow for the recreational use of marijuana. State recreational marijuana initiatives have legalized the possession of specific quantities of marijuana by individuals aged 21 and over, and (with the exception of DC and the states that only recently enacted these measures) have set up state-administered regulatory schemes for the sale of marijuana.

Decriminalization

Since marijuana became a Schedule I controlled substance, many states and municipalities have decriminalized marijuana. Marijuana *decriminalization* differs markedly from *legalization*. A state or municipality decriminalizes conduct by removing the accompanying criminal penalties or by lowering them (e.g., making it a low-level misdemeanor with no possibility of jail time); however, civil penalties may remain (e.g., someone possessing marijuana can be issued a ticket with a fine).

Marijuana as Medicine and Federal Involvement

Under federal law, a drug must be approved by FDA before it may be marketed in the United States. To date, FDA has not approved a marketing application for marijuana for the

treatment of any condition; however, FDA has approved one marijuana-derived drug and three marijuana-related drugs that are available by prescription. Epidiolex, which contains CBD as its active ingredient, is approved for the treatment of seizures associated with two rare and severe forms of epilepsy. It is the first (and only) FDA-approved drug containing a purified drug substance derived from marijuana. Following its approval, DEA issued an order placing FDA-approved drugs that contain cannabis-derived CBD with no more than 0.1% THC on Schedule V of the CSA.

FDA has also approved two drugs containing synthetic THC (i.e., Marinol [and its generic versions] and Syndros) and one drug containing a synthetic substance that is structurally similar to THC but not present in marijuana (i.e., Cesamet). These products are used to treat nausea and vomiting caused by chemotherapy as well as loss of appetite for individuals with human immunodeficiency virus (HIV). Additional drugs containing marijuana-derived THC and CBD are reportedly being developed.

Federal Regulation of Marijuana Research

The process for getting approval to conduct research with marijuana involves both DEA and FDA. Before conducting research with marijuana, an investigator must obtain a DEA registration, FDA review of an investigational new drug application (IND) or research protocol, and marijuana from a DEA-registered source.

The Medical Marijuana and Cannabidiol Research Expansion Act (P.L. 117-215), among other things, imposes new requirements on DEA to expedite registration for marijuana researchers and requires the Department of Health and Human Services to report on the therapeutic potential of marijuana for various conditions such as epilepsy, as well as on marijuana's effects on adolescent brains and on users' ability to operate a motor vehicle.

Federal Response to State Divergence

Although state laws do not affect the status of marijuana under federal law or the ability of federal law enforcement to enforce it, state legalization initiatives have spurred a number of questions regarding potential implications for federal laws and policies, including federal drug regulation and enforcement and banking for marijuana businesses. Thus far, the federal response to states' legalizing or decriminalizing marijuana largely has been to allow states to implement their own laws. The Department of Justice (DOJ) has nonetheless reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of states' marijuana laws. Federal law enforcement has generally focused its efforts on criminal networks involved in the illicit marijuana trade.

Federal banking regulators have yet to issue any formal guidance in response to state and local marijuana legalization efforts; however, in February 2014 the Treasury Department's Financial Crimes Enforcement Network issued guidance on financial institutions' suspicious activity report requirements when serving marijuana businesses. For broader discussion of this issue,

see CRS In Focus IF11373, *Financial Services for Marijuana Businesses*.

Limiting Federal Enforcement in States: Directives through Federal Appropriations

In each fiscal year since FY2015, Congress has included provisions in appropriations acts that prohibit DOJ from using appropriated funds to prevent certain states, territories, and DC from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana" (for the most recent provision, see the Consolidated Appropriations Act, 2022, P.L. 117-103). On its face, the appropriations rider bars DOJ from taking legal action against the states directly in order to prevent them from promulgating or enforcing medical marijuana laws. In addition, federal courts have interpreted the rider to prohibit certain federal prosecutions of private individuals or organizations that produce, distribute, or possess marijuana in accordance with state medical marijuana laws.

Select Issues for Congress

Given the current marijuana law and policy gap between the federal government and most states, there are a number of issues that Congress may address. These include, but are not limited to, marijuana's designation as a Schedule I controlled substance, financial services for marijuana businesses, federal tax issues for these businesses, oversight of federal law enforcement and its role in enforcing federal marijuana laws, and states' implementation of marijuana laws. Congress has raised these issues in hearings, through appropriations, and in bills introduced over the last decade.

In addressing state-level legalization efforts, Congress could take one of several routes. It could elect to take no action, thereby upholding the federal government's current marijuana policy and enforcement priorities and allowing states to carry on with implementation of recreational and medical marijuana laws. Or, it may decide that the CSA must be enforced and push for federal law enforcement to dismantle state medical and recreational marijuana programs. It could continue to take smaller steps, such as enacting appropriations provisions that temporarily restrict DOJ's ability to expend funds to enforce federal marijuana laws in states with medical marijuana programs, or altering the CSA definition of marijuana. Congress may also decide to eliminate the gap altogether by de-controlling marijuana under the CSA and repealing associated criminal provisions. This option would largely eliminate the gap with states that have authorized recreational and comprehensive medical marijuana. Whether Congress decides to address the inconsistencies between state and federal treatment or not, the states continue to act on marijuana legalization, further expanding the policy gap. No state has reversed its legalization of either medical or recreational marijuana at this time.

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