# Economic Opportunities For Cannabis Businesses May Expand Following Rescheduling

## Cannabis Business Legal News

By Darren Grady and Jack Hurst on June 13, 2024

The U.S. Drug Enforcement Administration's (DEA) recent recommendation to reschedule marijuana (cannabis) from Schedule I of the Controlled Substances Act (CSA) to Schedule III of the CSA has received praise and criticism on both sides of the aisle and among those in between. The strong likelihood that the DEA's recommendation will become reality prompts us to consider what is down the pike as a result of this rescheduling, especially for state-legal cannabis businesses. Of particular interest will be the impact of rescheduling on: (1) the federal tax code and the ability to deduct ordinary and necessary business-related expenses, (2) access to traditional banking services, (3) and the opening of interstate commerce. Each ramification is discussed in turn below.

To begin, it is expected that cannabis rescheduling will unbridle state-legal cannabis businesses from their current tax restrictions, namely, Section 280E. Section 280E of the Internal Revenue Code (IRC) prohibits businesses dealing in Schedule I substances (as cannabis currently is) from claiming business-related tax deductions. Consequently, state-legal cannabis businesses tend to out-pay non-cannabis businesses in taxes (in fact, by over $1.8 billion in 2022) and unfairly struggle to turn a profit. Well, no more. As the DEA's May 2024 Notice of Proposed Rulemaking makes clear, upon successful rescheduling, state-legal cannabis businesses will be able to, for the first time, calculate their federal tax liability without Section 280E's restrictions. This newfound benefit, combined with states similarly following suit for their own taxes, would likely result in profitability for state-legal cannabis businesses and enlarged economic activity by $35.2 billion over a 10-year period.

Rescheduling, however, will not create a total tax windfall. For instance, it is doubtful that state-legal cannabis businesses will be able to retroactively recover past Section 280E taxes paid or avoid paying Section 280E taxes that accrue prior to rescheduling. Further, it is unclear if losses that are not deductible under Section 280E could be carried forward to subsequent post-rescheduling tax years. Despite such uncertainties, cannabis being categorized as a Schedule III drug should be a boon to state-legal cannabis businesses, and, more specifically, their net profits.

Next, as experienced cannabis business operators well know, the industry poses a myriad of legal risks due to the CSA, anti-money laundering and asset forfeiture laws, the Bank Secrecy Act, and administrative enforcements (just to name a few). Due to these legal hurdles, many financial institutions refuse to provide banking products and services to state-legal cannabis businesses. Indeed, only about 10% of all U.S. banks and about 5% of all credit unions provide banking to such businesses. Should rescheduling come to fruition, there is a greater likelihood that financial regulators will amend their former guidance disfavoring financial institutions' involvement with state-legal cannabis businesses.

Lastly, while news of potential cannabis rescheduling has raised industry hopes that state-legal cannabis businesses will be able to place their products into the stream of interstate commerce, the DEA's May 2024 Notice of Proposed Rulemaking should limit these hopes—at least for now. The DEA noted that, if cannabis is transferred to Schedule III, drugs containing "marijuana" would still need to be approved by the Federal Drug Administration (FDA) before being sold state-to-state. To date, no marijuana-containing drugs have been approved by the FDA, and this approach is bound to continue into the near future, but nothing is for certain.

In sum, the prospect of cannabis rescheduling is good reason for excitement in the industry. State-legal cannabis businesses may look forward to enhanced economic opportunities in the areas of taxes, financing, and nationwide trade, though varying in likelihood. The mere possibility of these increased opportunities and loosening restrictions yields assurance that continued cannabis reform is on the horizon. Those currently operating in the industry should be poised and ready to take advantage of these potential benefits once rescheduling is finalized.