

Federal Cannabis Descheduling Bill Needs More Clarity

By **Andrew Kline, Barak Cohen and Yoko Miyashita**

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The third version of the Marijuana Opportunity Reinvestment and Expungement, or MORE, Act was introduced on May 28.

Most importantly, this is a descheduling bill, and descheduling is the only way in which we comprehensively address the social justice inequities that exist and the federal-state conflict that persists in the cannabis industry.

Although potentially a boost to the nation's growing cannabis industry, the draft bill contains numerous gaps that are problematic from a business perspective.

These include a lack of clarity as to a regulatory framework that encompasses both state and federal authority, a failure to lay out a specific role for the U.S. Food and Drug Administration, and virtually no consideration for the challenges of interstate commerce and importations.

Importantly, the findings contained in H.R. 3617 make a strong case for cannabis reform, including alarming figures from the American Civil Liberties Union indicating that enforcing cannabis prohibition laws costs taxpayers \$3.6 billion in support of 600,000 arrests annually.[1]

These arrests disproportionately affect people of color, who are four times more likely to be arrested for possession of cannabis.[2] According to Congress, fewer than one-fifth of cannabis business owners identify as minorities, and only 4% are Black.[3]

Clearly, the time is ripe for comprehensive cannabis and criminal justice reform, but we must be intentional and thoughtful in our lawmaking and make sure that we get this right. Soliciting substantive input from experts in the cannabis industry, including business leaders, lawyers, policy experts and advocates, would lead to a better result for the industry and lawmakers alike. There is a lot at stake.



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Legislative descheduling is the best path forward to achieve the desired results.

While it is laudable that the U.S. House of Representatives continues to introduce critically important descheduling legislation and social equity reforms, this bill's legislative language — and that of bills before it — lacks clarity. That is reflected substantively and definitionally, beginning with a misleading section title.[4]

By descheduling cannabis and removing it from the Controlled Substances Act, we are legalizing cannabis, not merely decriminalizing it. Of course, people can no longer be criminally prosecuted post-descheduling. But they also cannot, and should not, be civilly fined for a cannabis offense, because no such offense would exist in federal law.

This is an important distinction, because, above all, we all share a duty to protect those most deeply affected by the war on drugs and make certain that people are no longer unfairly punished — civilly or criminally — for possession of this plant. By descheduling cannabis, we are legalizing it.

More significantly, the bill also lacks sufficient clarity in how descheduling will be completed. For instance, the latest iteration of the MORE Act legislatively deschedules cannabis while simultaneously providing for a seemingly duplicative administrative rulemaking process by the U.S. Department of Justice.[5]

The MORE Act not only deschedules cannabis but also mandates that, within 180 days of the bill's enactment, the DOJ must finalize a rulemaking removing cannabis from the list of controlled substances.[6] This apparent legislative belt-and-suspenders approach may cause significant procedural headaches. The statutory authority for this rulemaking, Section 201(a)(2) of the CSA, permits the DOJ to administratively deschedule controlled substances, such as cannabis, but only after statutorily defined procedures.[7]

Congressional mandate is not one of the three defined mechanisms that would prompt such a rulemaking, meaning that the DOJ would need to initiate the process. That could take some time.[8]

Further, pursuant to existing statute, the DOJ must (1) provide an opportunity for public hearing and (2) undertake a complex set of interactions with the U.S. Department of Health and Human Services, which will, in turn, provide the DOJ with a recommendation regarding (de)scheduling of the substance.[9]

With a six-month deadline for finalizing a rule pursuant to this complicated interagency procedure, the agencies may be hard-pressed to meet their statutory obligations, including an assessment of the public health implications of descheduling.

Federal and state agencies need clear and intentional regulatory authority.

Businesses need and want more clarity in legislative drafting so that they can comply with federal and state law. Although some industries formerly rejected government oversight, many businesses now see the value in understanding the rules of the road and prioritizing compliance within reasonable guardrails.[10] It makes their jobs easier, and it is less costly in the end.

But regulation must be intentional, particularly in providing both state and federal government public health and safety officials with clear authority. Substantively, the recently introduced bill does not provide for clear regulatory authority for the states. More certainty is necessary because the majority of

states already have regulatory regimes in place, many of them well-established, and it would be disruptive and counterproductive to uproot them entirely. That would set things back, not move the ball forward.

And while the bill carves out a specific regulatory role for the U.S. Department of the Treasury and requires rules to be promulgated by the Treasury, the DOJ and the Small Business Administration, it misses the mark by neglecting to define a specific role for the FDA — other than vague references to allowing the promulgation of FDA regulations — in protecting public health.

Regulating intentionally and granting clear regulatory authority to state and federal government officials is the only way to avoid the problems that currently plague the state-legal industry, and it is the only way to protect public health.

If anyone doubts this imperative, we should take a lesson from Congress' descheduling the hemp plant without a clear regulatory pathway to protect the public health, resulting in continued confusion and uncertainty in the marketplace. This lack of clarity in statute and delay in regulation has resulted in untested, unregulated and potentially unsafe products readily available in gas stations and convenience stores, without regard for public safety or age verification.

Congress should take note and refrain from making the same mistake with cannabis by regulating purposefully and specifically.

Packaging and labeling requirements are a public safety imperative.

The bill leaves significant discretion to the Treasury to develop packaging and labeling rules, rather than providing for robust congressionally mandated requirements.

However, the Treasury is charged with certain regulatory powers relating to the operation of a cannabis enterprise — defined as cannabis producers, importers and export warehouse operators — including inventory tracking, packaging and labeling requirements. Pursuant to the bill, cannabis products must be placed in approved packages bearing certain required labels, marks and notices before they can be transferred or released.

Further, cannabis products may not bear any indecent or immoral language or images on their labeling — similar to the prohibition against obscene or indecent labeling that applies to alcoholic beverage products.[11]

The secretary of the Treasury is also required to prescribe specific labeling and marking requirements for cannabis goods that will be exported by authorized export warehouses. Cannabis products labeled for export may not be brought back into the U.S. unless such products satisfy certain partial duty exemptions and are removed from their export packaging and relabeled into new packaging that does not contain export labels.

Just how these new regulations may interface with existing state requirements is not fully fleshed out.

The bill further requires cannabis enterprises to accurately track inventory in a manner that can be verified. While the bill requires that cannabis companies "shall make a true and accurate inventory," it does not specifically contemplate how this should be done.

Incorporating mandatory electronic tracking requirements into descheduling legislation is critical to ensuring public safety. Electronic tracking technology allows for the ability to follow cannabis through every stage of the cannabis supply chain, providing visibility and transparency, preventing diversion, and protecting consumers. Congress should be specific in requiring that the industry leverage existing technology solutions to protect public safety.

A transition period prior to interstate commerce and importation is critical for social equity reforms, public safety imperatives and the preservation of american businesses.

While this bill is silent on interstate commerce, it paradoxically provides for immediate importation of cannabis from other countries, without contemplating the serious public safety ramifications. And it does not consider the time required for the states and federal government to prepare to regulate responsibly before interstate commerce is unleashed.

It is critically important that Congress get the regulatory plan right to protect stable state markets and burgeoning state-level social equity programs. Developing a proper plan prior to interstate commerce and extranational importation will require a transition period not currently contemplated in this bill or others previously introduced.

Getting interstate commerce and importation right means recognizing that states already have stable regulatory systems in place, and Congress should focus on bringing an end to the federal/state conflict rather than continuing to promote it.

Right now, more than 70% of states have made cannabis legal within their jurisdictions, whether for recreational or medical use. In turn, each state grants licenses to businesses that have invested time, money and substantial risk into obtaining them. To operate, these businesses have relied on the state license systems for massive capital investments.

And critical social equity programs are just getting started, needing time to gain traction before they face competition from large multinational corporations with existing distribution networks and formidable infrastructure. If we are serious about giving social equity programs a fighting chance, then let's not put them at a disadvantage before they are even on solid footing. Time and resources are necessary to support their success.

Significantly, Congress must speak clearly if it is setting out to reform or dismantle the current system. An ambiguous devolution of regulatory authority to the states could lead to further legislative wrangling and prolonged litigation.

Already, recent cases in Detroit,[12] Missouri,[13] Oklahoma,[14] and Maine[15] are being fought on dormant commerce clause grounds, and the frequency of these legal challenges is likely to increase in the wake of descheduling and in the absence of clarity in legislative drafting.

In short, we should retain the state regulatory systems and social equity programs that exist and support them through purposeful federal oversight in select areas to protect the public health. This is exactly what our framers envisioned when they contemplated federalism.

Social equity reforms are critical.

Importantly, this bill reflects efforts to further center social equity provisions as part of federal

legalization and to remove unfair barriers and create economic opportunity to participate in the industry for individuals and communities suffering a disproportionate impact of the war on drugs.

Of course, social equity programs embody the widespread recognition and belief that cannabis has a unique history and that legalization presents a once-in-a-lifetime opportunity and obligation to address and rectify directly the harms inflicted through decades of prohibition.

The MORE Act provides for automatic expungement of federal cannabis convictions and further provides for resentencing of individuals currently serving a criminal sentence for a past cannabis conviction.[16] Leafly's recent assessment of social equity initiatives[17] points out that automatic expungement of cannabis convictions is foundational to social equity because of the collateral consequences that ensue for individuals with a criminal record.

While provisions in the bill are a step forward, experience from other state expungement programs shows that addressing federal cannabis convictions alone fails to address state as well as ancillary charges that have often accompanied cannabis convictions. Until state and ancillary charges are fully resolved, prior convictions will continue to haunt individuals harmed by the war on drugs, both personally and economically.

In one major step forward since the last version of the bill, the legislative language now eliminates a prohibition on individuals with prior marijuana convictions from participating in the legal cannabis industry.

The bill also establishes several grant programs,[18] providing for investments to promote equitable licensing,[19] access to capital for socially and economically disadvantaged entrepreneurs, and investments in programs that offer services to the people most adversely affected by the war on drugs, including legal aid, job training, substance use treatment, reentry services, literacy programs, mentoring services and youth recreation programs.

These programs could tackle some of the greatest barriers to entry, including state licensing schemes that categorically exclude the economically disadvantaged through excessive licensing fees and upfront capital requirements, as well as lack of access to capital, which has plagued the industry and, particularly, economically disadvantaged communities from the start of legalization.

As with many other aspects of legalization, rolling out these programs effectively requires the expertise of community and state organizations, and the challenge will be for the SBA and the DOJ to identify and partner with the organizations doing the best work on the ground. And that will take time.

Immigration provisions are a positive step.

The MORE Act presents significant positive change for U.S. immigration, providing stability for foreign nationals to engage in the legal cannabis industry without fear of immigration consequences. Under current law, nonimmigrants — individuals holding temporary visas — and permanent residents alike can suffer significant consequences for involvement in the cannabis industry.

Although many states have legalized cannabis under state law, the standards for admission to and deportation from the U.S. rely on federal immigration law, which provides severe consequences for violations of the CSA. Noncitizens who are involved in the cannabis industry, have cannabis-related offenses, or admit to possession of cannabis can be denied entry to the U.S., face deportation, and/or

be prevented from applying for naturalization to become a U.S. citizen.

As noted within the findings detailed in the MORE Act, simple cannabis possession was the fourth most common cause of deportation of any offense as of 2013.[20]

Further, individuals with any connection to the legal cannabis industry can be found to lack the requisite good moral character for naturalization. This restriction has broad reach, removing the protections of U.S. citizenship and raising the risk of deportation for agricultural workers, entrepreneurs, and potentially even spouses of individuals who derive income through the legal cannabis industry.

The bill would remove grounds for the deportation based on possession of marijuana and eliminate the government's ability to deny a benefit or protection under immigration laws based on any event related to cannabis, including use or possession, arrests, convictions and addiction. Notably, these protections apply retroactively to any conduct prior to passage of the bill.

The MORE Act would also permit the admission of individuals for legal cannabis-related business activities and allow individuals engaging in the legal cannabis industry to qualify for naturalization. The bill takes a significant step forward for immigrant rights, expanding access to the legal cannabis industry, and eliminating severe, lifelong consequences for noncitizens.

Conclusion

For lawyers in the cannabis industry, our work continues unabated. Without significantly more clarity from Congress and relevant executive agencies, we must continue to interpret proposed federal law and regulation and share our feedback so that we get this right. We are a country of laws, and democracy requires active participation by its citizens — particularly its lawyers.

While we should all support the descheduling of marijuana, the establishment of industry guardrails, and robust social equity reforms, we must regulate responsibly, and that will take time to get right. Congress must ensure that it puts in place a thoughtful regulatory plan before intoxicating products are shipped over borders or across state lines.

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[1] See MORE Act, § 2(6) "Findings"; ACLU, A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform (2020), <https://www.aclu.org/report/report-war-marijuana-black-and-white> (last accessed Jun. 25, 2021).

[2] See MORE Act, § 2 "Findings."

[3] Id.

[4] See MORE Act, § 3 "Decriminalization of Cannabis."

[5] See MORE Act, § 3(a)(2) ("Not later than 180 days after the date of the enactment of this Act, the Attorney General shall finalize a rulemaking...removing marihuana and tetrahydrocannabinols from the schedules of controlled substances.").

[6] See MORE Act § 3(a)(1) ("Removal in Statute"); § 3(a)(2) ("Removal from Schedule").

[7] In relevant part, 21 U.S.C. § 811(a)(2) reads, "[T]he Attorney General may by rule... remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule."

[8] See 21 U.S.C. § 811(a) ("Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.").

[9] See 21 U.S.C. § 811(a) ("Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5."); § 811(b) ("The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance.").

[10] Letter from Business Roundtable to Members of the U.S. House of Representatives and Members of the U.S. Senate (Sept. 10, 2019), <https://s3.amazonaws.com/brt.org/BRT-CEOLetteronPrivacy-2.pdf>.

[11] See, e.g., 27 CFR § 5.42(a)(3) prohibiting obscene or indecent statements or designs on distilled spirit labels.

[12] Diana Novak Jones, Detroit Pot Licensing Scheme 'Likely Unconstitutional', Law360 (Jun. 17, 2021), <https://www.law360.com/retail/articles/1395187/detroit-pot-licensing-scheme-likely-unconstitutional-> (last accessed Jun. 25, 2021).

[13] Sam Reisman, Court Bars Mo. From Enforcing Residency Rules for Pot Cos., Law360 (Jun. 21, 2021), https://www.law360.com/cannabis/articles/1396173/court-bars-mo-from-enforcing-residency-rules-for-pot-cos-?utm_medium=email&utm_source=newsletter&utm_campaign=MJD_20210622_NEWS_Daily (last accessed Jun. 25, 2021).

[14] Sam Reisman, Okla. Says Pot Residency Rules Can't Be Unconstitutional, Law360 (Dec. 22, 2020), <https://www.law360.com/articles/1340273/okla-says-pot-residency-rules-can-t-be-unconstitutional> (last accessed Jun. 25, 2021).

[15] Sarah Jarvis, City Must Halt Pot License Policy Accused of Favoring Locals, Law360 (Aug. 14, 2020), <https://www.law360.com/cannabis/articles/1301495/city-must-halt-pot-license-policy-accused-of-favoring-locals> (last accessed Jun. 25, 2021).

[16] See MORE Act, § 10 "Resentencing and Expungement."

[17] Janessa Bailey, New 'Seeds of Change' report rates states on cannabis equity, finds most lacking, Leafly (Jun. 24, 2021), <https://www.leafly.com/news/politics/leafly-seeds-of-change-2021-report-rates-states-on-marijuana-equity> (last accessed Jun. 25, 2021).

[18] See MORE Act, § 6 "Opportunity Trust Fund Programs."

[19] Importantly, the Equitable Licensing Grant Program makes funds available to states and localities to develop and implement equitable cannabis licensing programs, contingent upon those states and localities having taken steps to create an automatic process, at no cost to the individual, for the expungement, destruction, or sealing of criminal records for cannabis offenses.

[20] MORE Act, § 2(9).