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The Marijuana Policy Gap and the Path Forward

Lisa N. Sacco, Coordinator

Analyst in Illicit Drugs and Crime Policy

Erin Bagalman

Analyst in Health Policy

Kristin Finklea

Specialist in Domestic Security

Sean Lowry

Analyst in Public Finance

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Summary

Under federal law, the cultivation, possession, and distribution of marijuana are illegal, except for the purposes of sanctioned research. States, however, have established a range of laws and policies regarding marijuana's medical and recreational use. Most states have deviated from an across-the-board prohibition of marijuana, and it is now more so the rule than the exception that states have laws and policies allowing for some cultivation, sale, distribution, and possession of marijuana—all of which are contrary to the federal Controlled Substances Act (CSA). As of March 2017, nearly 90% of the states, as well as Puerto Rico and the District of Columbia, allow for the *medical use* of marijuana in some capacity. Also, eight states and the District of Columbia now allow for some *recreational use* of marijuana. These developments have spurred a number of questions regarding their potential implications for federal law enforcement activities and for the nation's drug policies as a whole.

Thus far, the federal response to state actions to decriminalize or legalize marijuana largely has been to allow states to implement their own laws on marijuana. The Department of Justice (DOJ) has nonetheless reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of states' positions on marijuana. Rather than targeting individuals for drug use and possession, federal law enforcement has generally focused its counterdrug efforts on criminal networks involved in the drug trade.

While the majority of the American public supports marijuana legalization, some have voiced apprehension over possible negative implications. Opponents' concerns include, but are not limited to, the potential impact of legalization on (1) marijuana use, particularly among youth; (2) road incidents involving marijuana-impaired drivers; (3) marijuana trafficking from states that have legalized it into neighboring states that have not; and (4) U.S. compliance with international treaties. Proponents of legalization have been encouraged by potential outcomes that could result from marijuana legalization, including a new source of tax revenue for states and a decrease in marijuana-related arrests. Many of these potential implications are yet to be fully measured.

Given the current marijuana policy gap between the federal government and many of the states, there are a number of issues that Congress may address. These include, but are not limited to, issues surrounding availability of financial services for marijuana businesses, federal tax treatment, oversight of federal law enforcement, allowance of states to implement medical marijuana laws and involvement of federal health care workers, and consideration of marijuana as a Schedule I drug under the CSA. The marijuana policy gap has widened each year for some time. It has only been a few years since states began to legalize recreational marijuana, but over 20 years since they began to legalize medical marijuana. In addressing state-level legalization efforts and considering marijuana's current placement on Schedule I, Congress could take one of several routes. It could elect to take no action, thereby upholding the federal government's current marijuana policy. It may also decide that the CSA must be enforced in states and not allow them to implement conflicting laws on marijuana. Alternatively, Congress could choose to reevaluate marijuana's placement as a Schedule I controlled substance.

Contents

Introduction	1
Controlled Substances Act	2
Evolution of Public Opinion	2
Marijuana as Medicine	3
Scientific Evaluations of Medical Marijuana Effects	4
Federal Regulation of Marijuana Research.....	5
Current Federal Status of Marijuana and the Policy Gap with States	6
DEA Rejection of Petitions to Reschedule.....	6
Trends in States	7
Decriminalization	7
Decriminalization in Cities	8
Medical Marijuana Exceptions.....	9
Recreational Legalization.....	9
Federal Response to State Divergence	11
Enforcement Focused on Traffickers	11
Department of Justice Guidance Memos for U.S. Attorneys	12
Monitoring Enforcement Priorities	14
Federal Enforcement in States: Directives through Federal Appropriations.....	15
Financial Services for Marijuana Businesses.....	16
Bank Secrecy Act and Federal Anti-Money Laundering Laws.....	16
FinCEN and DOJ Guidance to Financial Institutions	19
Select Implications of State Marijuana Legalization.....	20
U.S. Demand for Marijuana	20
Marijuana-Related Traffic Incidents	22
Marijuana Arrests	23
Marijuana Trafficking	24
Transnational Trafficking.....	24
Trafficking from States that Have Legalized into Other States	24
The Changing Domestic Black Market.....	25
Legalization Impact on Criminal Networks.....	26
International Response	28
Tax Revenue.....	30
Selected Issues Before Congress—The Path Forward	30
Provision of Financial Services to the Marijuana Industry	30
Federal Tax Treatment.....	31
Oversight of Federal Law Enforcement	33
Review of Agency Missions	33
Cooperation with State and Local Law Enforcement	33
Oversight and Continuation of Federal Enforcement Priorities.....	33
Medical Marijuana	34
State Medical Marijuana Laws and Federal Law Enforcement	34
State Medical Marijuana Laws and Federal Health Care Providers	35
Consideration of Marijuana as a Schedule I Drug: Maintain or Minimize the Gap.....	35

Figures

Figure 1. Views on Legalization of Marijuana	3
Figure 2. Map of State Marijuana Laws	11
Figure 3. Estimates of Current Marijuana Use in Colorado, Washington, and the United States, 2010-2015	21

Appendixes

Appendix A. Medical Research on Marijuana.....	37
Appendix B. Background on Federal Marijuana Policy.....	41

Contacts

Author Contact Information	44
Acknowledgments	44

Introduction

Marijuana is the most commonly used illicit drug in the United States.¹ It is a psychoactive drug that generally consists of leaves and flowers of the cannabis sativa plant. Its history dates back thousands of years, but in the United States, it became popular as a recreational drug in the early 20th century.² The THC³ content of marijuana is dependent on both the variety of the cannabis plant and the part used.⁴ Under federal law, cannabis and its derivatives are classified as Schedule I controlled substances—thus prohibiting their possession, cultivation, or distribution—under the Controlled Substances Act (CSA), regardless of its THC content, unless specifically exempted or listed in another schedule (see “Controlled Substances Act”).

The percentage of the population 12 and older currently using (past month use of) marijuana has generally increased over the last several years—from 6.9% in 2010 to 8.3% in 2015.⁵ The rate of past-month marijuana use among youth (aged 12-17), however, has remained relatively unchanged over this period (7.0%).⁶ Youth also generally perceive that obtaining marijuana—if they desire it—is relatively easy.⁷ Indeed, marijuana is available throughout the United States; 34% of state and local law enforcement agencies that were surveyed by the Drug Enforcement Administration (DEA) reported an increase in availability over the last year, and 62% reported that availability had remained the same.⁸

This report provides a background on federal marijuana policy and an overview of state trends with respect to marijuana decriminalization and legalization—for both medical and recreational

¹ In 2015, an estimated 22.2 million individuals in the United States aged 12 or older (8.3% of this population) were current (past month) users of marijuana. See Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from the 2015 National Survey on Drug Use and Health: Detailed Tables*, September 2016, Tables 1.1A and 1.1B, <http://www.samhsa.gov/data/sites/default/files/NSDUH-DefTabs-2015/NSDUH-DefTabs-2015/NSDUH-DefTabs-2015.htm>. Hereinafter, *Results from 2015 NSDUH*.

² David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (New York: Oxford University Press, 1999), p. 219.

³ THC stands for delta-9-tetrahydrocannabinol, the primary psychoactive chemical compound, or cannabinoid, in marijuana.

⁴ Industrial hemp is a variety of the cannabis plant that has low THC content and is cultivated for use in the production of a wide range of products. THC levels for hemp are generally less than 1%. For further information about hemp, see CRS Report RL32725, *Hemp as an Agricultural Commodity*, by Renée Johnson. While hemp is mentioned in this report, it largely focuses on marijuana.

⁵ For each year from 2010 to 2014, the estimated percentage of the population currently using marijuana was 6.9%, 7.0%, 7.3%, 7.5%, and 8.4% respectively. The difference between each year’s estimate (2010 – 2013) and the 2014 estimate (8.4%) is statistically significant at the .05 level. For 2014 to 2015, however, the percentage dropped from 8.4% to 8.3%; this change is not statistically significant at the .05 level. See Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from 2015 NSDUH*; and *Results from the 2014 National Survey on Drug Use and Health: Summary of National Findings*, September 2015, p. 6 (hereinafter, *Results from 2014 NSDUH*). Of note, some warn of potential bias in drug usage survey data because of misreporting by respondents. See Beau Kilmer, Jonathan P. Caulkins, and Gregory Midgette, et al., *Before the Grand Opening: Measuring Washington State’s Marijuana Market in the Last Year Before Legalized Commercial Sales*, RAND Drug Policy Research Center, 2013.

⁶ Results from *2015 NSDUH*, Table 1.2B; and *Results from 2014 NSDUH*.

⁷ Nearly half of surveyed youth indicated that marijuana would be “fairly easy” or “very easy” to obtain if desired. *Results from the 2015 NSDUH*, Table 3.1B.

⁸ Based on assessments from 1,444 local, state, and tribal law enforcement agencies that responded to the DEA’s 2016 National Drug Threat Survey. U.S. Drug Enforcement Administration, *2016 National Drug Threat Assessment Summary*, DEA-DCT-DIR-001-17, November 2016 (hereinafter, *2016 National Drug Threat Assessment Summary*).

uses. It then analyzes relevant issues for federal law enforcement and the implications of state marijuana legalization. The report also outlines a number of related policy questions that Congress may confront, including legalization in the District of Columbia, financial services for marijuana businesses, the medical nature of marijuana, oversight of federal law enforcement, and evaluation of marijuana as a Schedule I drug.

Controlled Substances Act

Marijuana is currently listed as a Schedule I controlled substance under the CSA.⁹ This indicates that the federal government has determined that

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.¹⁰

Controlled Substances Act (CSA)

The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹¹ It regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. Under the CSA, there are five schedules under which substances may be classified—Schedule I being the most restrictive. Substances placed onto one of the five schedules are evaluated on

- actual or relative potential for abuse;
- known scientific evidence of pharmacological effects;
- current scientific knowledge of the substance;
- history and current pattern of abuse;
- scope, duration, and significance of abuse;
- risk to public health;
- psychic or physiological dependence liability; and
- whether the substance is an immediate precursor of an already scheduled substance.

U.S. federal drug control policies—specifically those positions relating to marijuana—continue to generate debates among policymakers, law enforcement officials, scholars, and the public. Even before the federal government’s move in 1970 to criminalize the manufacture, distribution, dispensation, and possession of marijuana,¹² there were significant discussions over marijuana’s place in American society.

Evolution of Public Opinion

Changes in state and local marijuana laws are coupled with a general shift in public attitudes toward the substance. In 1969, 12% of the surveyed population supported legalizing marijuana;

⁹ For more information on the CSA, see the text box, “Controlled Substances Act (CSA).”

¹⁰ 21 U.S.C. §812(b)(1).

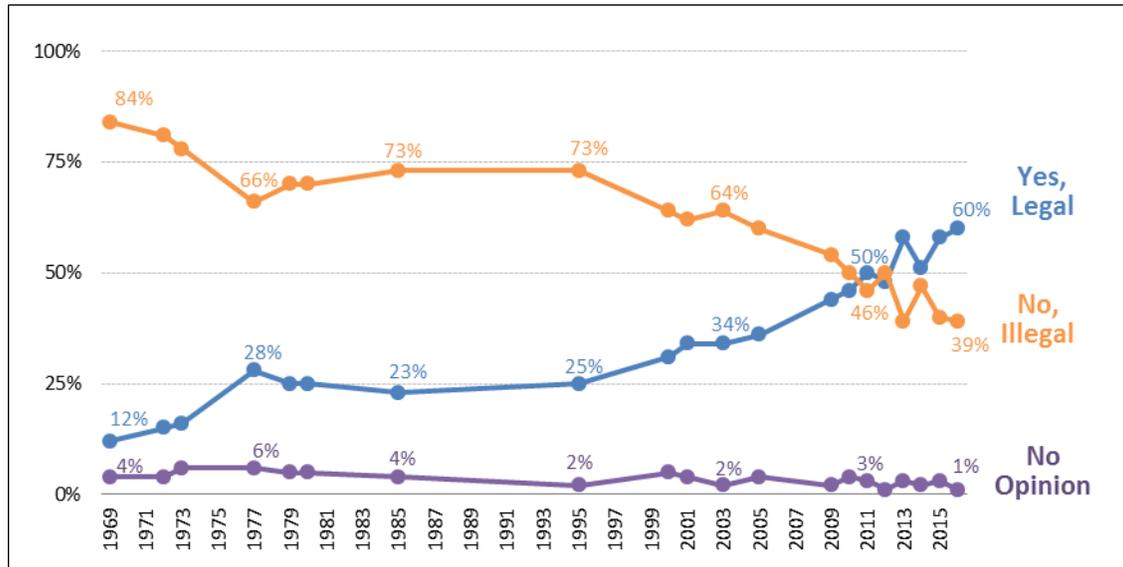
¹¹ P.L. 91-513; 21 U.S.C. §801 et. seq. For additional information on the CSA, see CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh; and CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

¹² 21 U.S.C. §§812 and 841.

today, 60% of surveyed adults feel that marijuana should be legalized.¹³ Support for legalization has more than doubled over the last 20 years. In addition, nearly 60% of respondents indicate that the federal government should not enforce federal marijuana prohibition laws in those states that allow for its use.¹⁴

Figure I. Views on Legalization of Marijuana

Percentage of Americans who support or are against legalizing marijuana, 1969-2016



Source: CRS presentation of Gallup data. Gallup News Service, *Gallup Poll Social Series: Crime*, <http://www.gallup.com>.

Notes: Question: “Do you think marijuana should be made legal or not?” Sample sizes vary from year to year. 2016 data are based on telephone interviews conducted October 5-9, 2016, with a random sample of 1,017 adults aged 18 and older living in the United States.

Marijuana as Medicine

As mentioned, marijuana’s placement on Schedule I of the CSA means that it has no currently accepted medical use according to the federal government. Under federal law, marketing a drug as medicine requires approval from the Food and Drug Administration (FDA).¹⁵ While most states have laws allowing for medicinal use of marijuana, the FDA has not approved marijuana, any drug containing marijuana, or any drug containing a plant-derived chemical constituent of marijuana for medicinal use. The FDA has, however, approved two drugs containing synthetic

¹³ The poll question is “Do you think marijuana should be made legal or not?” See Art Swift, *Support for Legal Marijuana Use Up to 60% in U.S.*, Gallup, October 19, 2016 (based on poll data from October 2016). For purposes of this question, it does not distinguish between medical and recreational marijuana. Of note, in August 2016, the Pew Research Center found similar levels of support for marijuana legalization among American adults. See Abigail Geiger, *Support for marijuana legalization continues to rise*, Pew Research Center, article based on Aug. 23-Sept. 2 Pew Research Center survey, October 12, 2016, <http://www.pewresearch.org>.

¹⁴ Pew Research Center for the People & the Press, *In Debate Over Legalizing Marijuana, Disagreement Over Drug’s Dangers*, April 14, 2015 (based on poll data from March 2015).

¹⁵ Federal Food, Drug, and Cosmetic Act (FFDCA, 21 U.S.C. §§301 et seq.). For more information CRS Report R41983, *How FDA Approves Drugs and Regulates Their Safety and Effectiveness*, by Susan Thaul.

THC.¹⁶ In addition, drugs containing plant-derived THC and/or cannabidiol (CBD, a nonpsychoactive chemical component of marijuana) are in the drug development and approval process.¹⁷ See **Appendix A** for further discussion of these drugs.

Individuals use marijuana to treat medical issues such as lack of appetite, nausea, chronic pain, spasticity, anxiety, and other maladies; however, the efficacy of this treatment is unclear from available scientific evidence.¹⁹ While some individuals report (both anecdotally and in scientific studies) benefits and alleviation of symptoms from use of marijuana, reports are inconsistent. Some have argued that the scientific field has been unable to robustly determine the medicinal value and merits of marijuana due to regulatory restrictions on quality, quantity, and use of marijuana in scientific research.²⁰

Scientific Evaluations of Medical Marijuana Effects

Recent evaluations conducted separately by the FDA and the National Academies of Sciences, Engineering, and Medicine (the National Academies) illustrate the challenge of meeting the required standard of evidence for demonstrating effective medical use. While taking different approaches to their evaluations, both the FDA and the National Academies have found that the current evidence base falls short. According to the FDA, “no published studies conducted with marijuana meet the criteria of an adequate and well-controlled efficacy study,” and “the criteria for adequate safety studies [have] also not been met.”²¹ According to the National Academies,

Risks Associated with Marijuana Use

The FDA’s eight-factor analysis includes an assessment of risks associated with marijuana use. Marijuana is known to affect the central nervous system, the cardiovascular system, the respiratory system, and the immune system. Its effects may vary according to how it is consumed (e.g., inhaled or ingested), how much of it is consumed, how often it is consumed, and over what time frame it is consumed.

Some of marijuana’s most widely recognized effects are among the reasons people use it recreationally: it can reduce inhibition, improve mood, enhance sensory perception, and heighten imagination (among other effects). Some common effects are more problematic: it can cause dizziness, confusion, ataxia (i.e., uncoordinated movements), delusions, and agitation (among other effects). Marijuana’s acute effects can impair an individual’s ability to perform daily activities, such as studying or driving. Chronic use of marijuana can lead to abuse or dependence and, in the case of heavy chronic use, the potential for withdrawal (with symptoms like insomnia, weight loss, and irritability).¹⁸

¹⁶ These drugs are Nabilone, an antiemetic (to reduce nausea or prevent vomiting) for patients receiving chemotherapy for cancer, and Dronabinol, both an antiemetic for patients on chemotherapy and an appetite stimulant for patients with AIDS-related weight loss. See **Appendix A** for additional information regarding FDA-approved drugs.

¹⁷ Department of Health and Human Services, Food and Drug Administration, *FDA and Marijuana: Questions and Answers*, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm#determinations>. For an explanation of the FDA’s drug development and approval process, see <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/default.htm>.

¹⁸ Department of Justice, Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53687-53766 and 53767-53845, August 12, 2016.

¹⁹ Penny F. Whiting, Robert F. Wolff, and Sophan Deshpande, et al., “Cannabinoids for Medical Use,” *Journal of the American Medical Association*, vol. 313, no. 24 (June 2015), pp. 2456-2473.

²⁰ See, for example, Chapter 15 of National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. S-1, doi: 10.17226/24625.

²¹ Department of Justice, Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53687-53766 and 53767-53845, August 12, 2016. The criteria for adequate and well-controlled studies are defined under 21 C.F.R. §314.126.

“conclusive evidence regarding the short- and long-term health effects (harms and benefits) of cannabis use remains elusive.”²² These studies are discussed in more detail in **Appendix A**.

Federal Regulation of Marijuana Research

Individuals who seek to conduct research on any controlled substance must do so in accordance with the CSA and other federal laws.²³ For all controlled substances, individuals must obtain a registration issued by the Attorney General, as delegated to the DEA²⁴ in accordance with associated rules and regulations issued by the Attorney General.²⁵ Also, DEA regulations require *all* registrants to comply with strict storage requirements for controlled substances.²⁶

Some have argued that federal regulation of marijuana research unnecessarily impedes the clinical trials that are required for FDA approval, and the Obama Administration simplified some small steps within the larger process. In recent years, the federal government has attempted to make marijuana research easier.

- In June 2015, HHS eliminated one step in obtaining research-grade marijuana for research that is not funded by the National Institutes of Health.²⁷
- In December 2015, the DEA announced a waiver to make it easier for researchers conducting clinical trials with CBD to modify their research protocols and obtain more CBD than was initially approved.²⁸
- In August 2016, the DEA announced a new policy intended to increase the number of approved sources of research-grade marijuana.²⁹

Prior to the August 2016 change, some contended that marijuana provided to researchers was “both qualitatively and quantitatively inadequate.”³⁰ The DEA’s recent policy change

²² National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. S-1, doi: 10.17226/24625.

²³ For regulatory requirements under the CSA, see CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh.

²⁴ As authorized under 21 U.S.C. §871, the Attorney General may delegate any of his/her control and enforcement functions under the CSA to any officer or employee of the Department of Justice—many of these functions are performed by the DEA.

²⁵ See 21 U.S.C. §822. This requirement is also described under 21 CFR 1301.11(a): Every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration unless exempted by law or pursuant to §§1301.22 through 1301.26.

²⁶ For the purposes of ensuring the secure storage and distribution of *all* controlled substances, all applicants and registrants must generally “provide effective controls and procedures to guard against theft and diversion of controlled substances.” See 21 C.F.R. §1301.71.

²⁷ Department of Health and Human Services, “Announcement of Revision to the Department of Health and Human Services Guidance on Procedures for the Provision of Marijuana for Medical Research as Published on May 21, 1999,” 80 *Federal Register* 35960-35961, June 23, 2015.

²⁸ Department of Justice, Drug Enforcement Administration, “DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol,” press release, December 23, 2015.

²⁹ Department of Justice, Drug Enforcement Administration, “Applications to Become Registered under the Controlled Substances Act to Manufacture Marijuana to Supply Researchers in the U.S.,” 81 *Federal Register* 53846-53848, August 12, 2016.

³⁰ Marc Kaufman, “Federal Marijuana Monopoly Challenged,” *Washington Post*, December 12, 2005; and Department of Justice, Drug Enforcement Administration, “Lyle E. Craker; Denial of Application,” 74 *Federal Register* 2101, January 14, 2009.

may appease those researchers seeking better quality and quantity of marijuana. For broader discussion of this issue, see **Appendix A**.

Current Federal Status of Marijuana and the Policy Gap with States

While the federal government maintains marijuana’s current placement as a Schedule I controlled substance, states have established a range of laws and policies regarding its medical and recreational use. These developments have spurred a number of questions regarding potential implications for federal drug enforcement activities and for the nation’s drug policies as a whole. In 1970, the CSA placed the control of marijuana under federal jurisdiction *regardless* of state regulations and laws, and its status has remained unchanged under federal law for nearly 50 years. For more background on federal marijuana policy and the history of how marijuana came to be illegal in the United States, see **Appendix B**.

Select Consequences of Marijuana Use Under Federal Law

Marijuana use may subject an individual to a number of consequences under federal law regardless of whether that individual has been convicted of a marijuana-related offense. For example, marijuana users may lose their ability to purchase and possess a firearm, or be barred from living in public housing. Under the Gun Control Act, it is unlawful to possess, ship, transport, receive, or dispose of any firearm or ammunition to any person “who is an unlawful user of or addicted to any controlled substance” as defined by the CSA.³¹ In addition, federal law also establishes that “illegal drug users” are ineligible for federally assisted housing.³² The law requires public housing agencies and owners of federally assisted housing to establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any such applicant or tenant.³³

DEA Rejection of Petitions to Reschedule

There has been mounting public pressure for the DEA to reevaluate marijuana as a Schedule I controlled substance. Over the years, several entities have submitted petitions to reschedule marijuana.³⁴ In August 2016, after a five-year evaluation process done in conjunction with the Food and Drug Administration (FDA), the DEA rejected two petitions submitted by two state governors and a New Mexico health provider, respectively, to move marijuana to a less-restrictive schedule under the CSA.³⁵ Consistent with past practice,³⁶ the rejections were based on a conclusion by both the FDA and DEA that marijuana continues to meet the criteria for inclusion

³¹ See 18 U.S.C. §§922(g)(3), 924(a)(2) and 27 C.F.R. §478.11.

³² 42 U.S.C. §§13661-13662.

³³ For a broader discussion of legal consequences of marijuana use, see CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey, Charles Doyle, and David H. Carpenter.

³⁴ Any interested party may petition the Administrator of the DEA to initiate rulemaking proceedings to reschedule a controlled substance. See 21 U.S.C. §811(a) and 21 C.F.R. §1308.43(a) for relevant rules and regulations.

³⁵ In 2011, the governors of Rhode Island and Washington petitioned the DEA to have marijuana and “related items” removed from Schedule I of the CSA and rescheduled as medical cannabis in Schedule II. In 2009, Bryan Krumm, a health provider in New Mexico, petitioned the DEA to have marijuana removed from Schedule I of the CSA and rescheduled in any schedule other than Schedule I.

³⁶ The DEA has previously denied petitions to reschedule marijuana. For example, in 2002 a petition was filed to have marijuana removed from Schedule I and rescheduled as cannabis in Schedule III, IV, or V. In 2011, the DEA rejected the petition. See Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 76 *Federal Register* 40552-40589, July 8, 2011.

on Schedule I—namely that it has a high potential for abuse, has no currently accepted medical use, and lacks an accepted level of safety for use under medical supervision.³⁷

It is important to note that both Congress and the Administration have the power to alter marijuana's status as a Schedule I substance. Congress could amend the CSA to move marijuana to a lower schedule or remove it entirely from control. The Administration could also make such changes on its own, though it is bound by the CSA to evaluate a substance prior to altering its scheduling status.³⁸

Trends in States

Over the past few decades, most states have deviated from an across-the-board prohibition of marijuana, and as of March 2017, nearly 90% of the states, as well as Puerto Rico and the District of Columbia, allowed for the *medical use* of marijuana in some capacity.³⁹ Also, eight states and the District of Columbia now allow for the *recreational use* of marijuana.⁴⁰ It is now more so the rule than the exception that states have laws and policies allowing for some manufacturing, sale, distribution, and possession of marijuana—all of which are contrary to the CSA, except for the purposes of sanctioned research.⁴¹ Evolving state-level positions on marijuana include decriminalization initiatives, legal exceptions for medical use, and legalization of certain quantities for recreational use. See **Figure 2** at the end of this section for the various marijuana policies of states.

Decriminalization and legalization initiatives in the states reflect growing public support for the legalization of marijuana. As mentioned, just prior to passage of the CSA in 1970, 12% of surveyed individuals aged 18 and older felt that marijuana should be made legal. In 2016, more than half (60%) of surveyed U.S. adults expressed that marijuana should be legalized.⁴²

Decriminalization

Marijuana *decriminalization* differs markedly from *legalization*. A state decriminalizes conduct by removing the accompanying criminal penalties; however, civil penalties remain. If, for instance, a state decriminalizes the possession of marijuana in small amounts,⁴³ possession of it

³⁷ See Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53767-53845, August 12, 2016; and Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53687-53766, August 12, 2016.

³⁸ Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the Attorney General (through the DEA), by the Secretary of Health and Human Services, or by petition from any interested person; 21 U.S.C. §811(a). Congress may change the scheduling status of a drug or substance through legislation.

³⁹ National Conference of State Legislatures, *State Medical Marijuana Laws*, November 2016. Some states allow broad access to medical marijuana while others have more narrow conditions under which access is granted. For example, in Alabama medical marijuana may only be dispensed by the University of Alabama and only to treat a person with an epileptic condition under certain conditions. Also, some states allow cannabidiol (CBD)-only medical marijuana. CBD is a chemical compound of marijuana.

⁴⁰ States have established rules surrounding marijuana use—see “Recreational Legalization” for a discussion of state regulations.

⁴¹ The notable exception is the distribution of marijuana for research purposes.

⁴² Art Swift, *Support for Legal Marijuana Use Up to 60% in U.S.*, Gallup, October 19, 2016 (based on poll data from October 2016).

⁴³ Typically one ounce or less, but the amount varies from state to state.

still violates state law, but possession of quantities within the specified *small amount* is considered a civil offense and subject to a civil penalty, not criminal prosecution. By decriminalizing possession of marijuana in small amounts, states are *not legalizing* its possession. In addition, as these initiatives generally relate to the *possession* (rather than the manufacture or distribution) of small amounts of marijuana, decriminalization initiatives do not impede federal law enforcement’s priority of targeting high-level drug offenders, or so-called “big fish,” rather than individual users.

Decriminalization initiatives by the states do not appear to be at odds with the CSA because both maintain that possessing marijuana is in violation of the law. For example, individuals in possession of small amounts of marijuana in Nebraska—a state that has decriminalized possession of small amounts—are in violation of both the CSA and Nebraska state law. The difference lies in the associated penalties for these federal and state violations. Under the CSA, a person convicted of simple possession (first offense) of marijuana may be punished with up to one year imprisonment and/or fined not more than \$1,000.⁴⁴ Under Nebraska state law, a person in possession (first offense) of an ounce or less of marijuana is subject to a civil penalty of not more than \$300.⁴⁵

In recent years, several states have decriminalized the possession of small amounts of marijuana; however, some of these states continue to treat possession of small amounts of marijuana as a criminal offense under specific circumstances. In New York, for example, the possession of small amounts of marijuana is still considered a crime when it is “open to public view.”⁴⁶ In 2015, just over 21,000 individuals in New York were arrested for criminal possession of marijuana in the fifth degree, a misdemeanor.⁴⁷

Decriminalization in Cities

Several cities have officially or unofficially decriminalized marijuana possession regardless of what has occurred at the state level. In November 2014, New York City (NYC) Mayor de Blasio and NYC Police Commissioner Bratton announced a change in marijuana enforcement policy; individuals found to be in possession of marijuana (25 grams or less)⁴⁸ *may* be eligible to receive a summons instead of being arrested.⁴⁹ The New York City Police Department (NYPD) issues so-called “pot tickets” for those in possession of 25 grams or less. In 2016, however, preliminary data indicated that marijuana possession arrests were increasing in NYC compared to 2015—this increase could be the result of changes in NYPD arrest policies; this remains unclear.⁵⁰

⁴⁴ 21 U.S.C. §844.

⁴⁵ Also, the judge may order the offender to attend a drug use and abuse education course. See §28-416 of the Nebraska Revised Statutes.

⁴⁶ NY Pen. Law §221.10.

⁴⁷ State-level arrest data provided to CRS by the New York State Department of Criminal Justice Services.

⁴⁸ Under NY Pen. Law §221.10, a person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses “1. marihuana in a public place ... and such marihuana is burning or open to public view; or 2. one or more preparations, compounds, mixtures or substances containing marihuana and... are of an aggregate weight of more than twenty-five grams.”

⁴⁹ City of New York, *Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy*, November 10, 2014.

⁵⁰ City-level arrest data provided to CRS by the New York State Department of Criminal Justice Services. Also see Jennifer Fermino, John Annese, and Ginger Adams Otis, “NYPD cracks down on marijuana possession in NYC, sees big uptick in arrests for carrying pot,” *New York Daily News*, June 2, 2016.

Just as there are disparities in state and federal laws and policies, some cities' decriminalization initiatives run contrary to the laws and policies of the states. In Pennsylvania, the state government has not decriminalized marijuana possession, but Pittsburgh, Philadelphia, State College, and Harrisburg have all decriminalized possession in some form. In 2016, Harrisburg's city council unanimously voted to make possession of 30 grams or less of marijuana punishable by a \$75 fine and public use punishable by a \$150 fine.⁵¹

Medical Marijuana Exceptions

In 1996, California became the first state to amend its drug laws to allow for the medicinal use of marijuana. As of March 2017, over half of the states, the District of Columbia, Puerto Rico, and Guam have comprehensive policies allowing for the medicinal use of marijuana.⁵² Seventeen additional states allow for so-called "limited access medical marijuana," which refers to cannabis with low THC content or CBD oil.⁵³

As noted, the CSA does not distinguish between the medical and recreational use of marijuana. Under the CSA, marijuana has "no currently accepted medical use in treatment in the United States,"⁵⁴ and states' allowance of its use for medical purposes is at odds with the federal position. Federal law enforcement has investigated, arrested, and prosecuted individuals for medical marijuana-related offenses regardless of whether they are in compliance with state law; however, federal law enforcement emphasizes the investigation and prosecution of growers and dispensers over individual users of medical marijuana. Federal enforcement priorities are discussed further in "Federal Response to State Divergence."

Recreational Legalization

In contrast to marijuana *decriminalization* initiatives wherein civil penalties remain for violations involving marijuana possession, marijuana *legalization* measures remove all state-imposed penalties for specified activities involving marijuana. Until 2012, the recreational use of marijuana had not been legal in any U.S. state since prior to the passage of the CSA in 1970. In November 2012, citizens of Colorado and Washington voted to legalize, regulate, and tax small amounts of marijuana for recreational use.⁵⁵ In November 2014, legalization initiatives also passed in Alaska, Oregon, and the District of Columbia (DC), further expanding the disparities between federal and state marijuana laws. Later, in November 2016, recreational legalization initiatives passed in Massachusetts, California, Maine, and Nevada.

These recreational legalization initiatives all legalized the possession of specific quantities of marijuana by individuals aged 21 and over and (with the exception of DC) set up state-administered regulatory schemes for the sale of marijuana;⁵⁶ however, there are variations among

⁵¹ Christine Vendel, "It's official: Harrisburg council reduces penalties for pot possession," *Penn Live*, July 5, 2016; and City of Harrisburg, City Council.

⁵² Several states are implementing recently enacted laws. National Conference of State Legislatures, *State Medical Marijuana Laws*, November 2016.

⁵³ As previously mentioned, CBD is a chemical compound in marijuana. Unlike THC, it does not have a psychoactive component.

⁵⁴ 21 U.S.C. §812(b)(1).

⁵⁵ For more detail regarding both Washington Initiative 502 and Colorado Amendment 64, see CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh

⁵⁶ Regulatory schemes include restrictions and requirements for licensing the production, processing, and retail of marijuana, and procedures for the issuance of licenses.

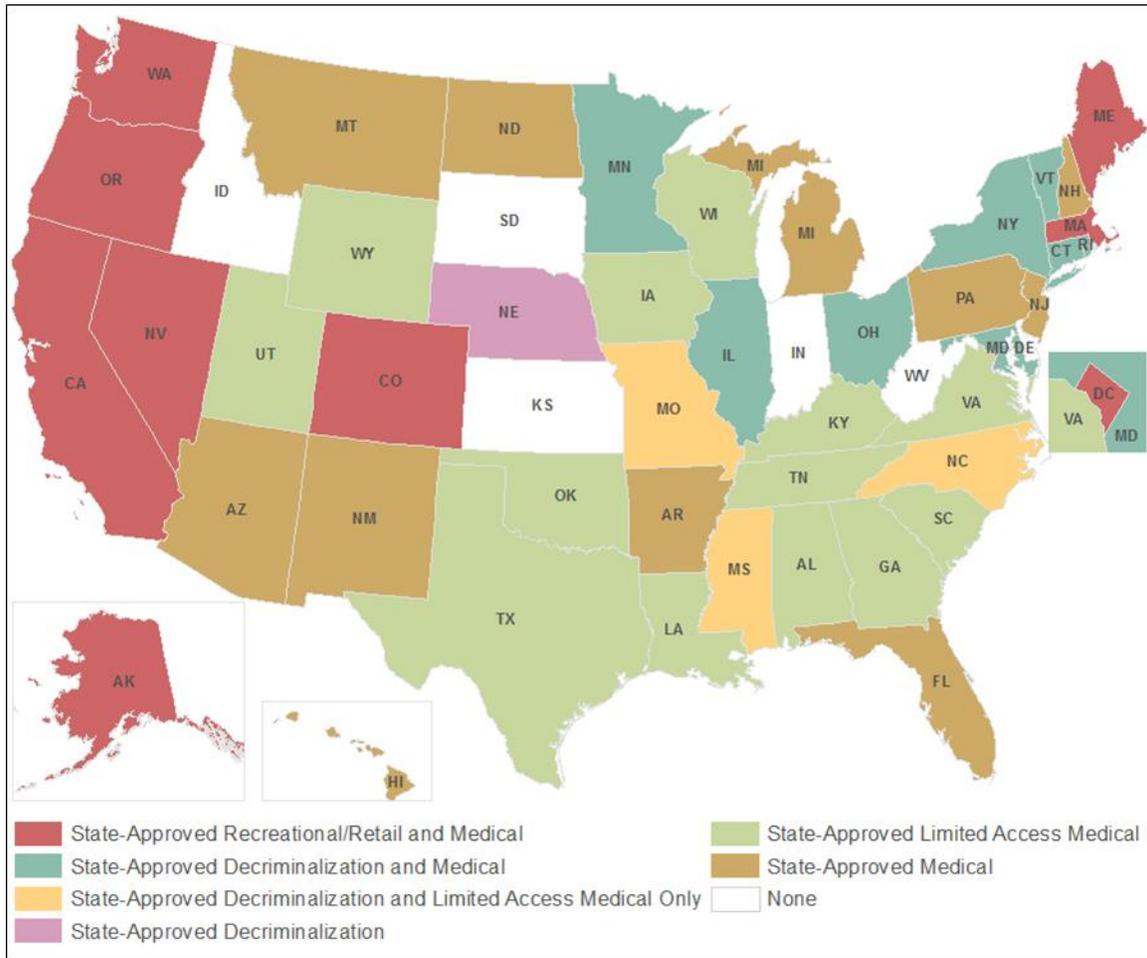
the initiatives. For example, Colorado, Alaska, Oregon, Massachusetts, Nevada, Maine, California, and DC allow for individuals to grow their own marijuana plants while Washington does not. These legalization initiatives also specify that many actions involving marijuana remain crimes. For example, in Washington, as well as other states, the operation of a motor vehicle while under the influence of marijuana remains a crime.⁵⁷ In some states such as Colorado, individuals over the age of 21 may grow small amounts of marijuana for personal use, but marijuana may not be consumed “openly and publicly or in a manner that endangers others.”⁵⁸ In an example of city-level initiatives breaking from state-level policies, in November 2016, the city of Denver voted to allow designated areas where public consumption of marijuana would be allowed.⁵⁹ **Figure 2** highlights the status of marijuana laws by state.

⁵⁷ Washington Initiative 502, http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

⁵⁸ Colorado Amendment 64, [http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/\\$FILE/Amendment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf](http://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Amendment%2064%20-%20Use%20&%20Regulation%20of%20Marijuana.pdf). For information on the Colorado regulatory system, see the website of the Colorado Department of Revenue, Marijuana Enforcement Division: <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement>.

⁵⁹ Denver Initiated Ordinance 300, https://www.denvergov.org/content/dam/denvergov/Portals/778/documents/VoterInfo/Sample_Ballot/2016GeneralComboSampleBallotWatermark.pdf.

Figure 2. Map of State Marijuana Laws
March 2017



Source: CRS presentation of data from the National Conference of State Legislatures and the Drug Enforcement Administration.

Notes: Limited-access medical marijuana refers to cannabis with low THC content or cannabidiol (CBD) oil. “State-approved” refers to either state laws that (1) allow for recreational and/or medical marijuana and/or (2) decriminalize the possession of marijuana in small amounts.

Federal Response to State Divergence

Enforcement Focused on Traffickers

Rather than targeting individuals for drug use and possession, federal law enforcement has generally focused its counterdrug efforts on criminal networks involved in the drug trade. Notably, federal policing efforts on marijuana enforcement appear consistent with this position. Federal marijuana enforcement efforts have largely been focused on *traffickers and distributors* of illicit drugs, rather than the low-level users; rather, arrests for marijuana *possession* offenses are largely made by state and local police.⁶⁰ President Obama once noted that “[it] would not

⁶⁰ For a discussion of drug enforcement in the United States, see CRS Report R43749, *Drug Enforcement in the United States* (continued...)

make sense from a prioritization point of view for us to focus on recreational drug users in a state that has already said that under state law that's legal."⁶¹ While it is not yet clear how the Trump Administration will proceed with drug enforcement priorities, the White House press secretary indicated there may be increased enforcement against recreational marijuana, and stated that there is a "big difference" between medical and recreational marijuana.⁶²

Department of Justice Guidance Memos for U.S. Attorneys

After some states began to legalize the medical use of marijuana, the Department of Justice (DOJ) reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of how individual states may change their laws and positions on marijuana.⁶³ DOJ has clarified federal marijuana policy through several memos providing direction for U.S. Attorneys in states that allow the medical use of marijuana. In the so-called "Ogden Memo" of 2009, former Deputy Attorney General David Ogden reiterated that combating major drug traffickers remains a central priority and stated:

[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the [Justice] Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.⁶⁴

In a follow-up memorandum to U.S. Attorneys, former Deputy Attorney General James Cole restated that enforcing the CSA remained a core priority of DOJ, even in states that had legalized medical marijuana. He clarified that "[t]he Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."⁶⁵

In his memo, Deputy Attorney General Cole warned those who might assist medical marijuana dispensaries in any way. He stated that "[p]ersons who are in the business of cultivating, selling or distributing marijuana, *and those who knowingly facilitate such activities* [emphasis added], are in violation of the Controlled Substances Act, regardless of state law."⁶⁶ This has been interpreted by some to mean, for example, that building owners and managers are in violation of

(...continued)

States: History, Policy, and Trends, by Lisa N. Sacco.

⁶¹ "Marijuana Not High Obama Priority," *ABC Nightline*, December 14, 2012.

⁶² The White House, Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer, 2/23/2017, #15*, February 22, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15>.

⁶³ United States Attorney's Office, "Statement From U.S. Attorney's Office on Initiative 502," press release, December 5, 2012.

⁶⁴ Deputy Attorney General David W. Ogden, *Memorandum for Selected United States Attorneys*, U.S. Department of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Washington, DC, October 19, 2009, pp. 1-2.

⁶⁵ Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011, p. 2.

⁶⁶ *Ibid.*

the CSA by allowing medical marijuana dispensaries to operate in their buildings.⁶⁷ Deputy Attorney General Cole further warned that “[t]hose who engage in transactions involving the proceeds of such activity [cultivating, selling, or distributing of marijuana] may be in violation of federal money laundering statutes and other federal financial laws.”⁶⁸ This warning may be one reason why medical marijuana dispensaries have had difficulty accessing bank services.⁶⁹ In an August 2013 memorandum, Deputy Attorney General Cole stated that while marijuana remains an illegal substance under the CSA, DOJ would focus its resources on the “most significant threats in the most effective, consistent, and rational way.”⁷⁰ The memo outlined eight enforcement priorities for DOJ:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.⁷¹

In a February 2014 memorandum, Deputy Attorney General Cole further reinforced these enforcement priorities, specifically as they relate to the prosecution of marijuana-related financial crimes. The memo directed the U.S. Attorneys that “in determining whether to charge individuals or institutions with ... [certain financial] offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance.”⁷²

In October 2014, DOJ released another memo to the U.S. Attorneys that reiterated the applicability of the eight enforcement priorities to their marijuana efforts in Indian country.⁷³ It

⁶⁷ Jennifer Medina, “U.S. Attorneys in California Set Crackdown on Marijuana,” *New York Times*, October 8, 2011, p. 10.

⁶⁸ Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011, p. 2.

⁶⁹ John Ingold, “Last Bank Shuts Doors on Colorado Pot Dispensaries,” *The Denver Post*, October 1, 2011; Jonathan Martin, “Medical-Marijuana Dispensaries Run Into Trouble at the Bank,” *The Seattle Times*, April 29, 2012.

⁷⁰ Deputy Attorney General James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, p. 1.

⁷¹ *Ibid.*, pp. 1-2.

⁷² Deputy Attorney General James M. Cole, *Memorandum for All United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Related Financial Crimes, Washington, DC, February 14, 2014, p. 2.

⁷³ Executive Office for United States Attorneys, *Policy Statement Regarding Marijuana Issues in Indian Country*, (continued...)

responded to the American Indian tribes' requests for guidance on CSA enforcement on tribal lands. DOJ reiterated that the August 2013 Cole memo does not prohibit the federal government from enforcing federal law in Indian Country, and adds the following:

The eight priorities in the Cole Memorandum will guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the *cultivation or use* of marijuana in Indian Country [emphasis added].⁷⁴

Unlike the Cole memo, DOJ did not specifically refer to *distribution* and regulation of marijuana. It was unclear whether distribution of marijuana would be tolerated on tribal lands should tribal governments seek to legalize and distribute marijuana. Despite the lack of clarity, some tribes moved forward with plans to grow and sell marijuana at tribe-owned stores on tribal lands.⁷⁵ Since the memo was released, the DEA has led marijuana enforcement actions on tribal lands,⁷⁶ but it remains unclear whether legal marijuana will be tolerated on tribal land as it has been tolerated in states.

Monitoring Enforcement Priorities

In a review of the DOJ memoranda, the Government Accountability Office (GAO) concluded that "DOJ has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Rather, DOJ has left such lower-level or localized marijuana activity to state and local law enforcement authorities through enforcement of their own drug laws."⁷⁷ GAO has recommended that DOJ monitor the effects of state-level marijuana legalization initiatives relative to the eight DOJ enforcement priorities. This evaluation noted that DOJ has used a number of tools to help assess these effects. For instance, DOJ indicated to GAO that U.S. Attorneys were in contact with officials in states such as Colorado and Washington that had legalized marijuana. In addition, DOJ reported that it relies upon information from sources such as "federal surveys on drug use; state and local research; and feedback from federal, state, and local law enforcement."⁷⁸ Notably, DOJ has reportedly not been documenting its specific monitoring process, and GAO has recommended that DOJ develop a "clear plan" for how it will monitor and document the effects of state marijuana legalization on federal enforcement priorities.⁷⁹

(...continued)

October 28, 2014.

⁷⁴ Monty Wilkinson, *Memorandum*, U.S. Department of Justice, Policy Statement Regarding Marijuana Issues in Indian Country, Washington, DC, October 28, 2014.

⁷⁵ "Native American Tribes Approve Plan to Grow and Sell Marijuana in Oregon," *The New York Times*, December 19, 2015; Noelle Crombie, "Warm Springs Tribes Launch Ambitious Pot Venture, Hope for Economic Windfall," *The Oregonian - Oregon Live*, April 29, 2016; John Gillie, "Two Marijuana Retailers Opening Soon in City that Still Bans Cannabis Sales," *The News Tribune*, January 28, 2017; and Jackie Valley, "Las Vegas Paiutes' Newest Venture: Medical Marijuana," *Las Vegas Sun*, March 1, 2016.

⁷⁶ Steven Nelson, "DEA Raid on Tribe's Cannabis Crop Infuriates and Confuses Reformers," *U.S. News & World Report*, October 26, 2015; and Cary Spivak, "Milwaukee Journal Sentinel," November 18, 2015.

⁷⁷ U.S. Government Accountability Office, *State Marijuana Legalization: DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, December 2015, p. 9.

⁷⁸ *Ibid.*, p. 27.

⁷⁹ *Ibid.*

Federal Enforcement in States: Directives through Federal Appropriations⁸⁰

Over the past several years, Congress has included provisions in appropriations acts that prohibit DOJ from using appropriated funds to prevent certain states and the District of Columbia⁸¹ from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”⁸² The current appropriations provision is in effect until April 28, 2017.⁸³ Courts have interpreted the appropriation provision to restrict DOJ from using appropriated funds (1) to take legal action directly against states and (2) to initiate criminal prosecutions of state officials for any action related to the implementation of a state medical marijuana law.⁸⁴ Several federal courts also have interpreted the provision as prohibiting DOJ from prosecuting individuals who, while strictly complying with the laws of one of the states covered by the appropriations provisions, have allegedly distributed, possessed, or cultivated medical marijuana in violation of *federal law*.⁸⁵ Although the appropriations provision restricts DOJ’s ability to expend funds to enforce federal law, at least one court has made clear that the provision “does not provide immunity from prosecution for federal marijuana offenses.”⁸⁶

⁸⁰ This section was contributed by Todd Garvey, Legislative Attorney, Congressional Research Service. For a more detailed analysis of this issue, see CRS Legal Sidebar WSLG1451, *District Court Holds Appropriations Language Limits Enforcement of Federal Marijuana Prohibition*, by Todd Garvey.

⁸¹ The provision specifically lists 43 jurisdictions: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, the District of Columbia, Guam, and Puerto Rico.

⁸² See, for example, P.L. 113-235, §538 (2014) and P.L. 114-113, §542 (2015).

⁸³ P.L. 114-254, §101(1).

⁸⁴ See, for example, *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1044 (E.D. Cal. 2015) (citing the DOJ’s interpretation that the appropriation provision prohibits “federal actions that interfere with a state’s promulgation of regulations implementing its statutory provisions, or with its establishment of a state licensing scheme.”).

⁸⁵ See, for example, *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016) (holding that the 2015 appropriations restriction “prohibits DOJ from spending funds from relevant appropriations for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws [of California, Oregon, and Washington] and who fully comply with such laws); *United States v. Daleman*, No. 1:11-CR-00385-DAD-BAM, 2017 U.S. Dist. LEXIS 23213 (E.D. Cal. Feb. 17, 2017) (denying defendant’s motion to enjoin the Department of Justice from using funds for his prosecution because defendant failed to establish that he “*strictly* complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.”) (emphasis in original); *Marin All. for Med. Marijuana*, 139 F. Supp. at 1040 (holding that the 2015 appropriations provision bars DOJ from using appropriated funds to enforce an injunction prohibiting a medical marijuana dispensary from engaging in activities that are compliant with California’s medical marijuana law).

⁸⁶ *McIntosh*, 833 F.3d at 1179, n. 5 (“The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur.... Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.”). See also *United States v. Nixon*, 839 F.3d 885, 886 (9th Cir. 2016) (per curiam) (holding that the appropriations provision does not “impact[] the ability of a federal district court to restrict the use of a medical marijuana as a condition of probation.”).

Financial Services for Marijuana Businesses⁸⁷

As explained below, so long as marijuana remains classified as a Schedule I controlled substance under federal law, financial institutions and their directors, officers, employees, and owners could be subject to severe criminal and administrative sanctions⁸⁸ for providing financial services to marijuana businesses, even if those businesses are operating in compliance with state law.⁸⁹ A consequence of these legal risks is that many financial institutions reportedly have been unwilling to provide financial services to state-authorized marijuana businesses.⁹⁰

Bank Secrecy Act⁹¹ and Federal Anti-Money Laundering Laws

Federal law classifies marijuana as a Schedule I controlled substance.⁹² As a result, it is a federal crime to grow, sell, or merely possess the drug.⁹³ In addition to facing the prospect of a federal criminal prosecution, imprisonment, and criminal fines, those who violate the federal CSA may suffer a number of additional adverse consequences under federal law.⁹⁴ For example, federal authorities may confiscate any property used to grow marijuana or facilitate its sale or use, as well as all proceeds derived from the sale of marijuana.⁹⁵ When financial institutions provide financial services to business customers, they generally are not directly involved in the sale, possession, or distribution of their customers' products. However, financial institutions commonly acquire the *proceeds* from the sale of their customers' products. To the extent that a bank acquires such proceeds with the knowledge that they are derived from the sale of marijuana in violation of federal law, the proceeds potentially could be confiscated by federal authorities,⁹⁶ even when the underlying actions are permissible under state law.⁹⁷ For example, if a bank originates a loan to a

⁸⁷ This section was contributed by David H. Carpenter, Legislative Attorney, Congressional Research Service.

⁸⁸ See, for example, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 U.S. Dist. LEXIS 92438, 31-38 (E.D. N.Y. July 1, 2013) (approving a deferred prosecution agreement with a financial institution for, among other things, “fail[ing] to implement an effective [anti-money laundering] program to monitor suspicious transactions ... [which] permitted Mexican and Colombian drug traffickers to launder at least \$881 million in drug trafficking proceeds through HSBC Bank USA undetected”; the agreement “imposes upon HSBC significant, and in some respect extraordinary, measures,” including the forfeiture of \$1.256 billion, remedial measures, and the admission of criminal violations).

⁸⁹ *McIntosh*, 833 F.3d at 1179, n. 5.

⁹⁰ Steve Leblanc, “Can Sen. Elizabeth Warren help fix banking issues for the cannabis industry?,” *Associated Press*, January 3, 2017, available at <http://www.thecannabist.co/2017/01/03/elizabeth-warren-marijuana-banking/70517/>; Lisa Lambert, “Got bank? Election could create flood of marijuana cash with no place to go,” *Reuters*, October 31, 2016, available at <http://www.reuters.com/article/us-usa-marijuana-banks-idUSKBN12V0D5>.

⁹¹ The “Bank Secrecy Act” is commonly used to refer to Titles I and II of the Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114–24 (1970).

⁹² 21 U.S.C. §812(c), Sch.I(c)(10).

⁹³ *Ibid.* §§841-890.

⁹⁴ *Ibid.* For a detailed description of the CSA’s civil and criminal provisions, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

⁹⁵ 18 U.S.C. §§981(a)(1)(A), 982(a)(1). For information on the procedural requirements and potential defenses associated with asset forfeiture, see CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

⁹⁶ *Ibid.* §981(a)(1)(C) (“The following property is subject to forfeiture to the United States ... (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to ... any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title) [i.e., the list of predicate offenses for money laundering (18 U.S.C. §1956)], or a conspiracy to commit such offense.”).

⁹⁷ *McIntosh*, 833 F.3d at 1179, n. 5.

business openly operating as a state-authorized medical marijuana dispensary, then the principal and interest payments earned by the bank on that loan could be subject to forfeiture, if the bank knew that those payments derived from the sale of marijuana in violation of federal law.⁹⁸

In addition to the risk of asset forfeiture, federal anti-money laundering laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize the handling of proceeds that are known to be derived from certain unlawful activities,⁹⁹ including the sale and distribution of marijuana.¹⁰⁰ Violators of these anti-money laundering laws may be subject to fines and imprisonment,¹⁰¹ and any real or personal property involved in or traceable to prohibited transactions is subject to criminal or civil forfeiture.¹⁰² For example, a bank employee could be subject to a 20-year prison sentence and criminal money penalties under Section 1956 for knowingly engaging in a financial transaction involving marijuana-related proceeds that is conducted with the intent to promote a further offense (e.g., withdrawing marijuana-generated funds in order to pay the salaries of medical marijuana dispensary employees).¹⁰³ Similarly, a bank officer could face a 10-year prison term and criminal money penalties under Section 1957 for knowingly depositing or withdrawing \$10,000 or more in cash that is derived from the distribution and sale of marijuana.¹⁰⁴

Furthermore, Congress has crafted laws that affirmatively enlist financial institutions¹⁰⁵ to aid in the investigation and prosecution of those who violate federal laws, including the CSA.¹⁰⁶ For example, financial institutions generally must file suspicious activity reports (SARs)¹⁰⁷ with the

⁹⁸ See, for example, *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 104 (2d Cir. 2000) (“In this Circuit, the government’s burden is to show a nexus between the illegal conduct and the seized property. Once the government establishes that there is probable cause to believe that a nexus exists between the seized property and the predicate illegal activity, the burden shifts to the claimant to show by a preponderance of the evidence (1) that the defendant property was not in fact used unlawfully, or (2) that the predicate illegal activity was committed without the knowledge of the owner-claimant, 18 U.S.C. § 981(a)(2), that is, that the claimant is an ‘innocent owner.’”) (internal citations and quotations omitted).

⁹⁹ 18 U.S.C. §§1956(c)(7), 1957(f)(3). For a full list of predicate offenses, see the “Specified Unlawful Activities” section of CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

¹⁰⁰ 18 U.S.C. §§1956, 1957. For a detailed analysis of federal anti-money laundering laws, see CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

¹⁰¹ Section 1956 violations are punishable by imprisonment for not more than 20 years and fines of up to \$500,000 or twice the value of the property involved, whichever is greater. 18 U.S.C. §1956(a)(1). Section 1957 violations are punishable by imprisonment for not more than 10 years and fines of up to \$250,000 (or \$500,000 for organizations) or twice the value of the property involved in the transaction, whichever is greater. *Ibid.* §§1957(b), 1957(h), 3571, 3559. Conspiracy to violate either section carries the same maximum penalties, as does aiding and abetting the commission of either offense. *Ibid.* §§2, 1956(h). See, for example, *United States v. Lyons*, 740 F.3d 702, 715 (1st Cir. 2014). For a detailed description of the penalties for violating these laws, see CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

¹⁰² 18 U.S.C. §§981(a)(1)(A), 982(a)(1).

¹⁰³ *Ibid.* §1956(a)(1)(A)(i). See for example, Department of Justice, “Man Sentenced to 35 Months Imprisonment for Bank Fraud and Money Laundering,” Press Release, July 19, 2013, available at <https://www.justice.gov/usao-edwi/pr/man-sentenced-35-months-imprisonment-bank-fraud-and-money-laundering> (announcing the sentence of an individual who pled guilty to violating 18 U.S.C. §1956 and other criminal laws while working as a bank officer).

¹⁰⁴ *Ibid.* §1957(a), (d).

¹⁰⁵ For the purposes of the Bank Secrecy Act and anti-money laundering laws, the term “financial institution” is defined broadly to include banks, savings associations, credit unions, broker dealers, insurance companies, pawnbrokers, automobile dealers, casinos, cash checkers, travel agencies, and precious metal dealers, among others. 31 U.S.C. §5312(a)(2).

¹⁰⁶ See, for example, 12 U.S.C. §§1951-59; 31 U.S.C. §§5311-32.

¹⁰⁷ Filing SARs are mandatory under certain circumstances, but financial institutions may file SARs even when not (continued...)

Treasury Department's Financial Crimes Enforcement Network (FinCEN) regarding financial transactions¹⁰⁸ suspected to be derived from specified illegal activities,¹⁰⁹ including the sale of marijuana.¹¹⁰ Depository institutions¹¹¹ and certain other financial institutions¹¹² also must establish and maintain anti-money laundering programs, designed to ensure that the institutions' officers and employees will have sufficient knowledge of their customers and of the businesses of those customers to identify the circumstances under which filing SARs is appropriate.¹¹³ Even in the absence of suspicion, financial institutions must file currency transaction reports (CTRs) with FinCEN relating to transactions involving \$10,000 or more in cash or other "currency."¹¹⁴ The failure to comply with these reporting requirements can result in fines and imprisonment.¹¹⁵

Additionally, financial institutions, their employees, and certain other affiliated parties could be subject to administrative enforcement actions by federal regulators for violating the Bank Secrecy Act or anti-money laundering laws.¹¹⁶ For example, the federal banking regulators¹¹⁷ may utilize

(...continued)

mandated by law. See, for example, 12 C.F.R. §§1020.320(a) (banks); 1022.320(a) (money services businesses).

¹⁰⁸ "Transaction":

means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

31 C.F.R. §1010.100(bbb).

¹⁰⁹ 18 U.S.C. §§1956(c)(7), 1957(f)(3). For a full list of predicate offenses, see the "Specified Unlawful Activities" section of CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

¹¹⁰ 21 U.S.C. §§841-890; 31 U.S.C. §5318(g); 31 C.F.R. §1020.320.

¹¹¹ There are several different types of depository institutions, including banks, savings associations, and credit unions. A depository charter can be issued by either a state or federal chartering authority.

¹¹² Some financial institutions are exempt from establishing anti-money laundering programs. 31 U.S.C. §5318(h)(2); 31 C.F.R. §1010.205.

¹¹³ See generally 31 U.S.C. §5318(h)(1); 31 C.F.R. §§1020.200-1020.220. See also 12 U.S.C. §1786(q)(1) (credit unions); 12 U.S.C. §1818(s) (banks and savings associations). See also CRS Legal Sidebar WSLG1515, *Wake Up Call for Financial Institution Management: Anti-Money Laundering Program Is Your Personal Responsibility*, by M. Maureen Murphy.

¹¹⁴ 31 U.S.C. §5313; 31 C.F.R. subpt.1020C; 31 C.F.R. subpt.1010C. "Currency" is defined as:

The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

31 C.F.R. §1010.100(m).

¹¹⁵ 31 U.S.C. §5322. The willful failure to file SARs and CTRs is punishable by imprisonment for not more than five years or not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity. *Ibid.* Structuring a transaction to avoid the reporting requirement exposes the offender to the same maximum terms of imprisonment. *Ibid.* §5324(d). For a detailed description of penalties for violations of Bank Secrecy Act reporting and monitoring requirements, see CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

¹¹⁶ See, for example, 12 U.S.C. §§1786, 1818, 1831o.

¹¹⁷ For these purposes, the federal banking regulators are: the Office of the Comptroller of the Currency (OCC) for national banks and federal savings associations; the Board of Governors of the Federal Reserve System for domestic (continued...)

administrative enforcement powers against depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates that engage in unlawful, marijuana-related activities.¹¹⁸ The banking regulators have the legal authority, for instance, to issue cease and desist orders, impose civil money penalties, and issue removal and prohibition orders that temporarily or permanently ban individuals from working for any depository institution.¹¹⁹ The banking regulators also have the authority, under certain circumstances, to revoke an institution's federal deposit insurance coverage and to take control of and liquidate a depository institution.¹²⁰ In fact, a criminal conviction for violating the Bank Secrecy Act or anti-money laundering laws is an explicit ground for the appointment of the Federal Deposit Insurance Corporation "as receiver [to] place the insured depository institution in liquidation."¹²¹

FinCEN and DOJ Guidance to Financial Institutions

In response to state marijuana legalization efforts, FinCEN issued guidance with respect to marijuana-related financial crimes on February 14, 2014.¹²² This guidance appears to provide a roadmap for financial institutions seeking to comply with suspicious activity reporting requirements when providing financial services to state-authorized marijuana businesses, while also alerting FinCEN to transactions that might trigger federal enforcement priorities.¹²³

The guidance notes that:

[b]ecause federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law) in accordance with this guidance and [FinCEN regulations].¹²⁴

FinCEN advised financial institutions that, in providing services to a marijuana business, they must file one of three types of special SARs:

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operations of foreign banks and state-chartered banks that are members of the Federal Reserve System; the Federal Deposit Insurance Corporation (FDIC) for state savings associations and state-chartered banks that are not members of the Federal Reserve System; and the National Credit Union Administration (NCUA) for federally insured credit unions. Ibid. §§1766, 1813(q).

¹¹⁸ See, for example, *ibid.* §1786 (credit unions); *ibid.* §§1818, 1831o (banks and savings associations). See also Office of the Comptroller of the Currency, "OCC Assesses \$2.5 Million Civil Money Penalty Against Gibraltar Private Bank and Trust Company for Bank Secrecy Act Violations, Press Release, February 25, 2016, available at <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-20.html> (ordering the payment of a civil money penalty and remedial actions for allegedly "fail[ing] to maintain an effective Bank Secrecy Act/Anti-Money Laundering (BSA/AML) compliance program.").

¹¹⁹ *Ibid.*

¹²⁰ See, for example, *ibid.* §§1786, 1787 (credit unions); *ibid.* §§1818, 1821, 1831o (banks and savings associations).

¹²¹ 12 U.S.C. §1821(c)(5)(M), (d)(2)(E).

¹²² Department of the Treasury, *Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Business*, FIN-2014-G001, February 14, 2014, available at <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>. The Administration could reverse or otherwise make significant changes to its enforcement priorities and policies. See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, p. 3.

1. A marijuana limited SAR: The marijuana limited SAR is seen to be appropriate when the bank determines, after the exercise of due diligence, that a customer is not engaged in any activities that violate state law or implicate the investigation and prosecution priorities in the 2014 Cole Memorandum (see “Department of Justice Guidance Memos for U.S. Attorneys”),¹²⁵
2. A marijuana priority SAR: A marijuana priority SAR must be filed when the financial institution believes a customer is engaged in activities that implicate DOJ’s investigation and prosecution priorities;¹²⁶ and
3. A marijuana termination SAR: A financial institution is instructed to file a marijuana termination SAR when it finds it necessary to sever its relationship with a customer to maintain an effective anti-money laundering program.¹²⁷

FinCEN also provides examples of “red flags” that may indicate that a marijuana priority SAR is appropriate.¹²⁸ The FinCEN guidance does not impact financial institutions’ obligations to file currency transaction reports.¹²⁹

Select Implications of State Marijuana Legalization

While the majority of the American public supports marijuana legalization, some have voiced concern over possible negative implications, particularly with respect to *recreational* legalization. Some concerns were outlined as enforcement priorities by DOJ in monitoring state legalization.¹³⁰ These implications include, but are not limited to, the potential impact of legalization on (1) use of marijuana, particularly among youth; (2) traffic-related incidents involving marijuana-impaired drivers; (3) trafficking of marijuana from states that have legalized it into neighboring states that have not; and (4) U.S. compliance with international treaties. On the other hand, some have been encouraged by the potential outcomes from marijuana legalization, including new tax revenue for states and a potential decrease in marijuana-related arrests.

Not all potential implications are discussed in this report, and some are yet to be fully measured. Of note, data on potential effects of marijuana legalization should be interpreted with caution, as they are fairly limited, and not all factors are presented when reporting changes in statistics since state legalization. Further, conclusions about the impact of marijuana legalization would be premature without broader inclusion of both historical data and additional years of post-legalization data, as well as consideration of other factors aside from legalization.

U.S. Demand for Marijuana

As discussed, marijuana is the most commonly used illicit drug in the United States. In 2015, an estimated 22.2 million individuals aged 12 or older were current (past month) users of marijuana.

¹²⁵ Ibid., pp. 3-4.

¹²⁶ Ibid., p. 4.

¹²⁷ Ibid., pp. 4-5.

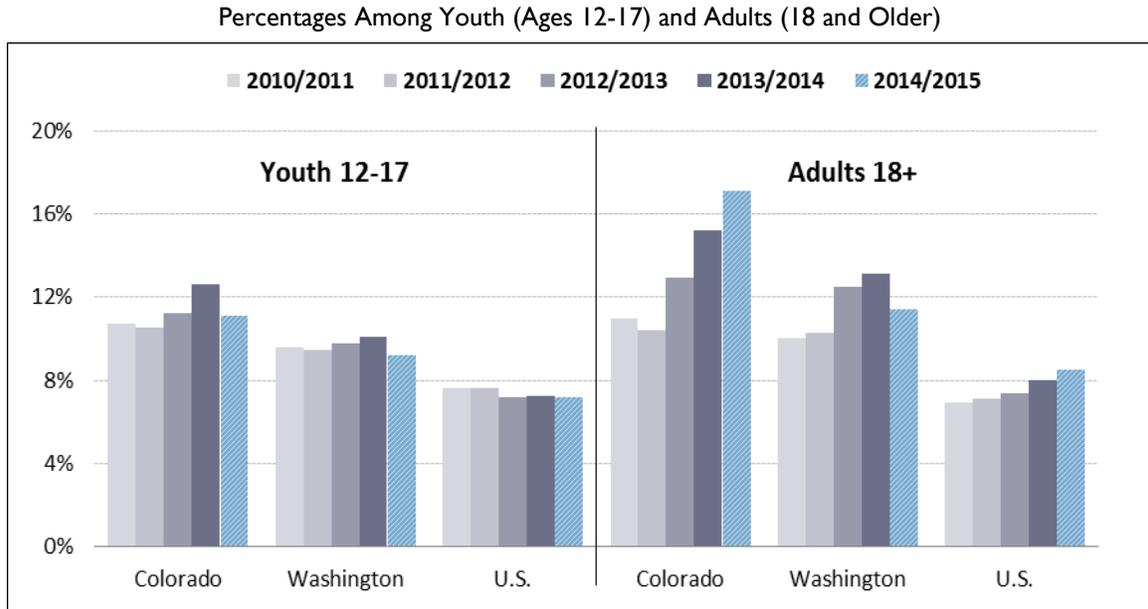
¹²⁸ Ibid., pp. 5-7. Some examples of “red flags” noted in the guidance are: “[t]he business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law”; and “[a] customer seeks to conceal or disguise involvement in marijuana-related business activity.” Ibid.

¹²⁹ Ibid., p. 7. For a discussion of currency transaction reporting requirements, see *supra* notes 114-115 and surrounding text.

¹³⁰ See James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, pp. 1-2.

The percentage of users has gradually increased over the last several years—from 6.9% in 2010 to 8.3% in 2015.¹³¹ The rate of past-month marijuana use among youth (aged 12 to 17), however, has remained fairly unchanged over this period (7.0%).¹³²

Figure 3. Estimates of Current Marijuana Use in Colorado, Washington, and the United States, 2010-2015



Source: Created by the Congressional Research Service (CRS) based on available population data from the Substance Abuse and Mental Health Services Administration (SAMHSA), *National Survey on Drug Use and Health (NSDUH)*, State Data, 2010/2011, 2011/2012, 2012/2013, 2013/2014, and 2014/2015, <http://www.samhsa.gov/data/>.

Notes: This figure presents yearly estimates of marijuana use in Colorado, Washington, and the United States and does not show statistical changes in these data. To review year-to-year, statistically significant changes, if any, see the NSDUH state data reports. The 2015/2016 state data are not yet available from SAMHSA. Annual state-level estimates are based on 2 calendar years of pooled NSDUH data, so two consecutive sets of estimates have a one-year overlap. For more information on the NSDUH methodology, see 2014-2015 National Survey on Drug Use and Health: Guide to State Tables and Summary of Small Area Estimation Methodology. Current use of marijuana is defined as use in the past 30 days.

In the states that legalized recreational marijuana in November 2012 (Washington and Colorado), the percentages of youth (aged 12-17) and adults (aged 18 and older) who are current users have changed in various ways over the 2010-2015 period according to survey data. For adults, the changes generally match national trends over the same time period (see **Figure 3**). Colorado and Washington have higher percentages of use for adults and youth compared to national estimates—both before and after recreational legalization began. Of note, the 2014/2015 percentages of marijuana use among youth are fairly similar to the percentages reported in 2010/2011, while adult percentages are higher than those reported in 2010/2011.¹³³ Rates of drug use may be

¹³¹ Results from 2015 NSDUH, Tables 1.1A and 1.1B.

¹³² Results from 2015 NSDUH, Table 1.2B and Results from the 2014 National Survey on Drug Use and Health: Summary of National Findings.

¹³³ Substance Abuse and Mental Health Services Administration (SAMHSA), *National Survey on Drug Use and Health (NSDUH)*, State Data, 2010/2011, 2011/2012, 2012/2013, 2013/2014, and 2014/2015, <http://www.samhsa.gov/data/>. The observed differences between estimates were not evaluated in terms of statistical significance—the probability that (continued...)

influenced by many possible factors including availability of the drug, family, peers, school, economic status, and community variables.¹³⁴

Of note, some state government officials in states that have legalized marijuana have monitored changes in drug use patterns and emerging research on the health effects of marijuana. For example, the Colorado Department of Public Health and Environment (CDPHE) was given the responsibility to “monitor changes in drug use patterns, broken down by county and race and ethnicity, and the emerging science and medical information relevant to the health effects associated with marijuana use.”¹³⁵

Marijuana-Related Traffic Incidents

The recent use of marijuana has been shown to impair driving ability.¹³⁶ According to the National Highway Traffic Safety Administration (NHTSA), “[l]ow doses of THC moderately impair cognitive and psychomotor tasks associated with driving, while severe driving impairment is observed with high doses, chronic use and in combination with low doses of alcohol.”¹³⁷ Some may be concerned that recreational marijuana legalization could be associated with an increase in marijuana-related traffic incidents. In Colorado, despite limited traffic data, the Department of Public Safety reports the following:

[T]he number of summons issued for Driving Under the Influence [DUI] in which marijuana or marijuana-in-combination¹³⁸ with other drugs [was recorded] decreased 1% between 2014 and 2015 (674 to 665).

The prevalence of marijuana or marijuana-in-combination identified by CSP [Colorado State Patrol] as the impairing substance increased from 12% of all DUIs in 2014 to 15% in 2015.

The Denver Police Department found summons where marijuana or marijuana-in-combination was recorded increased from 33 to 73 between 2013 and 2015. Citations for marijuana or marijuana-in-combination account for about 3% of all DUIs in Denver. Toxicology results from Chematox Laboratory showed an increase in positive cannabinoid screens for drivers, from 57% in 2012 to 65% in 2014. Of those that tested positive on the initial screen, the percent testing positive for delta-9 Tetrahydrocannabinol (THC) at 2 nanograms/millileter rose from 52% in 2012 to 67% in 2014.

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an observed difference in the population estimates would occur due to random variability if there was no difference in the estimates being compared. To review year-to-year, statistically significant changes, see the NSDUH state data reports.

¹³⁴ National Institute on Drug Abuse, *Preventing Drug Use among Children and Adolescents (In Brief)*, October 2003, <https://www.drugabuse.gov/publications/preventing-drug-abuse-among-children-adolescents/chapter-1-risk-factors-protective-factors/what-are-risk-factors>.

¹³⁵ See Colorado Revised Statutes, Title 25, §1.5-110. See the most recent report, CDPHE, Retail Marijuana Public Health Advisory Committee, *Monitoring Health Concerns Related to Marijuana in Colorado: 2016*, 2016.

¹³⁶ Blood THC concentrations drop quickly after individuals smoke marijuana. See Rebecca L. Hartman and Marilyn A. Huestis, “Cannabis effects on driving skills,” *Clinical Chemistry*, vol. 59, no. 3 (March 2013), pp. 478-492; and Rebecca L. Hartman, Timothy L. Brown, and Gary Milavetz, et al., “Cannabis effects on driving lateral control with and without alcohol,” *Drug and Alcohol Dependence*, vol. 154 (September 1, 2015), pp. 25-37.

¹³⁷ National Highway Traffic Safety Administration, *Drug and Human Performance Fact Sheets: Cannabis/Marijuana (Δ9-Tetrahydrocannabinol, THC)*, <https://one.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm>.

¹³⁸ In this report, the concept of marijuana “in combination” references marijuana in combination with other drugs.

Fatalities with THC-only or THC-in-combination positive drivers increased 44%, from 55 in 2013 to 79 in 2014. Note that the detection of any THC in [the] blood is not an indicator of impairment but only indicates presence in the system. Detection of delta-9 THC, one of the psychoactive properties of marijuana, may be an indicator of impairment.¹³⁹

In monitoring the impacts of recreational marijuana legalization in Washington State, government researchers report that there was no trend identified in the percentage of drivers testing positive for marijuana (either marijuana only or marijuana in combination with other drugs/alcohol) for those involved in traffic fatalities and who were tested for drugs or alcohol.¹⁴⁰ They also report that “marijuana incidents”¹⁴¹ on the highways and roads decreased from 2,462 in 2012 to 625 in 2014. Changes in these data may be influenced by many possible factors including changes in enforcement practices and priorities. It is possible that the sharp drop in marijuana incidents may be explained by the legalization of marijuana possession¹⁴² after 2012. For example, many traffic stops involving the smell of marijuana would no longer require further law enforcement investigation unless the individual in question is under the age of 21, there is suspicion of drug trafficking, or other reasons.

Marijuana Arrests

After the legalization of the possession, sale, manufacturing, and distribution of certain quantities of marijuana for recreational purposes, one might expect the number of marijuana arrests to go down in jurisdictions that have done so. Indeed, Washington State reports that “all criminal activities involving marijuana decreased between 2012 and 2014.”¹⁴³ Possession was cited as the most common criminal activity, and the number of marijuana possession arrests decreased from 5,133 in 2012 to 2,091 in 2013, and then to 1,918 in 2014.¹⁴⁴ Additionally, the number of marijuana incidents decreased from 6,336 in 2012 to 2,326 in 2014.¹⁴⁵

In Colorado, the number of marijuana arrests decreased by nearly half from 12,894 in 2012 to 6,502 in 2013, and then increased to 7,004 in 2014. Of note, the number of marijuana arrests for youth (aged 10-17) increased by 6%, from 3,235 in 2012 to 3,400 in 2014, after a slight decline in 2013.¹⁴⁶

¹³⁹ Jack Reed, *Marijuana Legalization in Colorado: Early Findings: A Report Pursuant to Senate Bill 13-283*, Colorado Department of Public Safety, March 2016, p. 6, (hereinafter, *Marijuana Legalization in Colorado: Early Findings: A Report Pursuant to Senate Bill 13-283*).

¹⁴⁰ Washington State Office of Financial Management, Forecasting and Research Division, *Monitoring the Impacts of Recreational Marijuana Legalization*, 2015 Update Report, January 2016, p. 3, (hereinafter, *Monitoring the Impacts of Recreational Marijuana Legalization*).

¹⁴¹ OFM relies on the FBI’s definition of the term “incident” and states the following: “an ‘incident’ occurs when any law enforcement officer investigates a scene or situation, whether that investigation results in an arrest or not. Incidents involving multiple illicit drugs or other criminal activities are counted only once, and are included in whichever category is listed first by the local law enforcement agency.” *Ibid.*, p. 4.

¹⁴² Washington State legalized the possession of marijuana in limited amounts by adults.

¹⁴³ *Monitoring the Impacts of Recreational Marijuana Legalization*, pp. 3 and 17.

¹⁴⁴ *Ibid.*, p. 17.

¹⁴⁵ Of note, over this same period, the number of incidents increased each year for amphetamines/methamphetamines and heroin, and decreased each year for incident data in which no drug type was provided and drug type was unknown. See *Monitoring the Impacts of Recreational Marijuana Legalization*, p. 14.

¹⁴⁶ *Marijuana Legalization in Colorado: Early Findings: A Report Pursuant to Senate Bill 13-283*, p. 22.

Marijuana Trafficking

Transnational Trafficking

Mexican transnational criminal organizations have historically been the primary foreign suppliers of marijuana to the United States, with small amounts also coming from Canada and the Caribbean. While anecdotal reports about the impact of domestic legalization initiatives on the domestic marijuana black market exist, officials have noted that there is an “intelligence gap” with respect to data on exactly how domestic legalization has impacted the amount of Mexican-produced marijuana entering the United States.¹⁴⁷ For one, estimates on domestic marijuana consumption cannot speak to the source of this marijuana. In addition, drug seizure data from the various federal, state, and local law enforcement agencies do not give a sense of the origin of the marijuana. Further, there is no marijuana “signature program,” like there is for cocaine and heroin, that can help determine the geographic origin of cannabis plants used to produce the seized marijuana.¹⁴⁸

Marijuana cultivation in Mexico has decreased, though it is unclear precisely how this affects or is driven by U.S. demand for Mexican marijuana. One of the tradeoffs has been an increase in production of other drugs. Reportedly, the trafficking organizations have shifted production to more profitable drugs such as heroin and methamphetamine.¹⁴⁹ Consistent with a decline in Mexican marijuana cultivation, there has been a general decline in marijuana seizures along the Southwest border between 2010 and 2015. However, the DEA’s outlook on marijuana trafficking is that “Mexico-produced marijuana will continue to be trafficked into the United States in bulk quantities and will likely increase in quality to compete with domestically-produced marijuana.”¹⁵⁰

One notable statistic is that since the first states began legalizing marijuana for recreational use in 2012, there has been a “sharp decline” in the number of individuals prosecuted and sentenced for federal marijuana trafficking offenses.¹⁵¹ As experts have noted, however, this decline could be driven by a number, or combination, of factors such as federal efforts to prosecute marijuana-related drug offenders, efforts by drug traffickers to conceal their illegal contraband entering the United States, and the amount of illegal marijuana being shipped into the United States.¹⁵²

Trafficking from States that Have Legalized into Other States

Some states have alleged that there has been increased marijuana trafficking from nearby states that have legalized marijuana possession or sale for medical or recreational purposes. For instance, according to DEA testimony, there has been increased marijuana trafficking in states surrounding Colorado since the state legalized recreational use.¹⁵³ The Rocky Mountain High

¹⁴⁷ U.S. Drug Enforcement Administration, *2015 National Drug Threat Assessment Summary*, DEA-DCT-DIR-008-16, October 2015, p. 71 (hereinafter, *2015 National Drug Threat Assessment Summary*).

¹⁴⁸ *National Drug Threat Assessment Summary 2016*, p. 116.

¹⁴⁹ Nick Miroff, “Losing Marijuana Business, Mexican Cartels Push Heroin and Meth,” *The Washington Post*, January 11, 2015.

¹⁵⁰ *National Drug Threat Assessment Summary 2016*, p. 125.

¹⁵¹ U.S. Sentencing Commission, *Quick Facts: Drug Trafficking Offenses*, May 2016.

¹⁵² Christopher Ingraham, “Federal Marijuana Smuggling is Declining in the Era of Legal Weed,” *The Washington Post*, May 26, 2016, referencing statements by Beau Kilmer, a drug policy researcher at RAND Corp.

¹⁵³ U.S. Congress, Senate Committee on the Judiciary, *Hearing on Oversight of the Drug Enforcement Administration*, Testimony of Administrator Michele M. Leonhart [transcript], 113th Cong., 2nd sess., April 30, 2014. Administrator (continued...)

Intensity Drug Trafficking Area (HIDTA) reported 394 instances of interdiction of Colorado marijuana destined for 36 other states in 2015.¹⁵⁴ Additionally, the HIDTA's report indicates that interdiction experts estimate these seizures represent about 10% or less of the total amount that is moved across the border undetected.¹⁵⁵

In December 2014, Nebraska and Oklahoma filed a lawsuit in the U.S. Supreme Court¹⁵⁶ against Colorado claiming that their law enforcement and criminal justice systems had been adversely impacted by Colorado's laws legalizing marijuana.¹⁵⁷ The complaint included claims that Colorado's "statutes and regulations are devoid of safeguards to ensure marijuana cultivated and sold in Colorado is not trafficked to other states."¹⁵⁸ In March 2016, however, the Supreme Court declined to hear the case challenging Colorado's marijuana law.¹⁵⁹

The Changing Domestic Black Market

There have been reports of changes in the domestic black market for marijuana as states have moved to legalize it for medical and recreational purposes. For instance, the market in Denver, CO, has been described as smaller and less violent than it previously was. In addition, buyers there are said to be purchasing more from "mom-and-pop operations" rather than from entities affiliated with larger cartels.¹⁶⁰ Most of the domestically produced marijuana (other than that which is produced in accordance with various state laws) is cultivated in California.¹⁶¹ This cultivation is carried out not only by U.S. persons, but also by foreign criminal networks. For instance, Mexican traffickers run large outdoor grow sites in California, which are sometimes established on public lands.

The DEA has indicated that marijuana concentrates—such as hashish, hash oil, and keif—are a growing concern for federal law enforcement. These substances have "potency levels far exceeding those of leaf marijuana."¹⁶² The DEA has also stated that one effect of state marijuana legalization initiatives has been an increase in seizures of marijuana concentrates and an increase in the number of THC extraction laboratories in the United States.¹⁶³

Broadly, there has been a shifting demand for higher-quality marijuana. The marijuana produced in the United States and Canada is generally thought to be of superior quality to the marijuana

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Leonhart further stated, "Take for instance, Kansas, and we've talked to our partners in Kansas and they've already been seeing a 61 percent increase in marijuana seizures coming from Colorado."

¹⁵⁴ Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact*, September 2016, p. 4.

¹⁵⁵ *Ibid.*, p. 110.

¹⁵⁶ The Constitution provides the Supreme Court with original jurisdiction over "Controversies between two or more States," meaning such claims can be filed directly with the Supreme Court without first being litigated in the lower federal courts. U.S. CONST., art. III, §2. cl. 1.

¹⁵⁷ Jack Healy, "Nebraska and Oklahoma Sue Colorado Over Marijuana Law," *The New York Times*, December 18, 2014.

¹⁵⁸ *States of Nebraska and Oklahoma v. State of Colorado*, S. Ct., Complaint, p. 3.

¹⁵⁹ *Nebraska, et al. v. Colorado*, 577 U.S. ___, 136 S. Ct. 1034 (2016); see also David G. Savage, "Supreme Court Rejects Challenge to Colorado Marijuana Law From Other States," *The Los Angeles Times*, March 21, 2016.

¹⁶⁰ Tom James, "The Failed Promise of Legal Pot," *The Atlantic*, May 9, 2016.

¹⁶¹ *National Drug Threat Assessment Summary 2015*, p. 72.

¹⁶² *National Drug Threat Assessment Summary 2015*, p. v.

¹⁶³ *National Drug Threat Assessment Summary 2016*, p. 105.

produced in Mexico. To be responsive to the U.S. demand for high-quality marijuana, Mexican drug traffickers have tried to improve their product.¹⁶⁴ However, it is not just U.S. consumers who demand higher-quality marijuana. The demand exists in Mexico as well; there have even been anecdotal reports of traffickers moving high-quality marijuana produced in the United States across the Southwest border for sale and distribution in Mexico.¹⁶⁵ U.S. officials have not yet reported data on the quantity or frequency of this southbound smuggling.

The Marijuana Gray Market

In Colorado, state law allows the cultivation of up to 99 marijuana plants for patients and caregivers and up to 6 plants per individual for recreational purposes. In what has been dubbed “the gray market,” marijuana is sometimes being grown legally *but then sold illegally*.¹⁶⁶ In addition to federal and local enforcement actions against gray market actors, Colorado Governor Hickenlooper reportedly is seeking to establish new limits on residential plants and give law enforcement additional resources to combat unlicensed marijuana growers.¹⁶⁷

Legalization Impact on Criminal Networks

A number of criminal networks rely on profits generated from the sale of illegal drugs—including marijuana—in the United States. Mexican drug trafficking organizations control more of the wholesale distribution of marijuana than other major drug trafficking organizations in the United States.¹⁶⁸ One estimate has placed the proportion of U.S.-consumed marijuana that was imported from Mexico at somewhere between 40% and 67%.¹⁶⁹ While the Mexican criminal networks control the wholesale distribution of illicit drugs in the United States, they “are not generally directly involved in retail distribution of illicit drugs.”¹⁷⁰ In order to facilitate the retail distribution and sale of drugs in the United States, Mexican drug traffickers have formed relationships with U.S. street, prison, and outlaw motorcycle gangs.¹⁷¹ Although these gangs have historically been involved with retail-level drug distribution, their ties to the Mexican criminal networks have allowed them to become increasingly involved at the wholesale level as well. Trafficking and distribution of illicit drugs is a primary source of revenue for these gangs.¹⁷²

A number of organizations have assessed the potential profits generated from illicit drug sales, both worldwide and in the United States, but “[e]stimates of marijuana ... revenues suffer particularly high rates of uncertainty.”¹⁷³ The former National Drug Intelligence Center (NDIC),

¹⁶⁴ *Ibid.*, p. 116.

¹⁶⁵ John Burnett, “Legal Pot In the U.S. May Be Undercutting Mexican Marijuana,” *NPR All Things Considered*, December 1, 2014.

¹⁶⁶ John Frank, “Colorado governor calls marijuana gray market ‘a clear and present danger’,” *The Denver Post*, November 15, 2016.

¹⁶⁷ Brian Eason “The top 10 issues facing Colorado lawmakers Eason and John Frank, in the 2017 session,” *The Denver Post*, January 9, 2017.

¹⁶⁸ *National Drug Threat Assessment Summary 2016*.

¹⁶⁹ Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

¹⁷⁰ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 18.

¹⁷¹ *National Drug Threat Assessment Summary 2016*.

¹⁷² *Ibid.* See also *National Drug Threat Assessment Summary 2015*.

¹⁷³ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, (continued...)

for instance, estimated that the sale of illicit drugs in the United States generates between \$18 billion and \$39 billion in U.S. wholesale drug proceeds for the Colombian and Mexican drug trafficking organizations annually.¹⁷⁴ The proportion that is attributable to marijuana sales, however, is unknown.¹⁷⁵ Without a clear understanding of (1) actual proceeds generated by the sale of illicit drugs in the United States, (2) the proportion of total proceeds attributable to the sale of marijuana, and (3) the proportion of marijuana sales controlled by criminal organizations and affiliated gangs, any estimates of how marijuana legalization might impact the drug trafficking organizations are purely speculative.

Marijuana proceeds are generated at many points along the supply chain, including production, transportation, and distribution. Experts have debated which aspects of this chain—and the related proceeds—would be most heavily impacted by marijuana legalization. In addition, the potential impact of marijuana legalization in some subset of the states (complicated by varying legal frameworks and regulatory regimes) may be more difficult to model than the impact of federal marijuana legalization. For instance, in evaluating the potential fiscal impact from the 2012 Washington and Colorado legalization initiatives on the profits of Mexican drug trafficking organizations, the Organization of American States (OAS) hypothesized that “[a]t the extreme, Mexican drug trafficking organizations could lose some 20 to 25 percent of their drug export income, and a smaller, though difficult to estimate, percentage of their total revenues.”¹⁷⁶

Other scholars have based their estimates on a hypothetical federal legalization of marijuana when estimating the potential financial impact of marijuana legalization. Under this scenario, small-scale growers at the start of the marijuana production-to-consumption chain might be put out of business by professional farmers, a few dozen of which “could produce enough marijuana to meet U.S. consumption at prices small-scale producers couldn't possibly match.”¹⁷⁷ Large drug trafficking organizations generate a majority of their marijuana-related income (which some estimates place at between \$1.1 billion to \$2.0 billion) from exporting the drug to the United States and selling it to wholesalers on the U.S. side of the border.¹⁷⁸ This revenue could be jeopardized if the United States were to legalize the production and consumption of recreational marijuana. Of note, the Tax Foundation has estimated that the annual U.S. marijuana

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2013, p. 7.

¹⁷⁴ U.S. Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2009*, December 2008, p. 49.

¹⁷⁵ A 2006 Office of National Drug Control Policy figure estimated that over 60% of Mexican drug trafficking organizations' revenue could be attributed to marijuana sales. However, a number of researchers and experts have questioned the accuracy of this number and provided other estimates of marijuana proceeds. See, for example, Beau Kilmer, *Debunking the Mythical Numbers about Marijuana Production in Mexico and the United States*, RAND Drug Policy Research Center. See also U.S. Government Accountability Office, *Drug Control: U.S. Assistance has Helped Mexican Counternarcotics Efforts, but Tons of Illicit Drugs Continue to Flow into the United States*, GAO-07-1018, August 2007. Another estimate has placed the proportion of Mexican DTO export revenues attributable to marijuana at between 15% and 26% of total drug revenues. See Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

¹⁷⁶ Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 41.

¹⁷⁷ Jonathan P. Caulkins, Angela Howken, and Beau Kilmer, “How Would Marijuana Legalization Affect Me Personally?” in *Marijuana Legalization: What Everyone Needs to Know* (Oxford University Press, 2012).

¹⁷⁸ Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond, et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

market is \$45 billion—0.28% of GDP.¹⁷⁹ Under a legalization regime, some portion of the revenue that might have previously been generated by traffickers could be lost to authorized sellers (in the form of profits) and governments (in the form of taxes).

International Response¹⁸⁰

Developments in state marijuana laws and policies, particularly those that relate to recreational marijuana activities, have raised some concerns about the United States' compliance with three United Nations (U.N.) drug control treaties that impose certain international obligations relating to marijuana. These treaties generally seek to curb the use of controlled substances while carving out exceptions for medicinal and scientific uses. The United States is a party to the following drug treaties:

- The Single Convention on Narcotic Drugs (Single Convention)¹⁸¹ requires parties to the convention to “take such legislative and administrative measures as may be necessary ... to limit exclusively to medical and scientific purposes” the manufacture, distribution, trade, use, and possession of “cannabis.”¹⁸²
- The 1971 Convention on Psychotropic Substances requires that specific controls be placed upon THC.¹⁸³
- The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires parties to establish criminal penalties for the possession, purchase, or cultivation of marijuana for nonmedicinal consumption, but only to the extent that such action is consistent with the “constitutional principles and basic concepts of [the country’s] legal system.”¹⁸⁴

The International Narcotics Control Board (INCB or Board) and the Commission on Narcotic Drugs of the Economic and Social Council (Commission) are responsible for monitoring parties' compliance with these treaties,¹⁸⁵ though they appear to have limited ability to enforce such compliance. For example, the Single Convention provides that the Commission may “call the attention of the Board to any matters which may be relevant to the functions of the Board,”¹⁸⁶ while the Board may take measures that are “most consistent with the intent to further the co-operation of Governments with the Board and to provide the mechanism for a continuing

¹⁷⁹ Gavin Ekins and Joseph Henchman, *Marijuana Legalization and Taxes: Federal Revenue Impact*, Tax Foundation, May 12, 2016.

¹⁸⁰ This section was authored by Brian T. Yeh, Legislative Attorney, Congressional Research Service.

¹⁸¹ Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, <https://www.unodc.org/unodc/en/treaties/single-convention.html> (last visited January 6, 2017). The Single Convention was amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs.

¹⁸² *Ibid.* at art. 2, 4, 21, 28.

¹⁸³ Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543. The convention directs parties to “prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them.”

¹⁸⁴ December 20, 1988, S. Treaty Doc. No. 101-4 (1989).

¹⁸⁵ Single Convention on Narcotic Drugs, art. 5, March 30, 1961, 18 U.S.T. 1407; Convention on Psychotropic Substances, art. 17, 19, February 21, 1971, 32 U.S.T. 543; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 21, 22, December 20, 1988, S. Treaty Doc. No. 101-4 (1989).

¹⁸⁶ Single Convention on Narcotic Drugs, art. 8.

dialogue between Governments and the Board which will lend assistance to and facilitate effective national action to attain the aims of this Convention.”¹⁸⁷

It is unclear whether, or to what extent, the enactment of state laws authorizing the use of marijuana for recreational purposes affects the United States’ compliance with the drug treaties. Some assert that state-level recreational marijuana legalization (and the federal government response to those state laws) does not conform with the international obligations regarding marijuana, while others disagree with this interpretation. For example, the then-President of the INCB stated in 2013 that recreational marijuana legalization in states is inconsistent with the Single Convention’s requirement that parties limit lawful uses of cannabis to medical and scientific purposes.¹⁸⁸ On the other hand, in 2014, the then-Assistant Secretary of State for International Narcotics and Law Enforcement Affairs appeared to express a contrary view when he urged the international community to “accept flexible interpretation of” the U.N. Drug Control Conventions.¹⁸⁹ He appealed to countries “to tolerate different national drug policies, to accept the fact that some countries will have very strict drug approaches; other countries will legalize entire categories of drugs.”¹⁹⁰ A Stanford University professor has also opined that the United States is not in violation of the drug control conventions on account of state-level laws,¹⁹¹ although a Brookings Institution fellow has argued otherwise.¹⁹²

Some observers have raised doubts about claims that the drug treaties contain the “flexibilities” that can accommodate state recreational marijuana laws; they have instead argued for reforms of the treaties to expressly permit them.¹⁹³ Yet in September 2014, President Obama disagreed that the international drug control regime needs revision in light of marijuana policy developments.¹⁹⁴ The Trump Administration’s stance on this issue has not yet been articulated.

¹⁸⁷ Ibid, at art. 9(5).

¹⁸⁸ Raymond Yans, INCB President, *Report of the International Narcotics Control Board*, March 11-15, 2013, at 7, https://www.incb.org/documents/Speeches/Speeches2013/CND_2013_Speech_FINAL_ENGLISH_120313_cl.pdf; “INCB has to underline, it is our mandate, the central role of the 1961 Convention which needs to be implemented worldwide, on the national level, but also on the sub-national level.”

¹⁸⁹ U.S. Department of State, William R. Brownfield, *Trends in Global Drug Policy*, New York Foreign Press Center Briefing, October 9, 2014.

¹⁹⁰ Ibid.

¹⁹¹ Keith Humphreys, “Can the United Nations Block U.S. Marijuana Legalization?,” *Huffington Post*, September 25, 2013 (updated November 25, 2013); “Countries with federated systems of government like the U.S. and Germany can only make international commitments regarding their national-level policies. Constitutionally, U.S. states are simply not required to make marijuana illegal as it is in federal law. Hence, the U.S. made no such commitment on behalf of the 50 states in signing the UN drug control treaties.”

¹⁹² Jonathan Rauch, “Marijuana Legalization Poses a Dilemma for International Drug Treaties,” *Brookings*, October 14, 2014; quoting Brookings fellow Wells Bennett as saying that “if 10, 15, 20 states enact and operate responsible regimes for the regulation of marijuana—we will be enforcing the Controlled Substances Act less and less in jurisdictions that have regulated, legal marijuana markets. And that will create more and more tension with our international commitments to suppress marijuana. At that point, it will be extraordinarily difficult for the U.S. to maintain that it complies with its obligations.”

¹⁹³ See, for example, Wells Bennett and John Walsh, “Marijuana Legalization Is an Opportunity to Modernize International Drug Treaties,” October 2014, *Brookings*.

¹⁹⁴ The White House, *Presidential Determination—Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015*, September 15, 2014. “The U.N. drug conventions ... allow sovereign nations the flexibility to develop and adapt new policies and programs in keeping with their own national circumstances while retaining their focus on achieving the conventions’ aim of ensuring the availability of controlled substances for medical and scientific purposes, preventing abuse and addiction, and suppressing drug trafficking and related criminal activities.... [R]evising the U.N. drug conventions is not a prerequisite to advancing the common and shared responsibility of international cooperation designed to enhance the positive goals we have set to counter illegal drugs and crime.”

Tax Revenue

All eight of the states that have legalized marijuana for recreational purposes levy some combination of taxes and business licensing fees at the level of marijuana cultivation or retail sales (in addition to general state sales taxes).¹⁹⁵ Tax rates on the cultivation and retail sales are more commonly levied on an *ad valorem* basis, or as a percentage of price.¹⁹⁶ The tax treatment of medical marijuana varies by state. In some states, medical marijuana is indirectly taxed further back the distribution chain at the cultivator level. In addition, states tax the retail sales of medical marijuana differently. In Colorado, for example, medical marijuana sales are exempt from a 10% special excise tax that applies to recreational marijuana sales, but they are still subject to the 2.9% general state sales tax.¹⁹⁷ In Washington, medical marijuana sales are subject to the same 37% excise tax that applies to recreational sales, but they are exempt from the state's 6.5% general sales tax.¹⁹⁸

While some states utilize marijuana-related revenue streams for general spending purposes, others have approved measures to dedicate a portion of this revenue for spending on education (Colorado and Oregon), criminal justice programs (Alaska), or public health and substance abuse programs (Washington).¹⁹⁹

Overall, though, these tax and spending regimes have been subject to change, as government officials and voters respond to changes in revenue collections and budget priorities.

Selected Issues Before Congress—The Path Forward

Given the current federal marijuana policy gap with certain states, there are a number of issues that Congress may address. These include, but are not limited to, issues surrounding financial services for marijuana businesses, federal tax issues for these businesses, oversight of federal law enforcement, allowance of states to implement medical marijuana laws and involvement of federal health care workers, and consideration of marijuana's designation as a Schedule I drug.

Provision of Financial Services to the Marijuana Industry

In spite of the guidance issued by FinCEN and DOJ, many financial institutions remain reluctant to openly enter relationships with state-authorized marijuana businesses.²⁰⁰ Some marijuana businesses and marijuana industry proponents have complained that even when marijuana

¹⁹⁵ As mentioned in the "Recreational Legalization" section of this report, Washington, DC, has not legalized the commercial sale of recreational marijuana.

¹⁹⁶ Alaska is the only state that imposes a flat dollar tax rate on marijuana: \$50 per ounce is imposed when marijuana is sold or transferred from a marijuana cultivation facility to a retail marijuana store or marijuana product manufacturing facility. See Alaska Department of Revenue, "Marijuana Tax," accessed January 11, 2017, <http://www.tax.alaska.gov/programs/programs/index.aspx?60000>.

¹⁹⁷ See Colorado Department of Revenue, "Marijuana Taxes," accessed January 11, 2017, <https://www.colorado.gov/pacific/tax/marijuana-taxes-quick-answers>.

¹⁹⁸ See Washington Department of Revenue, "Taxes Due on Marijuana," accessed January 11, 2017, <http://dor.wa.gov/Content/FindTaxesAndRates/marijuana/Default.aspx>.

¹⁹⁹ See Office of Governor Bill Walker, "Governor Walker Signs Historic Criminal Justice Reform Bill," press release, July 11, 2016, at; Laurel Andrews, "Here's Where Half of the Revenue from Alaska's Legal Pot Will Go," *Alaska Dispatch News*, July 14, 2016.

²⁰⁰ Sophie Quinton, *Why Marijuana Businesses Still Can't Get Bank Accounts*, The PEW Charitable Trusts, March 22, 2016.

businesses are able to open bank accounts or secure other financial services, those customer relationships are frequently terminated in relatively short order, especially when the existence of the relationship between the financial institution and the marijuana business becomes public.²⁰¹

Over the years, several legislative proposals have been designed to jump-start financial relationships with state-authorized marijuana businesses. Some of these proposals would attempt to alleviate BSA reporting burdens beyond the measures detailed in the 2014 FinCEN guidance.²⁰² These proposals also would amend banking laws to prevent banking regulators from “prohibit[ing], penaliz[ing], or otherwise discourag[ing] a depository institution from providing financial services to a marijuana-related legitimate business” (i.e., one that is in compliance with a state or local marijuana regulatory regime).²⁰³

While such measures, if enacted, might help around the edges, many financial institutions and their federal regulators may remain apprehensive about ties to the marijuana industry while marijuana is listed as a Schedule I controlled substance under the CSA. In the absence of legislative change to the CSA, financial institutions must proceed with the knowledge that the Administration could reverse or otherwise make significant changes to its enforcement priorities and policies.²⁰⁴ In other words, while these financial institutions may not be the subject of law enforcement investigations currently, the option remains.

Other legislative proposals²⁰⁵ would reclassify marijuana as a Schedule II substance—this would legalize marijuana for medical purposes. This would likely do more to ease bank concerns with providing financial services to *medical* marijuana businesses but would not *entirely* eliminate a financial institution’s legal risks, particularly if it associates with medical marijuana businesses that operate in states or localities lacking strong regulatory oversight and enforcement standards. Additionally, the reclassification of marijuana to Schedule II probably would have little impact on the provision of financial services to *recreational* marijuana businesses because they would still be operating in violation of the CSA.

Federal Tax Treatment

Marijuana producers and retailers may not deduct the costs of selling their product (e.g., payroll, rent, or advertising) for the purposes of the federal income tax filings.²⁰⁶ The Internal Revenue Code (IRC) Section 280E states that

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

²⁰¹ Ibid. See also David Migoya, “Oregon bank opens doors to Colorado marijuana businesses,” *The Denver Post*, January 20, 2015,

²⁰² See, for example, S. 683, 114th Cong.; S. 1726, 114th Cong.; H.R. 1538, 114th Cong.; and H.R. 2076, 114th Cong.

²⁰³ Ibid.

²⁰⁴ See generally CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

²⁰⁵ See, for example, S. 683, 114th Cong.; H.R. 1538, 114th Cong.

²⁰⁶ For more legal analysis, see CRS Report R44056, *Marijuana and Federal Tax Law: In Brief*, by Erika K. Lunder.

Media reports indicate that the Internal Revenue Service (IRS) has enforced Section 280E in audits of marijuana-related businesses by refusing to accept these businesses' deductions.²⁰⁷ IRC Section 280E does not prohibit a marijuana business from deducting the costs of cultivating or acquiring marijuana as a "cost of goods sold," though.²⁰⁸ Effectively this constitutes an implicit tax on marijuana-related businesses equal to the value of the tax benefit of such deductions if these firms had engaged in an industry that was legal under federal law. One such public case involves the Sacramento-based Canna Care marijuana dispensary. The IRS disallowed \$2.6 million in deductions for employee salaries, rent, and other costs over a three-year period, which resulted in the business owing \$875,000 in additional taxes. Canna Care challenged the IRS in U.S. Tax Court, but ultimately the court upheld the IRS ruling.²⁰⁹

The discrepancies between federal, state, and local tax treatments of marijuana-related businesses may create economic incentives to engage in the underground economy. In addition to the uncertainty of federal tax enforcement procedures (and costs of any related legal assistance), the inability of marijuana businesses to deduct their business expenses is effectively an implicit tax up to 39.6% (if organized as sole-proprietor or partnership) or 35% (if organized as a C corporation) of the cost of these expenses.²¹⁰ These implicit taxes are paid in addition to state and local sales and special excise taxes.²¹¹ The status quo administration of federal tax laws creates an economic advantage for illicit marijuana sellers, who are not subject to direct taxation of their sales.

Past marijuana-related tax proposals have varied in scope.²¹² Some would have exempted a business (that conducts marijuana sales in compliance with state law) from the Section 280E prohibition against allowing business-related tax credits or deductions for expenditures in connection with trafficking in controlled substances.²¹³ In contrast, one bill would have removed marijuana from all lists of controlled substances (and, indirectly, IRC §280E restrictions on marijuana),²¹⁴ and another would have imposed a federal excise tax on domestic recreational marijuana retail sales that would begin at 10% of the price and phase in a tax rate of 25% over four years.²¹⁵

²⁰⁷ For example, see Jeff Daniels, "IRS Said to be Auditing Colorado Marijuana Businesses," *CNBC*, July 12, 2016, <http://www.cnn.com/2016/07/12/irs-said-to-be-auditing-colorado-marijuana-businesses.html>; and Will Yankowicz, "Marijuana Companies' Biggest Battle Might Be Against the IRS," *Slate*, July 1, 2016, http://www.slate.com/blogs/moneybox/2016/07/01/legal_cannabis_businesses_pay_taxes_under_a_code_reserved_for_illegal_drug.html.

²⁰⁸ See CRS Report R44056, *Marijuana and Federal Tax Law: In Brief*, by Erika K. Lunder.

²⁰⁹ See *Canna Care, Inc. v. Commissioner*, T.C. Memo 2015-206, October 22, 2015, <http://ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10586>.

²¹⁰ With 35% being the top, marginal tax bracket for corporations and 39.6% being the top, marginal tax bracket for individuals under the federal income tax code.

²¹¹ Colorado imposes a sales tax of 10% and an excise tax of 15% on retail marijuana sales, in addition to a general 2.9% state sales tax and any local sales taxes. See State of Colorado Department of Revenue, "Retail Marijuana Return Filing Overview," January 29-31, 2014, <http://www.colorado.gov/cms/forms/dor-tax/RetailMarijuanaReturnFilingOverviewJan2014.pdf>. The state of Washington, which began allowing recreational marijuana sales in 2014, will impose an excise tax of 25% on the sales price of marijuana within an established, state-distribution system.

²¹² For more general analysis of federal proposals to tax marijuana, see CRS Report R43785, *Federal Proposals to Tax Marijuana: An Economic Analysis*, by Jane G. Gravelle and Sean Lowry.

²¹³ See the Small Business Tax Equity Act of 2015 (H.R. 1855; S. 987) from the 114th Congress.

²¹⁴ See the Regulate Marijuana Like Alcohol Act (H.R. 1013) from the 114th Congress.

²¹⁵ See the Marijuana Tax Revenue Act of 2015 (H.R. 1014) from the 114th Congress.

Oversight of Federal Law Enforcement

Review of Agency Missions

In exercising its oversight authorities, Congress may choose to examine the extent to which (if at all) federal law enforcement missions—in particular the DEA’s mission—are impacted by state legalization of marijuana. For instance, policymakers may elect to review the mission of each federal law enforcement agency involved in enforcing the CSA and examine how its drug-related investigations may be influenced by the varying state-level policies regarding marijuana. As noted, federal law enforcement has generally prioritized the investigation of drug traffickers and dealers over that of low-level drug users. Policymakers may question whether these policies and priorities are implemented consistently across states with different drug policies regarding marijuana.

Cooperation with State and Local Law Enforcement

One issue policymakers may debate is whether or how to incentivize task forces, fusion centers, and other coordinating bodies charged with combating drug-related crimes. Before determining whether to increase, decrease, or maintain funding for coordinated efforts such as task forces, policymakers may consider whether state and local counterparts are able to effectively achieve task force goals if the respective state marijuana policy is not in agreement with federal marijuana policy. Policymakers may choose to evaluate whether certain drug task forces are sustainable in states that have established policies that are either inconsistent—such as in states that have *decriminalized* small amounts of marijuana possession—or are in direct conflict—including states that have *legalized* either medical or recreational marijuana—with federal drug policy. For instance, might there be any internal conflicts that prevent task force partners from collaborating effectively to carry out their investigations?

Of note, the Arizona Court of Appeals ruled that patients who possess marijuana in compliance with the Arizona Medical Marijuana Act are entitled to the return of their marijuana that law enforcement may have seized during a traffic stop.²¹⁶ In states such as Colorado, media reports indicate that some local law enforcement officers avoid seizing marijuana in certain cases because they do not want to have to return the marijuana to its owner—an act that is tantamount to distribution of a Schedule I controlled substance, a violation of federal law.²¹⁷

Oversight and Continuation of Federal Enforcement Priorities

As noted, in responding to states with recreational legalization initiatives, DOJ issued federal enforcement priorities for states with legal marijuana. According to DOJ, it monitors the effects of state legalization by

- collaborating with other DOJ components and other federal agencies in assessment of marijuana enforcement-related data;
- prosecuting cases that threaten federal enforcement priorities; and
- consulting with state officials about areas of federal concern.²¹⁸

²¹⁶ *State v. Okun*, 231 Ariz. 462 (Ariz. Ct. App. 2013). The U.S. Supreme Court denied certiorari in 2014. *Arizona v. Okun*, 572 U.S. ___, 134 S. Ct. 1759 (2014).

²¹⁷ Jessica Maher, “Law enforcement conflicts still exist with legal pot,” *Reporter-Herald*, January 2, 2014.

²¹⁸ U.S. Government Accountability Office, *DOJ Should Document Its Approach to Monitoring the Effects of* (continued...)

As of December 2015, however, DOJ has not documented its efforts to monitor the effects of state legalization and ensure that these priorities are being emphasized. It is unclear how the metrics to evaluate these priorities will be used to determine whether federal intervention is needed in states that have legalized.²¹⁹ For example, one of the eight enforcement priorities listed by Deputy Attorney General Cole was to prevent the diversion of marijuana to other states. While it seems the DEA is aware of increased marijuana trafficking from Colorado to Kansas, it is unclear what level of increased trafficking might trigger action by the federal government against state marijuana laws. Congress may choose to exercise oversight over DOJ's enforcement priorities and metrics for tracking illicit activity in the states. Congress may also request research on or an investigation of this issue outside of actions by the Administration.

The Administration may alter or reverse its enforcement priorities at any time. As mentioned, in a February 2017 White House press statement, the Trump Administration indicated there may be increased enforcement against recreational marijuana, and stated that there is a "big difference" between medical and recreational marijuana.²²⁰

Medical Marijuana

State Medical Marijuana Laws and Federal Law Enforcement

State medical marijuana laws have raised questions for federal policymakers about enforcing federal law related to marijuana in situations where individuals or organizations are acting in compliance with state law. In previous Congresses, Members of both the House and the Senate have introduced legislation that would amend the CSA such that provisions relating to marijuana would not apply to a person who is acting in compliance with relevant state law.²²¹

As discussed, in recent years, Congress has included policy riders in appropriations acts to prohibit DOJ from using funds to prevent states from implementing their medical marijuana laws.²²² Congress may decide to alter, maintain, or reverse this provision. Notably, in a February 2017 White House press statement, the Trump Administration signaled some acceptance of the medicinal use of marijuana: "[t]he President understands the pain and suffering that many people go through who are facing especially terminal diseases and the comfort that some of these drugs, including medical marijuana, can bring to them."²²³

(...continued)

Legalization, GAO-16-1, December 30, 2015.

²¹⁹ *Ibid*, pp. 30-31.

²²⁰ The White House, Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer, 2/23/2017, #15*, February 22, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15>.

²²¹ See, for example, the Compassionate Access, Research Expansion, and Respect States (CARERS) Act of 2015 (H.R. 1538/S. 683 in the 114th Congress).

²²² See the Consolidated Appropriations Act, 2016 (P.L. 114-113), §542; and the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), §538 from the 114th Congress. Of note, the medical marijuana provision remains in effect during the FY2017 continuing resolution (The Further Continuing Appropriations Act, 2017 (P.L. 114-254).) that continues appropriations for the bureaus and agencies funded through the annual Commerce, Justice, Science, and Related Agencies appropriations until April 28, 2017

²²³ The White House, Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer, 2/23/2017, #15*, February 22, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/23/press-briefing-press-secretary-sean-spicer-2232017-15>.

State Medical Marijuana Laws and Federal Health Care Providers

A topic of particular interest to federal policymakers has been how federal health care providers—especially those in the Department of Veterans Affairs (VA)—deal with state medical marijuana laws. VA policy does not deny health care services to veterans who participate in state marijuana programs; however, it does prohibit VA providers from completing the forms that effectively take the place of prescriptions in state medical marijuana programs.²²⁴ Members in both chambers have introduced legislation that would allow VA providers to complete such forms.²²⁵ Similar provisions passed the Senate as part of an FY2016 appropriations bill, and passed the Senate Committee on Appropriations as part of an FY2017 appropriations bill; however, neither were included in an enacted appropriations law.²²⁶

Consideration of Marijuana as a Schedule I Drug: Maintain or Minimize the Gap

As the gap between federal and state policies on marijuana widens each year, policymakers might decide to reevaluate federal marijuana policy. It has only been a few years since states began to legalize recreational marijuana, but over 20 years since they began to legalize medical marijuana. A large majority of states now have marijuana policies that contradict the CSA.

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. It may also decide that the CSA must be enforced in states and direct federal law enforcement to strictly enforce the CSA, even when individuals may be in compliance with state laws. Alternatively, Congress could choose to reevaluate marijuana's placement as a Schedule I controlled substance. Given the history of its scheduling, Congress may consider establishing a committee of experts to evaluate the efficacy of marijuana laws in the United States and address other issues such as the medicinal value and harm of marijuana use.²²⁷

Upon reevaluation, should Congress determine that marijuana no longer meets the criteria to be a Schedule I substance, it could take legislative action to remove it from the list of substances on that schedule. In doing so, Congress may (1) place marijuana on one of the other schedules (II, III, IV, or V) of controlled substances or (2) remove marijuana as a controlled substance altogether. If Congress chooses to remove marijuana as a controlled substance, it could alternatively seek to regulate and tax commercial marijuana activities. If marijuana *remains* a controlled substance under the CSA under any schedule, this would not eliminate the existing conflict with states that have legalized recreational marijuana. If the conflict remains, Congress may choose to continue to allow states to carry on with implementation of recreational marijuana

²²⁴ Department of Veterans Affairs, Veterans Health Administration (VHA), *Access to Clinical Programs for Veterans Participating In State- Approved Marijuana Programs*, VHA Directive 2011-004, Washington, DC, January 31, 2011, http://www.va.gov/vhapublications/viewpublication.asp?pub_id=2362. This directive expired on January 31, 2016; however, it is cited in VHA Directive 1134 (published on November 28, 2016) and thus appears to remain in effect.

²²⁵ See the Veterans Equal Access Act (H.R. 667 in the 114th Congress); and the Compassionate Access, Research Expansion, and Respect States (CARERS) Act of 2015 (H.R. 1538/S. 683 in the 114th Congress).

²²⁶ See §246 of H.R. 2029 (in the 114th Congress) as engrossed in the Senate on November 10, 2015, and §249 of S. 2806 (in the 114th Congress) as reported to the Senate on April 18, 2016.

²²⁷ These would be similar to the efforts of the National Commission on Marijuana and Drug Abuse, also known as the Shafer Commission, which was established under the CSA to study marijuana in the United States. See **Appendix B** for further discussion of the Shafer Commission.

laws, or it may choose to press for increased enforcement action against or within the states to attempt to stop state-sanctioned, recreational marijuana.

Appendix A. Medical Research on Marijuana

Approved Drugs and Ongoing Research

The Food and Drug Administration (FDA) has approved two drugs containing synthetic THC: nabilone and dronabinol. Nabilone is FDA-approved as an antiemetic (to reduce nausea or prevent vomiting) for patients receiving chemotherapy for cancer.²²⁸ Dronabinol is FDA-approved as both an antiemetic for patients on chemotherapy and an appetite stimulant for patients with AIDS-related weight loss.²²⁹ In addition, drugs containing plant-derived THC and/or cannabidiol (CBD, a nonpsychoactive chemical component of marijuana) are in the drug development and approval process.²³⁰

The UK-based GW Pharmaceuticals has plant-derived cannabinoid drug products in trials with the goal of FDA approval.²³¹ Its drug Sativex®, which is composed primarily of plant-derived THC and CBD, has already gained approval in 30 other countries for the treatment of spasticity²³² due to multiple sclerosis.²³³ In 2014, the company announced that the FDA had granted “Fast Track” designation to Sativex as a potential pain reliever for patients with advanced cancer;²³⁴ however, in 2015, three trials of Sativex failed to show superiority over a placebo.²³⁵ The company continues to seek approval of Sativex and other plant-derived cannabinoid products for treatment of various conditions (e.g., childhood epilepsy).²³⁶

Scientific Evaluations of Marijuana

Recent evaluations conducted separately by the FDA and the National Academies of Sciences, Engineering, and Medicine (the National Academies) illustrate the challenge of meeting the required standard of evidence. While taking different approaches to their evaluations, both the FDA and the National Academies have found that the current evidence base falls short.

²²⁸ FDA first approved nabilone in 1985 under the trade name Cesamet®, which is registered to Meda Pharmaceuticals Inc. See http://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=018677.

²²⁹ FDA first approved dronabinol in 1985 under the trade name Marinol®, which is registered to AbbVie Inc. See http://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=018651.

²³⁰ Department of Health and Human Services, Food and Drug Administration, *FDA and Marijuana: Questions and Answers*, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm#determinations>. For an explanation of the FDA’s drug development and approval process, see <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/default.htm>.

²³¹ GW Pharmaceuticals, “GW Pharmaceuticals plc Reports Fourth Quarter and Year-End 2016 Financial Results and Operational Progress,” press release, December 5, 2016, <http://ir.gwpharm.com/releasedetail.cfm?ReleaseID=1002545>.

²³² Spasticity refers to problems with muscle control. It is a disorder often found in people with multiple sclerosis, cerebral palsy, and other conditions.

²³³ Ibid.

²³⁴ GW Pharmaceuticals, “GW Pharmaceuticals Announces that Sativex Receives Fast Track Designation from FDA in Cancer Pain,” press release, April 28, 2014, <http://ir.gwpharm.com/releasedetail.cfm?ReleaseID=842890>. For an explanation of FDA’s “Fast Track” designation, see <http://www.fda.gov/forpatients/approvals/fast/ucm20041766.htm>.

²³⁵ GW Pharmaceuticals, “GW Pharmaceuticals and Otsuka Announce Results From Two Remaining Sativex(R) Phase 3 Cancer Pain Trials,” press release, October 27, 2015.

²³⁶ GW Pharmaceuticals, “GW Pharmaceuticals plc Reports Fourth Quarter and Year-End 2016 Financial Results and Operational Progress,” press release, December 5, 2016. Of note, the FDA does not release this kind of information, which is proprietary; this information is publicly available because the company released it.

FDA Evaluation. The FDA evaluated only marijuana, not drugs containing a plant-derived chemical constituent of marijuana or drugs containing synthetic THC. Its analysis of marijuana’s potential therapeutic effects is limited to 11 published studies that met criteria for inclusion in the review (e.g., that the study must be a randomized controlled trial).²³⁷ The studies examined marijuana’s use to treat neuropathic pain (five studies), stimulate appetite in patients with HIV (two studies), treat glaucoma (two studies), treat spasticity in multiple sclerosis (one study), and treat asthma (one study).²³⁸ The evaluation also assessed potential risks of marijuana use (see text box, “Risks Associated with Marijuana Use”). The evaluation, called an eight-factor analysis, was conducted by the FDA pursuant to a request by the DEA.²³⁹ The DEA requests such scientific and medical evaluations from the Secretary of Health and Human Services (HHS) in response to petitions asking the DEA to reschedule marijuana administratively.²⁴⁰

National Academies Evaluation. The National Academies evaluated cannabis, its constituents, and drugs containing synthetic THC. For each of 11 health topics, the report assessed “fair- and good-quality” research, relying on systematic reviews published since 2011 (where available) and primary research published after the systematic review (or since 1999, if no systematic review exists).²⁴¹ The 11 health topics are (1) therapeutic effects; (2) cancer; (3) cardiometabolic risk; (4) respiratory disease; (5) immunity; (6) injury and death; (7) prenatal, perinatal, and postnatal exposure to cannabis; (8) psychosocial effects; (9) mental health; (10) problem cannabis use; and (11) cannabis use and abuse of other substances.²⁴² The report presents nearly 100 conclusions, including some related to the challenges in conducting research with cannabis and cannabinoids.

Federal Research Requirements for Marijuana

Many federal research requirements are standard across all schedules of controlled substances; however, some requirements vary according to the assigned schedule of the particular substance. Federal regulations are more stringent for Schedule I substances—including marijuana. Examples of this include the following:

- For Schedule I substances, such as marijuana, even if practitioners have a DEA registration for a substance in Schedules II-V, they must obtain a *separate* DEA registration for Schedule I substances.
- Individuals who seek to register to manufacture a controlled substance in Schedule I or II are subject to production quota limitations as determined by the DEA,²⁴³ but registrants for substances in Schedules III-V are not subject to such quotas.

²³⁷ Department of Justice, Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register* 53687-53766 and 53767-53845, August 12, 2016.

²³⁸ *Ibid.*

²³⁹ The term “eight-factor analysis” refers to the eight factors to be included pursuant to 21 U.S.C. §811(c).

²⁴⁰ The request for a scientific and medical evaluation is required by 21 U.S.C. §811(b). The results of the most recent eight-factor analysis prior to August 2016 are available at Department of Justice, Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 76 *Federal Register* 40551-40589, July 8, 2011.

²⁴¹ National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. S-3, doi: 10.17226/24625.

²⁴² *Ibid.*

²⁴³ See 21 U.S.C. §826.

- Researchers are required to store Schedule I and II substances in electronically monitored safes, steel cabinets, or vaults that meet or exceed certain specifications.²⁴⁴ They are required to store Schedule III-V substances by secure standards but the requirements are less stringent than those required for Schedule I and II substances.
- When researchers apply for a DEA registration to conduct research involving Schedule I controlled substances, they must comply with federal regulations specifying the form and content of the research protocols.²⁴⁵ The DEA Administrator must forward a copy of the application and research protocol to HHS, which is responsible for determining “the qualifications and competency of the applicant, as well as the merits of the protocol.”²⁴⁶ The HHS Secretary delegates that responsibility to the FDA. *No equivalent process is required for Schedule II-V controlled substances.*

Marijuana Supply for Researchers

Under the CSA, the Attorney General is required to register an applicant to manufacture Schedule I or II controlled substances “if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971.”²⁴⁷ In the case of marijuana, the National Center for Natural Products Research at the University of Mississippi has been the only registered manufacturer, operating under a contract administered by the National Institute on Drug Abuse (NIDA) within HHS’s National Institutes of Health. For nearly 50 years, it has been the only official source through which researchers may obtain marijuana for research purposes—and which some have referred to as a “federal research monopoly.”²⁴⁸ Some have contended that marijuana provided by NIDA to researchers is “both qualitatively and quantitatively inadequate.”²⁴⁹ Marijuana’s status as a Schedule I drug has reportedly created difficulty for researchers who seek to study the substance but are potentially unable to meet the strict requirements of the CSA, or perhaps they seek to utilize a different quality of marijuana than what is available through NIDA.

In August 2016, the DEA announced a policy change “designed to foster research by expanding the number of DEA-registered marijuana manufacturers.”²⁵⁰ Under the new policy, the DEA is willing to license additional growers to “operate independently, provided the grower agrees (through a written memorandum of agreement with DEA) that it will only distribute marijuana

²⁴⁴ 21 C.F.R. §§ 1301.72(a)(1)(i)-(iii) (specifications required for safes and steel cabinets storing Schedule I and II drugs or substances); see also 21 C.F.R. §§ 1301.72(a)(2) and 1301.72(a)(3)(i)-(vi) (specifications required for vaults storing Schedule I and II drugs or substances).

²⁴⁵ 21 C.F.R. § 1301.18(a).

²⁴⁶ 21 U.S.C. § 823(f); 21 C.F.R. § 1301.32(a).

²⁴⁷ 21 USC § 823(a).

²⁴⁸ See *NIDA’s Role in Providing Marijuana for Research*, available at <http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research>; and Marc Kaufman, “Federal Marijuana Monopoly Challenged,” *Washington Post*, December 12, 2005.

²⁴⁹ Marc Kaufman, “Federal Marijuana Monopoly Challenged,” *Washington Post*, December 12, 2005; and Department of Justice, Drug Enforcement Administration, “Lyle E. Craker; Denial of Application,” 74 *Federal Register* 2101, January 14, 2009.

²⁵⁰ Department of Justice, Drug Enforcement Administration, *DEA Announces Actions Related to Marijuana and Industrial Hemp*, August 11, 2016.

with prior, written approval from DEA.”²⁵¹ In addition, under the new policy, these growers will only be permitted to supply marijuana to DEA-registered researchers whose “protocols have been determined by [HHS] to be scientifically meritorious.” This new approach, DEA states, will allow individuals to obtain a DEA cultivation registration “not only to supply federally funded or other academic researchers, but also for strictly commercial endeavors funded by the private sector and aimed at drug product development.” Given that both the FDA and the DEA identified the lack of research as a significant factor in denying the rescheduling petitions in 2016, and to the extent that this policy may increase the amount of marijuana research conducted, the change *could* contribute to future debate on rescheduling.

²⁵¹ Department of Justice, Drug Enforcement Administration, “Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States,” 81 *Federal Register* 53846-53848, August 12, 2016.

Appendix B. Background on Federal Marijuana Policy

Early 20th Century

Prior to 1937, the growth and use of marijuana was legal under federal law.²⁵⁵ During the course of promoting federal legislation to control marijuana, Henry Anslinger, the first commissioner of the Federal Bureau of Narcotics (FBN),²⁵⁶ and others submitted testimony to Congress regarding the evils of marijuana use, claiming that it incited violent and insane behavior.²⁵⁷ Of note, Commissioner Anslinger had informed Congress that “the major criminal in the United States is the drug addict; that of all the offenses committed against the laws of this country, the narcotic addict is the most frequent offender.”²⁵⁸ The federal government *unofficially* banned marijuana under the Marihuana Tax Act of 1937 (MTA; P.L. 75-238).²⁵⁹ The MTA imposed a strict regulation requiring a high-cost transfer tax stamp on marijuana sales, and these stamps were rarely issued by the federal government.²⁶⁰ Shortly after passage of the MTA, all states made the possession of marijuana illegal.²⁶¹

Anti-marijuana Propaganda

In the early 20th century, enforcement of drug laws was primarily the responsibility of local police, and the FBN occasionally assisted.²⁵² Due to limited and reduced appropriations during the Great Depression, the FBN budget and the number of narcotic agents declined and remained low for years. Publicity and warnings of the dangers of narcotics, in particular marijuana, became methods of drug control for the FBN.²⁵³ In seeking federal control of marijuana and uniform narcotic laws, Commissioner Anslinger made personal appeals to civic groups and legislators and pushed for, and received, editorial support in newspapers; many newspapers maintained a steady stream of anti-marijuana propaganda in the 1930s.²⁵⁴

²⁵² David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (New York: Oxford University Press, 1999), pp. 183-200, p. 228.

²⁵³ *Ibid.*, p. 214.

²⁵⁴ Richard J. Bonnie and Charles H. Whitebread II, *The Marijuana Conviction: A History of Marijuana Conviction in the United States* (New York: The Lindesmith Center, 1999), pp. 94-95.

²⁵⁵ States regulated marijuana but did not begin to ban it until after 1937.

²⁵⁶ In 1930, the Federal Bureau of Narcotics (FBN) was established within the Treasury to handle narcotic enforcement.

²⁵⁷ See statements by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury and Dr. James C. Munch, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002.

²⁵⁸ U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002, p. 7.

²⁵⁹ Congressional testimony indicated that marijuana, while it was a problem in the Southwest United States starting in the mid-1920s, became a “national menace” in the mid-1930s (1935-1937). See statement by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27, 1937.

²⁶⁰ Charles F. Levinthal, *Drugs, Society, and Criminal Justice*, 3rd ed. (New York: Prentice Hall, 2012), p. 58.

²⁶¹ In *Leary v. United States* (395 U.S. 6 (1968)), the MTA was overturned by the U.S. Supreme Court as a violation of the Fifth Amendment’s privilege against compelled self-incrimination.

Mid-20th Century

In the decades after enactment of the MTA, Congress continued to pass drug control legislation and further criminalized drug abuse. For example, the Boggs Act (P.L. 82-255), passed in 1951, established mandatory prison sentences for some drug offenses, while the 1956 Narcotic Control Act (P.L. 84-728) further increased penalties for drug offenses. In conjunction with growing support for a medical approach to addressing drug abuse, there was a strong emphasis on law enforcement control of narcotics. Congress shifted the constitutional basis for drug control from its taxing authority to its power to regulate interstate commerce,²⁶² and in 1968 the FBN merged with the Bureau of Drug Abuse Control and was transferred from Treasury to the Department of Justice.²⁶³ Several years later, President Nixon would declare a war on drugs.²⁶⁴

Congress and President Nixon enhanced federal control of drugs in the enactment of comprehensive federal drug laws—including the Controlled Substances Act (CSA), enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513). The CSA placed the control of marijuana and other plant, drug, and chemical substances under federal jurisdiction regardless of state regulations and laws. In designating marijuana as a Schedule I controlled substance, this legislation *officially* prohibited the manufacture, distribution, dispensation, and possession of marijuana.²⁶⁵

The Shafer Commission

As part of the CSA, the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, was established to study marijuana in the United States.²⁶⁶ Specifically, this commission was charged with examining issues such as

- (A) the extent of use of marihuana in the United States to include its various sources of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use;
- (B) an evaluation of the efficacy of existing marihuana laws;
- (C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;
- (D) the relationship of marihuana use to aggressive behavior and crime;
- (E) the relationship between marihuana and the use of other drugs; and
- (F) the international control of marihuana.²⁶⁷

²⁶² As stated in Article I, §8, cl. 3 of the U.S. Constitution, “Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” For more information about the commerce clause, see CRS Report R43023, *Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases*, by Charles Doyle.

²⁶³ David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (New York: Oxford University Press, 1999), p. 239. The shift in constitutional authority was part of the Drug Abuse Control Amendments of 1965 (P.L. 89-74).

²⁶⁴ For a broader discussion of the federal government’s drug enforcement history, see CRS Report R43749, *Drug Enforcement in the United States: History, Policy, and Trends*, by Lisa N. Sacco.

²⁶⁵ 21 U.S.C. §812 and §841. Of note, growing a marijuana plant is considered *manufacturing* marijuana.

²⁶⁶ The commission was composed of two Members of the Senate, two Members of the House, and nine members appointed by the President of the United States. President Nixon appointed Raymond Shafer as the commissioner.

²⁶⁷ P.L. 91-513, §601(d).

The Shafer Commission, in concluding its review, produced two reports: (1) *Marihuana: A Signal of Misunderstanding*, and (2) *Drug Use in America: Problem in Perspective*.²⁶⁸

In its first report, the Shafer Commission discussed the perception of marijuana as a major social problem and how it came to be viewed as such.²⁶⁹ It made a number of recommendations, including the development of a “social control policy seeking to discourage marihuana use, while concentrating primarily on the prevention of heavy and very heavy use.”²⁷⁰ In this first report, the commission also called the application of criminal law in cases of personal use of marijuana “constitutionally suspect” and declared that “total prohibition is functionally inappropriate.”²⁷¹ Of note, federal criminalization and prohibition of marijuana was never altered, either administratively or legislatively, to comply with the recommendations of the Shafer Commission.

In its second report, the Shafer Commission reviewed the use of all drugs in the United States, not solely marijuana. It examined the origins of the country’s drug problem, including the social costs of drug use, and once again made specific recommendations regarding social policy. Among other conclusions regarding marijuana, the commission indicated that aggressive behavior generally cannot be attributed to its use.²⁷² The commission also reaffirmed its previous findings and recommendations regarding marijuana and added the following statement:

The risk potential of marihuana is quite low compared to the potent psychoactive substances, and even its widespread consumption does not involve social cost now associated with most of the stimulants and depressants (Jones, 1973; Tinklenberg, 1971). Nonetheless, the Commission remains persuaded that availability of this drug should not be institutionalized at this time.²⁷³

At the conclusion of the second report, the Shafer Commission recommended that Congress launch a subsequent commission to reexamine the broad issues surrounding drug use and societal response.²⁷⁴ While a number of congressionally directed commissions regarding drugs have since been established,²⁷⁵ no such commission has been directed to review the comprehensive issues of drug use, abuse, and response in the United States.

²⁶⁸ National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, First Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1972 (hereinafter, First Report of the Shafer Commission); and National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, Second Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1973 (hereinafter, Second Report of the Shafer Commission).

²⁶⁹ The commission stated that three factors contributed to the perception of marijuana as a major national problem, including “[1] the illegal behavior is highly visible to all segments of our society, [2] use of the drug is perceived to threaten the health and morality not only of the individual but of society itself, and [3] most important, the drug has evolved in the late sixties and early seventies as a symbol of wider social conflicts and public issues.” First Report of the Shafer Commission, p. 6.

²⁷⁰ First Report of the Shafer Commission, p. 134.

²⁷¹ *Ibid.*, pp. 142-143.

²⁷² Second Report of the Shafer Commission, p. 158.

²⁷³ *Ibid.*, p. 224. In this statement, the Shafer Commission cites the following studies: R.T. Jones, *Mental Illness and Drugs: Pre-Existing Psychopathology and Response to Psychoactive Drugs*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, 1973; and J.R. Tinklenberg, *Marihuana and Crime*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, Unpublished, October 1971.

²⁷⁴ Second Report of the Shafer Commission, pp. 410-411.

²⁷⁵ See, for example, the President’s Media Commission on Alcohol and Drug Abuse Prevention and the National Commission on Drug-Free Schools.

Author Contact Information

Lisa N. Sacco, Coordinator
Analyst in Illicit Drugs and Crime Policy
lsacco@crs.loc.gov, 7-7359

Erin Bagalman
Analyst in Health Policy
ebagalman@crs.loc.gov, 7-5345

Kristin Finklea
Specialist in Domestic Security
kfinklea@crs.loc.gov, 7-6259

Sean Lowry
Analyst in Public Finance
slowry@crs.loc.gov, 7-9154

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