



AND THE LAW

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MARIJUANA DEVELOPMENT

Back in 2014, this series explored the legality of marijuana, medical and otherwise, as state laws diverged from Federal law. This divergence started with California in 1996. Two concepts discussed in that article have not changed; the Supremacy Clause and Enforcement Discretion.

The Supremacy Clause is a provision in the United States Constitution and it states that Federal law is supreme to state law.¹ Generally, states may enact laws that are more stringent than Federal laws, but not more lenient. For example, a state can move a Schedule III up to a Schedule II or move a non-controlled drug into Schedule IV within their borders. But a state is unable to move a Schedule II down to Schedule III.

This is a basic tenet in the relationship between Federal and state laws. However, this tenet seems to have been forgotten as states moved to legalize marijuana and associated products within their borders.

One reason that this has occurred is another concept known as Enforcement Discretion. This occurs when an agency responsible for the enforcement of a law decides to not enforce that law. An earlier example of this concept was the importation of prescription drugs from Canada. The Food & Drug Administration (FDA) stated that all importation was illegal, but they exercised their discretion and would not prosecute those bringing in these drugs for their own use. In essence, the activity is still illegal, but the agency chooses to do nothing about it. The Drug Enforcement Administration (DEA) has been following this course since at least the publication of the Ogden memo in 2009.

The caveat here is that the agencies always have the ability to change their minds.

Two recent developments have the potential to radically change the marijuana discussion. The first is the publication of a DEA internal directive on May 22, 2018.² The clarification provided in this directive is that products and materials made from the parts of the marijuana plant that are not included in the definition of marijuana under

¹ Article 6 - This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

² https://www.dea.gov/divisions/office-of-the-dea-attorney-general/schedules/marijuana/dea_internal_directive_cannabinoids_05222018.html

the Controlled Substances Act (CSA) are not themselves controlled under the CSA. The directive goes on to say, “*the mere presence of cannabinoids is not itself dispositive as to whether a substance is within the scope of the CSA . . .*” This is a reversal from the position taken by DEA in a news release in 2001 that stated that any product that causes THC to enter the human body is a Schedule I substance. Essentially they were saying at that time was that any product that has any THC in it is a controlled substance. What this change in direction might mean for future enforcement actions by DEA is uncertain at this time.

The second recent development was the introduction of a bill by Senator Charles Schumer of New York on June 28, 2018.³ This bill may render the previous discussions moot. The main objective of the bill is the removal of marijuana and THC from Schedule I of the CSA. The bill also amends a number of U. S. Code sections to remove marijuana and THC from them. Examples of these include removing them from the definition of felony drug offense and from the mandatory sentencing guidelines. If marijuana and THC are no longer Schedule I substances, there is no longer any disconnect between state and Federal law. The states would clearly be free to regulate marijuana as they see fit.

The law also creates some other related funds and requirements. First, the bill creates a fund to provide small business loans to women and socially and economically disadvantaged people who want to operate a marijuana business. It also directs the National Highway Traffic Safety Administration to study the impact of driving under the influence of THC on highway safety. The bill goes on to direct the Secretary of Health and Human Services to conduct research on various health issues involving marijuana, such as the effects of THC on the brain, efficacy of

marijuana as treatment for specific conditions, and the identification of additional medical uses for marijuana. The bill would also restrict advertising of marijuana products if needed for the protection of the public health, especially for individuals who are 18 years old or younger. Lastly, the bill would provide funds for grants to states to allow them to set up programs to expunge previous marijuana convictions.

If passed, this bill would completely change the conversation on marijuana in the United States. There has been a huge shift in public opinion on this issue, especially in the last 20 years or so. It is too early to tell if the bill has enough support in Congress to get passed. If anything gets in the way, it may be the additional requirements and studies that are created in the bill. Each of them comes with their own appropriations, so the fight may come down to the budget. Stay alert for new developments – there will almost assuredly be more coming!

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This article discusses general principles of law and risk management. It is not intended as legal advice. Pharmacists should consult their own attorneys and insurance companies for specific advice. Pharmacists should be familiar with policies and procedures of their employers and insurance companies, and act accordingly.

³ Marijuana Freedom and Opportunity Act - <https://www.congress.gov/bill/115th-congress/senate-bill/3174/text?q=%7B%22search%22%3A%5B%22schumer+marijuana%22%5D%7D&r=1>