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Funding Limits on Federal Prosecutions of State-Legal Medical Marijuana

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Federal law generally prohibits the production, distribution, and possession of marijuana for both medical and recreational purposes. Nonetheless, in recent years, many states have repealed state law criminal prohibitions on some marijuana-related activities, and medical and recreational cannabis businesses now operate openly in some parts of the United States.

In response to the growing disparity between state and federal law, Congress has enacted appropriations legislation prohibiting the Department of Justice (DOJ) from expending appropriated funds to prevent states from implementing their own medical marijuana laws. Federal courts have interpreted the appropriations rider to prohibit DOJ from bringing criminal drug prosecutions against certain private individuals and entities involved in the state-legal medical marijuana industry, but they have differed as to the scope of conduct the rider shields from prosecution.

This Legal Sidebar first outlines the legal status of marijuana under federal and state law. It then discusses the medical marijuana appropriations rider and analyzes how federal courts have interpreted the provision. The Sidebar closes with key considerations for Congress related to the appropriations rider and the disparity between federal and state marijuana policy more generally.

Federal and State Marijuana Regulation

In recent years, a significant divide has developed between federal and state marijuana law. On the federal side, the Controlled Substances Act (CSA) imposes stringent regulations on the cannabis plant and many of its derivatives. Unless an exception applies, the CSA classifies cannabis and its derivatives as "marihuana." (The statute uses an archaic spelling; this Sidebar uses the more common spelling, "marijuana.") Congress classified marijuana as a Schedule I controlled substance when it enacted the CSA, reflecting a legislative determination that the substance has a high potential for abuse, no currently accepted medical use, and "a lack of accepted safety for use … under medical supervision." Because Congress has made that determination, Schedule I substances may not be dispensed by prescription in compliance with federal law. In contrast, controlled substances in Schedules II through V have accepted medical uses and pose progressively lower risks of abuse and dependence. Unlike substances in Schedule I, those substances may be dispensed by prescription for medical purposes.

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It is legal to produce, distribute, and possess Schedule I controlled substances in the context of federally approved scientific studies, subject to CSA regulatory requirements designed to prevent abuse and diversion. However, activities involving Schedule I substances not authorized under the CSA are federal crimes that may give rise to large fines and significant prison sentences.

The CSA definition of *marijuana* excludes "hemp," legally defined to mean the cannabis plant or any part of that plant with a delta-9 tetrahydrocannabinol (THC) concentration of no more than 0.3%. Hemp, which includes low-THC varietals of cannabis and low-THC cannabis derivatives such as the non-psychoactive cannabinoid cannabidiol (CBD), is not a controlled substance subject to the CSA (though it may be regulated under other federal laws).

In addition to the federal CSA, each state has its own controlled substance laws. State controlled substance laws often roughly mirror federal law, and many states have adopted similar versions of a model statute called the Uniform Controlled Substances Act. However, there is not a complete overlap between drugs subject to federal and state control. States sometimes opt to impose controls that are either more or less strict than those of the CSA. One area where federal and state controlled substance laws diverge in a number of ways is marijuana regulation.

While every state once broadly prohibited the production, distribution, and possession of marijuana, in the past few decades many states have repealed or limited such prohibitions. As of February 2022, all but two states have changed their laws to permit the use of cannabis for medical purposes. State medical cannabis laws vary in scope; some states authorize medical use only of low-THC products that may fall outside the CSA's definition of *marijuana*. In addition, 19 states, two territories, and the District of Columbia have amended their laws to remove state prohibitions on recreational marijuana use by adults age 21 or older. (One such amendment has been struck down in state court.)

Notwithstanding the recent changes to state laws, any activity involving marijuana that is not authorized under the CSA remains a federal crime anywhere in the United States, including in states that have purported to legalize medical or recreational marijuana. Under the Constitution's Supremacy Clause, federal law takes precedence over conflicting state laws, and the Supreme Court has held that state laws authorizing medical marijuana use do not affect the CSA's restrictions. Thus, when states "legalize" a federally controlled substance such as marijuana, the substance becomes legal under state law only.

Funding Limitations on Medical Marijuana Prosecutions

In each fiscal year since FY2015, Congress has included provisions in appropriations acts that prohibit DOJ from using appropriated funds to prevent certain states and territories and the District of Columbia from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The FY2021 provision lists 52 jurisdictions, including every U.S. jurisdiction that had legalized medical cannabis use at the time it was enacted.

On its face, the appropriations rider bars DOJ from taking legal action against the states directly in order to prevent them from promulgating or enforcing medical marijuana laws. In addition, federal courts have interpreted the rider to prohibit certain federal prosecutions of private individuals or organizations that produce, distribute, or possess marijuana in accordance with state medical marijuana laws. In those cases, criminal defendants have invoked the rider before trial, seeking the dismissal of their indictments or injunctions barring prosecution. By contrast, courts have generally declined to apply the rider outside the context of initial criminal prosecutions. For instance, the Ninth Circuit has held that the provision does not "impact[ ] the ability of a federal district court to restrict the use of medical marijuana as a condition of probation."

In the 2016 case *United States v. McIntosh*, the U.S. Court of Appeals for the Ninth Circuit considered the circumstances in which the appropriations rider bars CSA prosecution of marijuana-related activities. The court held that the rider

> prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of [such rules] when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [the rider].

Relying on *McIntosh*, the Ninth Circuit has issued several decisions allowing federal prosecution of individuals who did not "strictly comply" with state medical marijuana laws, notwithstanding the appropriations rider, and several district courts have followed that reasoning. As one example, in *United States v. Evans*, the Ninth Circuit upheld the prosecution of two individuals involved in the production of medical marijuana who smoked marijuana as they processed plants for sale. Although state law permitted medical marijuana use by "qualifying patients," the court concluded that the defendants failed to show they were qualifying patients, and thus they could be prosecuted because their personal marijuana use did not strictly comply with state medical marijuana law.

In the 2022 case *United States v. Bilodeau*, the U.S. Court of Appeals for the First Circuit also considered the scope of the appropriations rider. The defendants in *Bilodeau* were registered with the State of Maine to produce medical marijuana, but DOJ alleged that they distributed large quantities of marijuana to individuals who were not qualifying patients under Maine law, including recipients in other states. Following indictment for criminal CSA violations, the defendants sought to invoke the appropriations rider to bar their prosecutions. They argued that the rider "must be read to preclude the DOJ, under most circumstances, from prosecuting persons who possess state licenses to partake in medical marijuana activity." DOJ instead urged the court to apply the Ninth Circuit's standard, allowing prosecution unless the defendants could show that they acted in strict compliance with state medical marijuana laws.

The First Circuit declined to adopt either of the proposed tests. As an initial matter, the court agreed with the Ninth Circuit that the rider means "DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws." However, the panel declined to adopt the Ninth Circuit's holding that the rider bars prosecution only in cases where defendants strictly complied with state law. The court noted that the text of the rider does not explicitly require strict compliance with state law and that, given the complexity of state marijuana regulations, "the potential for technical noncompliance [with state law] is real enough that no person through any reasonable effort could always assure strict compliance." Thus, the First Circuit concluded that requiring strict compliance with state law would likely chill state-legal medical marijuana activities and prevent the states from giving effect to their medical marijuana laws. On the other hand, the court also rejected the defendants' more expansive reading of the rider, reasoning that "Congress surely did not intend for the rider to provide a safe harbor to all caregivers with facially valid documents without regard for blatantly illegitimate activity."

Ultimately, while the First Circuit held that the rider bars CSA prosecution in at least some cases where the defendant has committed minor technical violations of state medical marijuana laws, it declined to "fully define [the] precise boundaries" of its alternative standard. On the record before it, the court concluded that "the defendants' cultivation, possession, and distribution of marijuana aimed at supplying persons whom no defendant ever thought were qualifying patients under Maine law" and that a CSA conviction in those circumstances would not "prevent Maine's medical marijuana laws from having their intended practical effect."

Considerations for Congress

It remains to be seen whether and how the difference in reasoning between the Ninth Circuit and the First Circuit will make a practical difference in federal marijuana prosecutions. In theory, the First Circuit's analysis could make it easier for defendants to invoke the appropriations rider to bar federal prosecutions, because they could do so even if they had not been in strict compliance with state law. In practice, however, resource limitations and enforcement priorities have historically meant that federal marijuana prosecutions target individuals and organizations that clearly have not complied with state law. Thus, one of the First Circuit judges who considered *Bilodeau* agreed with the panel's interpretation of the rider but wrote a concurrence noting that, in practice, the First Circuit's standard might not be "materially different from the one that the Ninth Circuit applied."

While the medical marijuana appropriations rider restricts DOJ's ability to bring some marijuana prosecutions, its effect is limited in several ways. First, marijuana-related activities that fall outside the scope of the appropriations rider remain subject to prosecution under the CSA. By its terms, the rider applies only to state laws related to *medical* marijuana; it does not bar prosecution of any activities related to recreational marijuana, even if those activities are permitted under state law. Second, as the Ninth Circuit has explained, even where the rider does apply, it "does not provide immunity from prosecution for federal marijuana offenses"—it simply restricts DOJ's ability to expend funds to enforce federal law for as long as it remains in effect. If Congress instead opted to repeal the rider or allow it to lapse, DOJ would be able to prosecute future CSA violations as well as past violations that occurred while the rider was in effect, subject to the applicable statute of limitations. Third, participants in the cannabis industry may face numerous collateral consequences arising from the federal prohibition of marijuana in areas including bankruptcy, taxation, and immigration. Many of those legal consequences attach regardless of whether a person is charged with or convicted of a CSA offense, meaning the rider would not affect them.

Congress has the authority to enact legislation to clarify or alter the scope of the appropriations rider, repeal the rider, or decline to include it in future appropriations laws. For instance, Congress could amend the rider to specify whether strict compliance with state medical marijuana law is required in order to bar prosecution under the CSA or provide a different standard that DOJ and the courts should apply. Congress could also expand the scope of the rider to bar the expenditure of funds on prosecutions related to recreational marijuana or other controlled substances.

Beyond the appropriations context, Congress could also consider other changes to federal marijuana law that would affect its interaction with state law. Such changes could take the form of more stringent marijuana regulation—for instance, through repeal of the appropriations rider or increased DOJ funding to prosecute CSA violations. In contrast, most recent proposals before Congress generally seek to relax federal restrictions on marijuana or mitigate the disparity between federal and state marijuana regulation. Some proposals would remove marijuana from regulation under the CSA entirely or move it to a less restrictive schedule so that it could be dispensed by prescription for medical purposes. Other proposed legislation would leave marijuana in Schedule I but limit enforcement of federal marijuana law in states that elect to legalize marijuana. Additional proposals would seek to address specific legal consequences of marijuana's Schedule I status by, for example, enabling marijuana businesses to access banking services, facilitating federally approved clinical research involving marijuana and other Schedule I substances, or removing collateral consequences for individuals in areas such as immigration and gun ownership.

For further information on proposed reforms and legal issues related to marijuana's status under the CSA, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*, by Joanna R. Lampe.

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