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# U.S. International Treaty Obligations and Marijuana Rescheduling

*Meeting U.S. Treaty Obligations in Marijuana Rescheduling*

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## Executive Summary

Responding to President Biden's initiation of a formal process to "expeditiously" reconsider Marijuana's Schedule I status and address the nation's "failed approach to marijuana",[1] the Secretary of the Department of Health and Human Services ("HHS") (and thus his delegee, the Commissioner of the Food and Drug Administration ("FDA")) submitted its recommendation to the Drug Enforcement Administration ("DEA") that Marijuana[2] be moved to Schedule III. The President's request and HHS's recommendation, reflect the United States' (the "U.S.") trend toward Marijuana regulation over prohibition as a more effective approach to promoting public health and safety. HHS's recommendation marks the first time HHS/FDA has acknowledged that Marijuana has an accepted medical use in treatment and a potential for abuse less than substances in Schedules I and II.[3] As the U.S.'s leading health agency joins a growing majority of global leaders in acknowledging Marijuana's medical efficacy and relatively low abuse potential, the DEA must do so as well. By accepting HHS's recommendation, moving Marijuana to Schedule III, and simultaneously imposing certain other regulatory controls, the DEA can provide for domestic control of Marijuana consistent with its accepted medical use in treatment while ensuring that the U.S. also carries out its treaty obligations. Marijuana regulation can be a more effective approach than prohibition for achieving health, safety, equity, and justice, and the DEA can help usher in a new era of scientific, medical, and societal advancements that have been stalled for decades.

Now that HHS/FDA has submitted its recommendation, the DEA is tasked with conducting its own scheduling review for Marijuana. Pursuant to requirements in the CSA, however, it must accept HHS/FDA's medical and scientific determinations that Marijuana has a currently accepted medical use in treatment, and the scientific and medical conclusions FDA/HHS drew in concluding that Marijuana has a potential for abuse lower than substances in Schedules I and II.[4] Therefore, the DEA's review will likely focus on whether moving Marijuana to Schedule III would compromise the U.S.'s ability to carry out its treaty obligations. As we discuss below, it would not. Therefore, DEA should accept HHS/FDA's recommendation and transfer Marijuana to Schedule III.

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[1] *Presidential Statement on Marijuana Reform*, 2022 Daily Comp. Pres. Doc. 883 (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/ (hereinafter referred to as "Presidential Statement on Marijuana Reform").

[2] We use the term "Marijuana" in this document in reference to "marihuana" and non-synthetic "Tetrahydrocannabinols, except for tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946" ("THC"), as set forth in 21 U.S.C. § 812). It remains unclear whether HHS's recommendation includes the rescheduling of synthetic THC.

[3] *Compare* 21 U.S.C. § 812(b)(1) & (2) *with* (3).

[4] 21 U.S.C. § 811(b).

The President's scheduling directive implies that Treaty obligations should not impede the DEA's acceptance of HHS's Schedule III recommendation. On October 6, 2022, President Biden issued a directive that the Attorney General (and thus his delegee, the DEA) and HHS/FDA initiate the administrative process to reconsider Marijuana's Schedule I status.[5] Two provisions under the Controlled Substances Act ("CSA") permit the DEA to reschedule or deschedule a substance: Section 811 (a)-(b), which require DEA to consult HHS/FDA, and Section 811(d)(1), which empowers the DEA to take unilateral scheduling actions, if necessary, to carry out U.S. Treaty obligations. Under Section 811(d)(1), the DEA can set aside a scheduling recommendation from HHS/FDA and the related rulemaking hearing process required under 21 U.S.C. 811(a).[6] Given that, as we discuss below, placing Marijuana in schedule III would not effect the US' ability to adhere to Treaty Obligations, section 811(d)(1) should not prevent DEA from accepting HHS/FDA's schedule III recommendation and moving forward with the 811(a)-(b) notice and comment period.

The U.S., Germany, Canada, Uruguay, and many other countries are adopting Marijuana regulation as a more effective approach than prohibition for achieving health, safety, equity, and justice. Those governments must ensure that their policies allow them to meet international treaty obligations. The U.S., along with most of the world, is a party to the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol (the "Single Convention"), the 1971 Convention on Psychotropic Substances (the "'71 Convention"), and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "'88 Convention", together with the '71 Convention and the Single Convention, the "Treaties"). The Treaties obligate Parties[7] to prevent the diversion of illicit substances and abuse of drugs by their citizens. The U.S. implements the Treaties' obligations through the CSA[8] and related regulations.[9] For at least three reasons, the obligations set forth in the Treaties should neither prevent nor delay the DEA from moving Marijuana to Schedule III (as scientific and medical evidence dictates).

First, it would be inconsistent and unjustifiable for the DEA to refuse to move Marijuana to Schedule III in the name of Treaty obligations when Schedule III is an appropriate schedule (coupled with simultaneously amending the regulations) to carry out those obligations. The Treaties do not require a substance to be placed in any particular schedule so long as certain reporting, quota, and other requirements are met. Accordingly, the Treaties provide Parties with the flexibility to reevaluate the scheduling of substances under their respective domestic laws based on the emergence of new scientific and medical evidence.[10] This flexibility in the Treaties is a core component of their application and vital to their continued relevance. The DEA has previously relied on this scheduling flexibility when it rescheduled Epidiolex, a Marijuana-based drug. In 2018, Epidiolex was classified as Marijuana.[11] The DEA's policy at the time prohibited it

[5] *Presidential Statement on Marijuana Reform*.

[6] 21 USC 811(a), (d)(1).

[7] "Party" or "Parties" is a term of art used in the Treaties, generally, to reference countries, states, and territories that have signed on to the Treaties.

[8] *See* 21 U.S.C. § 811(d)(1) (implementing the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407).

[9] 21 C.F.R. § 1300.01 *et seq*.

[10] *See* U.S. Dept. of State, *Trends in Global Drug Policy: Statement by William R. Brownfield, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs* (Oct. 9, 2014), https://2009-2017-fpc.state.gov/232813.htm (speaking about how Parties have the flexibility to interpret obligations of the Treaties through enforcement priorities.).

[11] Id. We use the term Marijuana here because when DEA moved Epidiolex to Schedule V, it did so before hemp was removed from the definition of Marijuana in the Agriculture Improvement Act of 2018. Thus, even though Epidiolex is a CBD product, at the time of this DEA rescheduling action, Epidiolex was considered "Marihuana" for CSA purposes.

from moving Marijuana to any schedule outside of Schedules I and II.[12] The DEA, however, moved Epidiolex into Schedule V (then subsequently descheduled it after the passage of the Agricultural Act of 2018 (the "2018 Farm Bill")), establishing another method of ensuring the U.S. could carry out its Treaty obligations with respect to Marijuana: reschedule and re-regulate. The DEA determined, for the first time ever, that it could "control [Marijuana] in schedule III, IV, or V, and simultaneously amend the regulations. . ." to ensure the scheduling move did not impede the U.S.'s ability to carry out its Treaty obligations.[13] This DEA concept of rescheduling and re-regulating applies with equal force to the current Marijuana rescheduling process. Moving Marijuana to Schedule III while simultaneously amending regulations is therefor appropriate and consistent with DEA precedent.

Second, the Treaties permit the DEA to move Marijuana to Schedule III. The international treaty system allows Parties to interpret and apply Treaty requirements in the manner they deem most appropriate, including by prioritizing reforms designed to promote public health, safety, and welfare. In light of the failed war on drugs, devastating impacts on communities of color, and the public health risks associated with a dangerous illicit market, placing Marijuana in Schedule III would further the public health, safety, and welfare better than Schedule I or II could. The Treaties also afford Parties the flexibility necessary to regulate controlled substances in a manner that promotes the advancement of medical and scientific research of controlled substances—another goal that would be better served by placing Marijuana in Schedule III, as opposed to Schedules I or II.[14]

Leaving Marijuana on Schedule I or moving it to Schedule II would be unjustifiable since HHS/FDA has already acknowledged that Marijuana has a currently accepted medical use in treatment and a lower potential for abuse than substances listed in Schedule II.[15] The DEA has long relied on HHS/FDA to determine whether a substance has an accepted medical use in treatment. In fact, it has never publicly side stepped an HHS/FDA recommendation to reschedule a drug or other substance. Doing so now, in the name of meeting Treaty obligations, would be neither just nor justified. Internationally, Marijuana is recognized as having medical efficacy,[16] and the Treaties do not obligate the U.S. to place Marijuana in any specific CSA schedule. Instead, they simply require that the U.S. impose control and reporting requirements to ensure security against diversion of illicit substances and to protect the health and safety of society. As the DEA is well aware (and explained below in our discussion of Epidiolex), placing Marijuana in Schedule III would not impact the DEA's ability to apply these control and reporting measures.[17] In fact, it would allow the DEA to meet its Treaty reporting, quota, and other obligations while satisfying the Treaties' primary objective: to promote the medical and scientific understanding of controlled

[12] DEA, *Preliminary Note Regarding Treaty Considerations* (last visited Sept. 5, 2023), https://www.deadiversion.usdoj.gov/schedules/marijuana/Preliminary_Note_Regarding_Treaty_Considerations.pdf (citing, NORML v. DEA, 559 F.2d 735, 751 (D.C. Cir. 1977).

[13] 83 Fed. Reg. 48,950 (Sept. 28, 2018) (to be codified at 21 C.F.R. pt. 1308, 1312), *Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements*.

[14] *See generally* Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407.

[15] *Top Federal Health Official Confirms At Exactly 4:20 That His Department Is Recommending Marijuana Rescheduling*, Marijuana Moment (Aug. 30, 2023), https://www.marijuanamoment.net/top-federal-health-official-confirms-at-exactly-420-that-his-department-is-recommending-marijuana-rescheduling/.

[16] In December of 2020 Parties voted to remove cannabis (the Single Convention does not define "Marijuana" or "Marihuana," but rather uses the term "Cannabis") from Schedule IV of the Single Convention. Such a move, as far as the Treaties are concerned, acknowledges that cannabis has medical and therapeutic efficacy. Cannabis remains on Schedule I of the Single Convention, however. UNCND, *CND Votes on Recommendations for Cannabis and Cannabis-Related Substances* (Dec. 2, 2020), https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_63Reconvened/Press_statement_CND_2_December.pdf.

[17] 83 Fed. Reg. 48,950 (Sept. 28, 2018).

substances and to ensure access to those substances for those who could benefit from their medicinal properties.[18]

Finally, the Treaties provide that a Party need not comply[19] with certain provisions if doing so is incompatible with its constitutional framework.[20] This constitutional exception is limited[21] but important.[22] Despite the Treaties accounting for constitutional exceptions entrenched in our Federalist system, many members of the international community and the International Narcotics Control Board ("INCB," the international body granted limited oversight of the Treaties)[23] believe that regardless of Marijuana's scheduling under the CSA, the U.S.: (a) is already non-compliant with Treaty obligations; (b) cannot come into compliance with Treaty obligations; and (c) will remain non-compliant with Treaty obligations as long as State adult-use Marijuana markets are permitted to operate.[24] These interpretations are flawed given that the Treaties include exceptions when a Party is bound by constitutional limitations, and shutting down the State adult-use Marijuana markets on Treaty grounds would intrude into core police powers reserved to the States under our Constitution.[25]

For these reasons, U.S. Treaty obligations should not impede DEA's acceptance of HHS/FDA's recommendation that Marijuana be moved to Schedule III. Consistent with carrying out those obligations, the U.S. and other Parties continue to adopt or consider Marijuana regulatory regimes

[18] *See generally Single* Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407; *See generally* Commentary to the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407.

[19] We sometimes use the term "compliance" and "non-compliance" when referring to obligations of the Treaties, since those terms are used by DEA and the Office of Legal Counsel when analyzing obligations section 811(d)(1). It's important to note, however, that Section 811(d)(1) does not use the term "compliance" when referring to DEA's obligations to schedule a substance pursuant to the Single Convention. Rather, it requires the Attorney General (DEA) to "issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations . . .." 21 U.S.C. § 811(d)(1).

[20] Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 23(3), 35, 36, 42.

[21] The 1988 Convention limited the applicability of this constitutional exception to a Party's obligation to adopt such measures as may be necessary to establish a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention. (See United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493, Art. 3(2)). However, when the U.S. signed the 1988 Convention it issued a "declaration of understanding" that "Nothing in this Treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States." United Nations Treaty Collection, *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Dec. 20, 1988), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en#EndDec.

[22] John Walsh and Martin Jelsma, *Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System*, 1(3) Journal of Illicit Economies and Development 266, 268 (2019), https://jied.lse.ac.uk/articles/10.31389/jied.23#B2.

[23] Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 14(a). INCB is granted very limited oversight authority under the Treaties. Only after it has examined information submitted to it by a Party's government, and after determining that the information provided shows an "objective reason[] to believe that the aims of this Convention are being seriously endangered by reason of the failure of any Party," can the INCB open consultations with, or request explanations from, a Party. Over the years, INCB has unilaterally expanded its mandate to include oversight of Party's compliance with Treaty Obligations. The U.S., other global experts, and the Authors of this memorandum, believe that direct oversight is clearly outside of INCB's mandate.

[24] *See* Report of the International Narcotics Control Board for 2022 (Int'l Narcotics Control Bd. ed., 2022), https://www.incb.org/incb/en/publications/annual-reports/annual-report-2022.html.

[25] *New York v. United States*, 505 U.S. 144, 170 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)) (rejecting an outcome that "would, to say the least, 'upset the usual constitutional balance of federal and state powers"); *see also* Shane Pennington, *Anslinger's Treaty Trap*, SUBSTACK: ON DRUGS (Dec. 13, 2021), https://ondrugs.substack.com/p/anslingers-treaty-trap; *see also* Jaeger, *UN Suggests U.S. Federal Government Must Force States to Repeal Marijuana Legalization to Comply with International Treaty Obligations*, ("[I]t remains notable that [INCB] is leaning on the six-decade-old treaty provision to imply that the U.S. is shirking its duties to stay in compliance by allowing states to legalize marijuana for recreational purposes without taking enforcement action."); The Tenth Amendment to the U.S. Constitution prevents the federal government from commanding states to criminalize marijuana, and likewise from forcing the states to enforce federal laws criminalizing it. *See* Erwin Chemerinsky, Jolene Forman, Allen Hopper and Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, Legal Studies Research Paper Series No. 2014-2025 at 21 & n. 91 (citing *New York v. United States*, 505 U.S. 114, 162 (1992) and *Printz v. United States*, 521 U.S. 898, 912 (1997)); Similarly, in 2018, the Supreme Court of Mexico held that "the law prohibiting recreational use of cannabis in Mexico" was unconstitutional. See Peter Orsi, *Mexico Court Sets Precedent on Legal, Recreational Pot Use,* Associated Press (Nov. 1, 2018), https://www.bostonglobe.com/news/marijuana/2018/11/01/mexico-court-sets-precedent-legal-recreational-pot-use/eBvvS4QMaKhOzcmn6KGu2H/story.html; Report of the International Narcotics Control Board for 2021 4 (Int'l Narcotics Control Bd. Ed., 2020), https://www.incb.org/documents/Publications/AnnualReports/AR2020/Annual_Report/E_INCB_2020_1_eng.pdf.

as a more effective approach than prohibition for promoting public health, safety and welfare.[26] HHS/FDA's acknowledgment that Marijuana has a currently accepted medical use in treatment and a potential for abuse less than substances in Schedule I or II removes any doubt that scientific and medical considerations can no longer justify maintaining Marijuana in Schedules I or II. And in rescheduling and re-regulating Epidiolex, the DEA established the blueprint for placing Marijuana in Schedule III while preserving the U.S.'s ability to carry out its Treaty obligations.

### 1. The U.S. Can Carry Out its Treaty Obligations by Placing Marijuana in Schedule III.

The CSA divides substances into two groups for scheduling purposes: those subject to the Single Convention and everything else. Those subject to the Single Convention (i.e., certain parts of the Marijuana plant and their resin[27]) may be scheduled, descheduled, and rescheduled through a simple process set forth in Section 811(d)(1) that is entirely within the DEA's discretion. Section 811(d)(1) directs the DEA to issue an order placing such substances in the schedule it "deems most appropriate to carry out such [Treaty] obligations, without regard to the findings [and procedures] prescribed by [Section 811(a)-(c)]."[28]

For substances not subject to the Single Convention (i.e, THC),[29] the CSA requires the DEA to base scheduling decisions on three criteria:[30] (1) whether the substance in question has a medical use; (2) its potential for abuse; and (3) the extent to which the substance is unsafe or addictive.[31] In Section 811(a)-(b), Congress designated HHS/FDA as the competent agency to provide the authoritative scientific and medical analysis necessary to make scheduling decisions. Where those provisions apply, "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance."[32] The DEA must accept HHS/FDA's findings with respect to scientific and medical issues and place Marijuana in a schedule no stricter than the one HHS/FDA recommend.[33] Congress' inclusion of five schedules that all account for substances with a potential for abuse shows that Congress intended for the DEA to "reserve to [HHS/FDA] a finely tuned balancing process involving several medical and scientific considerations."[34] Having received HHS/FDA's recommendation, DEA should therefore make findings through the formal "on the record" rulemaking process described in Section 811(a)-(c), rather than unilaterally refusing to place Marijuana outside of Schedule II, pursuant to its authority under Section 811(d)(1).[35]

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[26] *See* U.S. Dept. of State, *Trends in Global Drug Policy*.

[27] Subject to the control of the Single Convention is the cultivation of the cannabis plant used for the production of cannabis (i.e., flowering or fruiting tops of the cannabis plant from which resin has not been extracted) and cannabis resin not cultivated exclusively for industrial purposes (e.g., fibre and seed) or horticulture purposes. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 1(1)(a), Art. 28(2). Subject to the control of the CSA is Tetrahydrocannabinols and marihuana. 21 U.S.C. § 812 Schedule I(c)(10), (17).

[28] *Id.* § 811(d)(1).

[29] Section 811(d)(1) applies only to treaties, conventions, or protocols in effect on October 27,1970.

[30] 21 U.S.C. § 812

[31] DEA considers eight factors under 21 U.S.C. § 811(c) as part of the process to determine whether the three findings under 21 U.S.C. § 812 render a substance appropriate for any particular schedule. DEA must also consider all other relevant evidence, including HHS's binding medical and scientific evaluation and recommendation. 21 U.S.C. 811(a)-(b).

[32] 21 U.S.C. § 811(b).

[33] *Cannabis Policies for the New Decade: Hearing Before the H. Comm. On Energy and Commerce*, Subcommittee on Health, 116th Cong. At 9, 61 (Jan. 15, 2020), http://docs.house.gov/meetings/IF/IF14/20200115/110381/HHRG-116-IF14-Transcript-20200115.pdf.

[34] *NORML v. DEA*, 559 F.2d 735, 748 (D.C. Cir. 1977).

[35] 21 U.S.C. 811(a)(2) ("Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5.").

This is not the first time that the DEA has had to decide whether to apply Section 811(d)(1) after requesting a scheduling review marijuana by HHS/FDA under Section 811(a)-(c). Until recently, DEA insisted that Section 811(d)(1) required that Marijuana be placed in either Schedule I or II.[36] Nevertheless, the D.C. Circuit has held that DEA must still account for HHS/FDA's views as provided through the Section 811(a)-(c) process to the extent Treaty obligations allow.[37] In *NORML v. DEA*, the Court held that Section 811(d)(1) requires DEA to set the "minimum schedule below which the substance in question may not be placed" based on U.S. Treaty obligations.[38] Within that range, however, DEA was to accommodate HHS/FDA's analysis as much as possible. Therefore, if DEA continues to claim that Treaty obligations require Marijuana to be placed in Schedules I or II, then DEA can skip the "on the record" rulemaking process required under Section 811(a)-(b) and simply keep Marijuana within Schedule I or II, pursuant to its authority under 811(d)(1).

For decades, DEA insisted that the Treaties require it to place Marijuana in Schedule I or II. In 2018, however, DEA adopted a more flexible approach in deciding to move Schedule I Epidiolex (a cannabis-derived drug that, at the time, qualified as "marihuana" under 21 U.S.C. § 802(16)) to Schedule V.[39] In doing so, the DEA carefully balanced Section 811(d)(1)'s Treaty-related mandate *and* HHS/FDA's determinations that Epidiolex had a medical use in treatment and a low potential for abuse.[40] In doing so, the DEA acknowledged that Marijuana could be moved into Schedule V without compromising the U.S.'s ability to carry out its Treaty obligations. The DEA reasoned that it had two viable options: "(i) control the drug in schedule II . . . under existing provisions of the CSA and DEA regulations or (ii) **control the drug in schedule III, IV, or V, and simultaneously amend the regulations** . . ." to ensure the scheduling decision satisfied obligations in the Single Convention.[41] This move effectively set a new precedent for how the DEA could place Marijuana in Schedule III, IV, or V while still adhering to Section 811(d)(1)'s mandate. Applied here, the same approach permits DEA to accept HHS/FDA's Schedule III recommendation while maintaining the U.S.'s ability to carry out its Treaty obligations.

### 2. Moving Marijuana to Schedule III Would Better Promote the Treaties' General and Specific Goals.

Rescheduling Marijuana to Schedule III would better promote the Treaties' general goal of prioritizing the health, safety, and welfare of humankind and their specific goal of advancing medical and scientific research of controlled substances. Similar considerations led Uruguay and Canada to proceed with full adult-use legalization (a step far beyond HHS/FDA's Schedule III recommendation). Neither country viewed their Treaty obligations as an obstacle to such a move, and neither has suffered repercussions from the international community as a result. In doing so, they posit that regulated Marijuana markets are consistent with the Treaties' general purpose of promoting the health and welfare of humankind.[42] Addressing the devastating harms that the

[36] DEA, *Preliminary Note Regarding Treaty Considerations* (Last Visited Sept. 5, 2023), https://www.deadiversion.usdoj.gov/schedules/marijuana/Preliminary_Note_Regarding_Treaty_Considerations.pdf.
[37] NORML v. DEA, 559 F.2d 735 (D.C. Cir 1977).
[38] Id. at 752.
[39] 83 Fed. Reg. 48,950 (Sept. 28, 2018) (We use the term Marijuana here because when DEA moved Epidiolex to Schedule V, it did so before hemp was removed from the definition of Marijuana in the Agriculture Improvement Act of 2018. Thus, even though Epidiolex is a CBD product, at the time of this DEA rescheduling action, Epidiolex was considered "Marihuana" for CSA purposes.).
[40] 83 Fed. Reg. 48,950 (Sept. 28, 2018).
[41] *Id.* (emphasis added).
[42] *Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System* at 268.

admittedly racist "War on Drugs" has wrought on minority communities in the U.S.—the key reason that the President cited for instructing the DEA and HHS/FDA to reconsider "our failed approach to marijuana" in his October 6, 2022 directive—[43]advances these same core purposes of the Treaties, and thus, easily justifies the more modest step of transferring Marijuana to Schedule III.

Marijuana's placement in Schedule I or II is contrary to law and available science, as HHS/FDA has already acknowledged that Marijuana has a currently accepted medical use in treatment and a lower potential for abuse than those substances listed in Schedule II.[44] Notably, in 2019, the WHO also acknowledged the medical and therapeutic utility of Marijuana[45] and thus recommended its removal from Schedule IV of the Single Convention.[46] Indeed, the stringent scheduling of Marijuana in the Single Convention more than half a century ago had "very little to do with the consideration of the available scientific evidence concerning relative health risks".[47] Medical marijuana has proven to have significant public health benefits, including declines in opiate use and opioid overdose mortality rates.[48]

Furthermore, regulated Marijuana product safety standards help prevent abuse by ensuring that products are produced to the highest quality standards, properly labeled and packaged, tested according to standardized laboratory requirements, maintained in a secure chain of custody, and not advertised or sold to minors. Thus, from a public-health and consumer-protection standpoint, regulation is far superior to prohibition and the virtually nonexistent standards applicable to intoxicating hemp-derived products that Congress removed from the CSA under the 2018 Farm Bill.

As a political matter, moving Marijuana to Schedule III would ease the tension that exists between U.S. drug policy and human rights norms and obligations.[49] Marijuana prohibition has long been imposed in the hope of promoting public health and welfare. Unfortunately, such policies have proven to be ineffective and devastating. Prohibition has failed to reduce the illicit market and perceived Marijuana related health harms. Instead, it has caused extreme negative public health and social impacts. Arguably, continuing to promote this harmful and failed approach to Marijuana policy violates our Treaty obligations more so than even full descheduling would. The last few decades have seen

> a growing number of [Parties] engage with not only the public health-oriented harm reduction approach, but also implement the depenalization or decriminalization of the possession of drugs for personal use, particularly in relation to marijuana, as well as medical marijuana schemes. Such a shift has had much to do with improving

[43] *See Presidential Statement on Marijuana Reform*.
[44] Pennington et al., *Coalition for Cannabis Scheduling Reform* 20. (Hanna Barker Mullin ed., 2023), https://schedulingreform.org/report. (detailed analysis of marijuana's appropriate status under the CSA considering its medical use and low potential for abuse).
[45] Supra, note 15.
[46] World Health Organization, WHO Expert Committee on Drug Dependence: Forty-First Report 39-41 (World Health Organization, 2019), https://apps.who.int/iris/handle/10665/325073.
[47] *Balancing Treaty Stability and Change*.
[48] *Coalition for Cannabis Scheduling Reform* at 22.
[49] Martin Jelsma, Neil Boister, David Bewley-Taylor, Malgosia Fitzmaurice & John Walsh, Global Drug Policy Observatory (GDPO) / Washington Office on Latin America (WOLA) / Transnational Institute (TNI), *Balancing Treaty Stability and Change* 16 (2018), https://www.druglawreform.info/en/publications/item/8273-balancing-treaty-stability-and-change.

> the evidence concerning the effectiveness of market interventions, particularly in relation to health oriented versus law enforcement dominated approaches.[50]

Canada and Uruguay were the first Parties to move forward with legalization policies based on the view that legal regulation is superior to prohibition and criminalization in terms of promoting public health and welfare—the animating purpose of the Treaties.[51] By maintaining Marijuana in Schedule I or Schedule II, the U.S. would continue to face challenges in encouraging other Parties to observe their own Treaty requirements as it relates to stopping the flow of dangerous substances such as heroin (another Schedule I substance) and fentanyl (a Schedule II substance that kills tens of thousands of people in the U.S. annually).[52] Placing Marijuana in Schedule III would go a long way toward helping the U.S. encourage other nations to stem the flow of these dangerous Schedule I and II substances, while still allowing the U.S. to carry out its own Treaty obligations with respect to Marijuana.

In prioritizing its human rights obligations,[53] Canada and Uruguay have expressed a willingness to work with Treaty partners in identifying solutions that accommodate these public health and welfare approaches to Marijuana within the international framework. Such an action from the U.S. would be a strong and necessary signal to the international community that Marijuana regulation advances these general and specific goals of the Treaties better than prohibition. Even if the DEA incorrectly perceives that moving Marijuana to Schedule III will violate the U.S.'s obligations under the Treaties, doing so is still justified and permitted by the Treaties since it aligns with foundational human rights obligations and would promote the health and welfare of U.S. citizens through increased medical and scientific advancements. Should the DEA side step HHS/FDA's recommendation, the U.S. must be prepared to address the practical implications of promoting and enforcing drug diversion policies with other Parties (i.e. controlling the flow of fentanyl), when it cannot promote a consistent and justifiable approach itself. Such an inconsistency could harm, rather than help, the health and welfare of humankind.

Accordingly, the Treaties and the U.S.'s obligations under them, should neither prevent nor delay moving Marijuana to Schedule III. In fact, such a move would better align U.S. domestic policy with the Treaties' aim of promoting the health and welfare of society through medical and scientific advancements.

### 3. Section 811(d)(1) Should not Deter DEA From Moving Marijuana to Schedule III Because Section 811(d)(1) May Risk an Unconstitutionally Delegation of Legislative Authority to the CND and WHO.[54]

"Parties to the Single Convention must take such legislative and administrative measures as may be necessary, subject to the provisions of that convention, to limit production, distribution, and possession of narcotic drugs to medical and scientific purposes."[55] Many Parties therefore interpret

[50] *Id.*
[51] *Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System* at 268.
[52] 21 USC 812(c) Schedule I(b)(10), Schedule II (b)(6); NIDA, *Drug Overdose Death Rates* (las viewed Aug. 31, 2023), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates.
[53] *Resolving Conflicts with the UN Drug Control Treaty System* at 268.
[54] Shane Pennington & Matthew C. Zorn, *The Controlled Substances Act: An International Private Delegation That Goes Too Far,* 100 Wash. Univ. Law Rev. Online. 29, 49-50 (2023).
[55] Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Preamble, Art. 4(c).

the Treaties to require prohibiting activities without a medical or scientific purpose in all of their territories, no matter how a Party's Federalist system is structured.[56] Twenty-three states, D.C., and two U.S. territories have legalized Marijuana for adult-use,[57] and the 2018 Farm Bill descheduled certain hemp-derived THCs.[58] As such, many perceive the U.S. to have fallen out of compliance with the Treaties since the first U.S. state legalized the adult-use of Marijuana.[59] For various legal, political, and practical reasons, the U.S. will not be able to address its perceived non-compliance through the DEA's scheduling review.

The U.S. has historically maintained that Federalism and its constitutional limitations prevent the Federal government from enforcing Marijuana prohibition on the States, as authority to prohibit state-legal markets is an exercise "of the 'police powers' reserved to the states under the Constitution."[60] INCB argues that the Treaties' general obligations require that the U.S. limit controlled activities in all of its territories (which the INCB suggest includes within individual U.S. states).[61] It is important to note that the INCB's limited oversight must be triggered by a Party's objection to another Party's action and is relevant only when INCB has an "objective reason[] to believe that the aims of this Convention are being seriously endangered by reason of the failure of any Party,"[62] which as discussed, would not exist with Marijuana in Schedule III.

In addition, Section 811(d)(1) may unconstitutionally permit foreign organizations to control domestic criminal law, which would make it an unconstitutional delegation of lawmaking power.[63] If a substance is added to one of the schedules of the Single Convention, then, the U.S. is obligated to control that substance under its national drug control legislation–the CSA.[64] Section 811(d)(1) states that, if control of a substance is required:

> by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings and procedures required by section 201(a) and (b) (21 U.S.C. 811(a) and (b)) and section 202(b) (21 U.S.C. 812(b)) of the Act.[65]

[56] Report of the International Narcotics Control Board for 2022 (Some argue that obligations of a Party's "territories", as set forth in Section 4 of the Single Convention, does not apply to U.S. States, because the relevant definition of "territory" under Article 4 is that found in Article 1(y), which "means any part of a State which is treated as a separate entity for the application of the system of import certificates and export authorizations provided for in Article 31." Since U.S. States would not fall under this definition, many believe that Article 4(a) does not impose an obligation to apply the convention within sub-national jurisdictions within the "territory" of a Party, nor does it override concerns of federalism and constitutional limitations that shape U.S. obligations. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 1(y), 4.

[57] NCSL, *Non-Medical/Adult-Use Update* (June 1, 2023), https://www.ncsl.org/health/state-medical-cannabis-laws.

[58] *See* Agriculture Improvement Act of 2018, H.R.2 334, 115th Cong. (2018).

[59] While adult-use Marijuana legalization is strictly prohibited by the Treaties, the U.S. "medical" system at the state level also does not meet the Convention's administrative requirement for a medical Marijuana system.

[60] See, e.g., *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) (States retain "broad police powers" under Tenth Amendment to regulate "the administration of drugs by the health professions"); *Linder v. United States*, 268 U.S. 5, 18 (1925) ("[D]irect control of medical practice in the states is beyond the power of the federal government."); *See* U.S. Dept. of State, *Trends in Global Drug Policy*.

[61] Report of the International Narcotics Control Board for 2022. Many argue that the U.S. is already complying with this obligation since the CSA limits controlled activity within all of its States, regardless of conflicting state laws and INCB statements to the contrary, and the U.S. is restricted by constitutional limitations that prohibit the U.S. federal government from forcing States to enforce U.S. Treaty obligations. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 14(a), *Supra* Note 56.

[62] Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 14(a).

[63] *The Controlled Substances Act: An International Private Delegation That Goes Too Far at* 50.

[64] *See* Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, Art. 3(7).

[65] 21 U.S.C. § 811(d)(1); *See* 21 C.F.R. § 1308.46 (2023).

Section 811(d)(1) emphasizes that in deciding what is "most appropriate," the DEA need not consult HHS/FDA, consider any particular evidence, or make the specific findings ordinarily required before it may place a substance in a particular schedule. Instead, it directs the DEA simply to place substances subject to the Single Convention in the CSA schedule it "deems most appropriate" to ensure the U.S. remains compliant with Treaty obligations.[66] DEA routinely invokes Section 811(d)(1) to add substances to the CSA schedules without using the rulemaking procedures of the Administrative Procedure Act (the "APA") when "carrying out" Treaty obligations under the Single Convention.[67] This action therefore creates domestic criminal penalties for unauthorized manufacture, cultivation, possession, use, research, import, export, or distribution of the newly added controlled substance.[68] In this way, a court could find that the United Nations (through the CND) unconstitutionally creates domestic criminal law in violation of the nondelegation doctrine and its due process principles.[69] Accordingly, any deviation by the DEA from HHS/FDA's Schedule III recommendation, without notice or comment, and legitimate legal authority (outside of 811(d)(1)), would raise severe constitutional concerns and be vulnerable on judicial review.

The Federal government's current perceived non-compliance is ongoing and unresolvable. To the extent that the Treaties' limited constitutional exception does not permit the U.S. to satisfy its obligations under the Treaties *without* running afoul of core constitutional constraints under U.S. law, it makes little sense to apply the Treaties' outmoded and unworkable directives in the name of Treaty obligations when doing so will fail to convince the international community, and INCB, that the U.S. is meeting its Treaty obligations anyway. As such, obligations under Section 811(d)(1) should not pose an obstacle to placing Marijuana in Schedule III.

## Conclusion

Marijuana does not belong in Schedule I or II of the CSA given its low potential for abuse and its currently accepted medical use in treatment. HHS/FDA's Schedule III recommendation is evidence that the medical and scientific data support Schedule III. The DEA can clearly meet its obligations under the Treaties by controlling Marijuana in Schedule III and amending current regulations to meet Treaty reporting, quota, and other requirements. If the DEA comes to a different conclusion, contradicting its own recent precedent, the decision would be unjustifiable and would lack sound scientific, medical, and legal arguments. Refusing to move Marijuana to Schedule III in the name of Treaty obligations, would not change the perception by many that the U.S. is, and will remain out of compliance with Treaty obligations. As such, the Treaties do not

[66] 21 U.S.C. § 811(d)(1).

[67] Schedules of Controlled Substances: Placement of Isotonitazene in Schedule I, 86 Fed. Reg. 60761 (Nov. 4, 2021) (to be codified at 21 C.F.R. pt. 1308); Schedules of Controlled Substances: Placement of Crotonyl Fentanyl in Schedule I, 85 Fed. Reg. 62215 (Oct. 2, 2020) (to be codified at 21 C.F.R. pt. 1308).

[68] It should be noted that with Marijuana, its scheduled placement would not change criminal penalties associated with unauthorized manufacture, cultivation, possession, use, research, import, export, or distribution. These penalties for marijuana can be found in 21 USC 841 and specifically reference "marihuana" and not a particular schedule. Criminal penalties for violating 26 USC 280E, however, would no longer apply if Marijuana is moved to Schedule III.

[69] The private nondelegation doctrine finds its roots in due process principles since scheduling decisions have serious criminal implications. As a matter of due process, Section 811(d)(1) appears to be quite problematic. *See* Alexander "Sasha" Volokh, *The Shadow Debate over Private Nondelegation in* DOT v. Association of American Railroads, 2014 CATO SUP. CT. REV. 359, at 369–70 (describing private delegations as problematic because they arbitrarily deprive private citizens of liberty and property rights safeguarded by the Constitution and are therefore without due process of law).

require delay, or prevent the DEA from placing Marijuana onto Schedule III. Even if the DEA believes that they do, President Biden's 2022 directive strongly implied that Treaty considerations under 21 U.S.C. 811(d)(1) should not determine Marijuana's scheduling under the assumption that its scheduling would be governed by the processes set forth in 21 U.S.C. 811(a)-(b) – requiring the DEA to act in accordance with HHS/FDA medical and scientific determinations. However, even applying 811(d)(1), the precedent the DEA set with Epidiolex shows that Marijuana should be rescheduled into Schedule III, well within the minimum schedule the DEA set with Epidiolex. If the DEA maintains that Marijuana must be placed in Schedule I or II pursuant to its authority under 21 U.S.C. 811(d)(1), then such a decision will not be based on the Treaties' requirements, or the medical and scientific analysis conducted by HHS/FDA. It would be an arbitrary decision, without appropriate justification, and vulnerable to judicial review.

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