SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.

July 22, 2024

VIA ELECTRONIC SUBMISSION

Drug Enforcement Administration
Attn: DEA Federal Register Representative/DPW
8701 Morrissette Drive
Springfield, Virginia 22152

**RE: Public Comments on Proposed Rule, *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597 (May 21, 2024)
Docket No. DEA-1362**

To Whom It May Concern:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) is supported by more than 3,500 construction firms engaged in industrial, commercial, residential, architectural and specialty sheet metal and air conditioning construction throughout the United States and North America.

SMACNA provides these comments in support of the Drug Enforcement Administration's Notice of Proposed Rulemaking, *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597 (May 21, 2024) (hereafter "Proposed Rule"). As outlined in detail below, SMACNA supports the Proposed Rule because it lessens (but does not eliminate) the legal complications for legitimate businesses – including SMACNA contractors – who perform work for businesses in the cannabis industry – also called marijuana-related businesses ("MRBs"). While the Proposed Rule is an important step, SMACNA believes that legislative reforms are needed to protect the construction industry.

The cannabis industry is growing exponentially and MRBs need grow facilities with sophisticated heating, electrical, and air conditioning ("HVAC") systems. SMACNA and its contractors can provide these construction services, but the existing tension between federal and state law creates a myriad of legal issues that have stymied economic growth. The legislative reforms advocated by SMACNA will remove these obstacles and unleash economic opportunities for SMACNA contractors and create family-sustaining jobs.

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HEADQUARTERS 4201 LAFAYETTE CENTER DRIVE • CHANTILLY VA 20151-1219
MAIL ADDRESS P.O. BOX 221230 • CHANTILLY VA 20153-1230
PHONE 703 803 2980
FAX 703 803 3732
WEB www.smacna.org

I. BACKGROUND

Since the 1970s, federal law has classified marijuana[1] – or cannabis – as a Schedule I narcotic under the Controlled Substances Act of 1970 ("CSA").[2] Schedule I narcotics include heroin, LSD and MDMA and are classified as such because the federal government considers them to have the highest risk of abuse and no recognized medical use. The CSA prohibits the manufacture, sale, and possession of marijuana and other controlled substances.[3] In addition, aiding and abetting a violation of the CSA and conspiring to violate the CSA are also federal crimes.[4]

Notwithstanding the federal prohibition on marijuana, numerous states have passed laws legalizing marijuana for both medical and recreational purposes. Specifically, as of July 1, 2024, 23 states have legalized recreational marijuana and 39 states have legalized medical marijuana. State legalization of marijuana has generated significant economic growth. In 2022 alone, legal cannabis sales topped $27 billion and will likely hit $57 billion by 2026.[5] In 2023, states collected more than $4 billion in cannabis tax revenue from adult-use sales.[6]

The cannabis industry and MRBs specifically have economic needs like any other industry, including banking, finance, legal services, packaging, equipment, and, of course, construction.

With respect to construction specifically, cultivation facilities and dispensaries often must be built with strict adherence to state laws and regulations. And, to achieve optimal growth and productivity, marijuana "grow houses" – i.e., facilities that grow marijuana for lawful use under

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[1] Federal law defines "Marihuana" and "marijuana" to mean: "All parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C § 802(16)(A). In 2018, Congress passed the Farm Act, which removed "hemp" from the definition of marijuana in the CSA. Pub. L. No. 115-334, 132 Stat. 4490 (2018). To be considered "hemp," the product cannot contain more than 0.3 percent THC. Any plant that contains ***more*** than 0.3 percent THC would be considered non-hemp – i.e., marijuana – under federal law and would be considered an illegal substance under the CSA. 7 U.S.C. § 1639o(1).

[2] Pub. L. No. 91-513, 84 Stat. 1242 (1970), 21 U.S.C. §§ 801-971.

[3] 21 U.S.C. § 841(a) ("Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.").

[4] 21 U.S.C. § 846; 18 U.S.C. § 2(a).

[5] Iris Dorbian, Global Cannabis Sales to Skyrocket to $57 Billion In 2026, Says Top Market Research Firm, FORBES (Sept. 13, 2022), available at https://www.forbes.com/sites/irisdorbian/2022/09/13/global-cannabis-sales-to-skyrocket-to-57-billion-in-2026-says-new-report/?sh=7037200c7b07).

[6] Angélica Serrano-Román, Cannabis Brought States Record $4 Billion Tax Revenue in 2023, Bloomberg Law (May 8, 2024).

state law – must be constructed with sophisticated HVAC systems, such as those installed by SMACNA contractors.

Given the obvious tension between state and federal law regarding marijuana, MRBs that are licensed to operate in a particular state exist in a legal quagmire – lacking regulatory guidance and consistent enforcement. The federal prohibition on marijuana creates a host of collateral consequences for MRBs, even if the MRB is licensed by state law.

The impacts of marijuana's illegality under federal law are not limited to MRBs that grow, produce, process, distribute, or sell marijuana or marijuana products. **Businesses that transact with MRBs face similar uncertainty.** For example, SMACNA contractors engaged in building and servicing marijuana grow houses may face legal and compliance-related risks related to their connection to an MRB.

II. IMPACTS ON MRBS

The federal prohibition on cannabis creates a host of collateral consequences for MRBs, even if the MRB is licensed by state law.

***First*, and most significantly, the CSA impairs these businesses' access to traditional financial services like lending and banking.** Because marijuana is illegal under federal law and handling money from an illegal source is money laundering, many banks have refused to service MRBs.[7] Indeed, the Money Laundering Control Act prohibits financial institutions from knowingly engaging or attempting to engage in monetary transactions in criminally derived property of a value greater than $10,000.[8] The Bank Secrecy Act requires financial institutions to maintain programs designed to verify the identity of its prospective customers and for higher risk accounts, the purpose of the accounts, the source of funds in the accounts, and the customers' line of business.[9] In addition, Banks are regulated and supervised by federal regulators, including the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System, and the National Credit Union Administration ("NCUA"). Banks that serve MRBs risk regulatory enforcement actions, revocation of deposit insurance, and restrictions on their access to payment systems operated by the Federal Reserve.

***Second*, a provision of the Internal Revenue Code – Section 280E – disallows a deduction or credit for any expense paid or incurred in carrying on a trade or business that consists of trafficking in a Schedule I or II substance** under the Controlled Substances Act

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[7] 18 U.S.C. §§ 1956-1957.

[8] 18 U.S.C. § 1957(a).

[9] 18 U.S.C. §§ 1957(c).

which is prohibited under federal or any State law in which the business is conducted.[10] Section 280E does not apply to expenditures that are deductions from gross receipts – i.e. cost of goods sold. Therefore, under Section 280E a state sanctioned marijuana seller can deduct the cost of the product sold from its gross receipts but other legal expenses, such as rent, payroll, utilities, and the like, are not deductible.

***Third*, the CSA provides that it is unlawful to "knowingly open, lease, rent, use, or maintain" property for the manufacturing, storing, or distribution of controlled substances**.[11] It is also unlawful to aid and abet the commission of a federal crime.[12] Thus, agreements for the sale of marijuana and agreements with a marijuana business, whose subject matter are otherwise non-objectionable, violate federal law.

***Fourth*, state authorized MRBs are ineligible for federal funding programs, including the Small Business Administration loans that benefit small businesses.** As the SBA explained:

> Because 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, businesses that derive revenue from marijuana-related activities or that support the end-use of marijuana may be ineligible for SBA financial assistance. [13]

***Fifth*, MRBs are generally not eligible for federal bankruptcy protection.** As one bankruptcy court explained, "the Debtor cannot conduct an enterprise that admittedly violates federal criminal law while enjoying the federal benefits the Bankruptcy Code affords him."[14] As another court explained, "Several courts have held that a bankruptcy case must be dismissed if the continuation of the case would require the court, trustee, or debtor in possession to administer assets that are illegal under the CSA or that constitute proceeds of activity criminalized by the CSA."[15]

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[10] I.R.C. § 280E ("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.").

[11] 21 U.S.C. § 856(a)(1).

[12] 18 U.S.C. § 2.

[13] SBA Policy Notice, Control No. 5000-17057 (April 3, 2018).

[14] In re Johnson, 532 B.R. 53, 59 (Bankr. W.D. Mich. 2015).

[15] In re Burton, 610 B.R. 633 (B.A.P. 9th Cir. 2020).

III. COLLATERAL EFFECTS ON OTHER BUSINESSES

Marijuana's status as a Schedule I controlled substance not only affects MRBs – that is, those businesses that grow, produce, process, distribute, or sell marijuana or marijuana products – **it also impacts other businesses that do business with MRBs.**

For example, in Colorado, a bankruptcy court denied relief to a debtor who leased his warehouse space to someone who sold marijuana legally under state law.[16] The court reasoned that, until Congress passes a law deeming the sale of marijuana legal under federal law, "a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a debtor whose activities constitute a continuing federal crime."

Businesses needing a security clearance from the federal government may also be impacted. Specifically, an individual requesting a security clearance must complete the Standard Form 86, Questionnaire for National Security Positions ("SF-86").[17] Section 23.2 of SF-86 asks the following: "*In the last seven (7) years, have you been **involved in** the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling or sale of any drug or **controlled substance**?*" For contractors performing work on marijuana "grow houses" – i.e., operations that grow marijuana for lawful use under state law – there is a question regarding whether they are required to report this work under Section 23.2 of SF-86. There is no definitive guidance regarding whether such work should be reported under Section 23.2 and the answer may depend on the extent of the contractor's involvement and whether the grow house is operating when the work is performed.

Financial institutions may refuse to provide banking services for businesses that transact with MRBs. For example, businesses that contract with MRBs to provide equipment, supplies, security, staffing, and benefits to employees of MRBs may be considered by a financial institution to be "too close" to the marijuana industry to provide services. Other businesses that are even further removed from the industry, such as landlords and professional services providers, may similarly be considered by the financial institution as "too close" to the cannabis industry.

IV. RESCHEDULING MARIJUANA TO SCHEDULE III WILL LESSEN (BUT NOT REMOVE) ADVERSE IMPACTS TO BUSINESSES

Rescheduling marijuana from Schedule I to Schedule III does not decriminalize marijuana or legalize medical or recreational marijuana. What is more, the same criminal prohibitions against the manufacture, distribution, dispensing and possession of marijuana would apply, similar to those restrictions applicable to other Schedule III controlled substances, such as ketamine and anabolic steroids.

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[16] In re Rent-Rite Super Kegs W. Ltd., 484 B.R. 799 (Bankr. D. Colo. 2012).

[17] Available at https://www.opm.gov/forms/pdf_fill/sf86.pdf.

With respect to medical marijuana, a key difference between placement in Schedule I and Schedule III is that substances in Schedule III have an accepted medical use and may lawfully be dispensed by prescription, while substances in Schedule I cannot. However, prescription drugs must be approved by the Food and Drug Administration ("FDA"). While the FDA has approved some drugs derived from or related to cannabis, marijuana itself is not an FDA-approved drug. Moreover, even if one or more marijuana products obtained FDA approval, the proposed rule makes clear that "regulatory controls applicable to Schedule III substances would apply." Presumably, this means that manufacturers and distributors would need to register with the DEA and comply with regulatory requirements that apply to Schedule III substances in order to produce or handle those products.

One key change that would occur if marijuana is rescheduled from Schedule I to Schedule III would be that the prohibition on business deductions in Section 280E would no longer apply. This is because Section 280E applies only to activities involving substances classified in Schedule I or II. As a result, moving marijuana from Schedule I to Schedule III would allow marijuana businesses to deduct business expenses on federal tax filings.

As noted above, Section 280E bars MRBs from claiming deductions on many basic business expenses. According to the Wall Street Journal, the impact of Section 280E is that it often results in an effective tax rate of 70% or more, wiping out most licensed marijuana retailers' earnings.[18]

Thus, the Proposed Rule would unlock additional economic funds for redeployment by MRBs. For example, cannabis companies could use additional funds to reinvest in operations, build new facilities, and expand existing facilities. This would spur economic growth in both the real estate, retail, and construction sectors.

The Proposed Rule would also foster more investment in academic research. From 1986 to 2021, researchers were allowed to use cannabis from only one source – a facility at the University of Mississippi. Researchers were also required to store any marijuana in high-security facilities consistent with DEA guidelines. If the Proposed Rule is finalized, it will be easier for researchers to obtain federal research licenses and researchers will not need to acquire expensive, high-security facilities for storing marijuana.

V. Additional Legislative Reforms Are Needed to Protect Businesses and Foster Economic Growth

While the Proposed Rule is an important step, SMACNA believes that additional reforms are needed to protect the construction industry when it performs work for cannabis and cannabis-adjacent businesses. Thus, in light of the Supreme Court's recent decision in *Loper Bright*

[18] Available at https://www.wsj.com/business/cannabis-companies-profits-taxes-3f8bbee0.

Enterprises v. Raimondo,[19] SMACNA supports federal legislation to protect businesses that provide services to MRBs, including the SAFER Banking Act and the CURE Act.

A. THE SAFER BANKING ACT.

As noted above, while marijuana remains illegal under federal law, the vast majority of financial institutions will refuse to do business with MRBs, and, in some cases, businesses that transact with MRBs. Even when banking services (such as deposit accounts) are available, access to funding for marijuana-related businesses remains constrained. Any potential reclassification of marijuana will not change the fact that marijuana will remain illegal at the federal level.

The Secure and Fair Enforcement Regulation Banking Act ("SAFER Banking Act") aims to provide state-licensed MRBs access to traditional financial services, reducing the risk for financial institutions, lenders, insurers, and others serving the industry despite federal restrictions on cannabis.

The SAFER Banking Act provides "safe harbor" protections to financial institutions, lenders, insurers, and others serving the industry, ensuring they are not penalized for providing financial services to a "State-sanctioned marijuana business or service provider." The SAFER Banking Act not only addresses banking and insurance but also extends protections to mortgage lending, payment processing, and other businesses, aiming to normalize financial transactions for cannabis businesses and potentially stimulate significant industry growth.

Additionally, the Act also would allow banks, credit unions, and other financial institutions to offer banking services to construction contractors and other legally operating businesses providing contracting and other services to the industry. This would be done without fear of punishment by federal banking regulators.

Cannabis-related enterprises are a growing, legal business market segment in nearly 40 states and the District of Columbia. Even more states have legalized marijuana for medical use, and sixteen allow adult recreational use. ***This banking reform would also reduce small business anxiety, contracting complications, and safety risks***. The positive economic and contractor security benefits to the construction industry as well as local and state economies are substantial.

B. THE CURE ACT.

Even though medical and recreational marijuana is lawful in most states, the federal government routinely denies security clearances to federal employees and employees of federal contractors who admit to having used marijuana, even if the use was lawful under state law.

The Cannabis Users Restoration of Eligibility Act ("CURE Act") would prevent security clearance and federal employment denials over a person's "current or past use of marihuana." The

[19] 144 S.Ct. 2244 (2024).

bill would also allow those who have been previously denied a security clearance or federal job to seek reconsideration of that decision, provided it occurred on or after January 1, 2008.

VI. SUMMARY

As Bob Dylan wrote, "*the times, they are a-changin*'." The state legalization of marijuana for both medical and recreational purposes has resulted in booming businesses that may be operating legally under state law, but these businesses (and others doing business with them) are exposed to considerable risks under federal law.

The existing disconnect between federal and state law with respect to the treatment of marijuana remains a serious impediment to lawfully conducting business. As noted above, MRBs and businesses who conduct business with MRBs face considerable uncertainty given the current treatment of marijuana under federal law.

The existing reforms, including the Proposed Rule, which would reschedule marijuana from Schedule I to Schedule III, would be helpful to these businesses, but they do not solve all – or even a majority – of the issues facing businesses.

Thus, as outlined above, SMACNA believes that legislative reforms are needed, including the SAFER Banking Act. These legislative reforms will offer greater protections to SMACNA contractors and other businesses who transact with MRBs.

Sincerely,

Aaron Hilger
Chief Executive Officer