



Fox Rothschild Podcast

The Presumption of Innocence

Special Edition | Episode 36: Rolling Change: The DEA Turns Over a New Leaf on Marijuana Scheduling

Featuring Matt Adams and Joshua Horn of Fox Rothschild

Adams: Hi, everyone, and welcome to a special edition of "The Presumption of Innocence" podcast. I am your host, Matt Adams. I'm joined today by a return guest, as you may recall from episode 11 of "The Presumption of Innocence." Josh Horn is the Co-Chair of Fox Rothschild's Cannabis Law practice and previously came on the program to talk about anti-money laundering in state legal cannabis businesses.

And today we have Josh rejoining us because there's a major development in the world of legalized cannabis that really warrants disruption of our ordinary sequencing of programs. And we're bringing this supplemental extra episode to you as a special edition of the podcast, because this really is monumental. And I'm going to set the stage, Josh, and then I really want to dig into this because the U.S. Drug Enforcement Agency is effectively, at this point, announcing that it intends to reschedule marijuana to a Schedule III drug from its previous position as a Schedule I drug.

Before we dive into the ramifications of that, how big of a sea change in federal law is this? Because as you mentioned when you were on the podcast last -- and I think with more and more states coming online with recreational and medical adult-use cannabis -- we really have seen this unique conflict of loss position develop over time. Where federal law still has a prohibition on cannabis and many, many, many states an evolving -- sort of wave of states I would even go as far as to say -- legalizing what was formerly this illicit, unlawful substance. How big of a deal is it that the federal government is seemingly, at least from my perspective, showing signs that it's too relenting away from this prohibition?

Horn: I think, for the industry, Matt, it's a game changer. I mean, pure and simple. If rescheduling happens, there's so many potential ripple effects that would likely happen throughout the industry and throughout our country. I mean, just by way of example only, I mean, we know that President Biden pardoned people with nonviolent cannabis crimes who are in federal prison, and he asked the states to do it as well. And not every governor in every state has taken that step. And the thought here is, with rescheduling, that may help further incentivize governors and states that have not done it to pardon folks who are in state prisons for state violations of their cannabis laws.

And so I think that's just one example. But for the industry itself, the other potential ripple effects are, is it going to open up capital markets? Will it open up traditional banking? Will it modify or eviscerate the implications of Section 280E of the Internal Revenue Code, which is the substantial

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factor for why companies have such tight margins and are generally not operating in the black. And so, I think the potential ramifications are enormous for the industry and for people who have been jailed for nonviolent cannabis crimes.

Adams: I've seen this in New Jersey, where I live and practice, and the number of convictions that have been cleansed off the books has really been a revelation for people -- who may have had minor marijuana convictions -- that have truly impacted their ability to be gainfully employed, to open up a range of opportunities now, as our society's pendulum has really shifted, I think, squarely in the direction of legalization.

But let's talk about this from a mechanical perspective, because I know your background. We've been partners for a long time. And it's really in the regulated professions, which kind of brings you directly into this, is probably the most regulated new profession that we have in the legal cannabis markets. And I know our firm and you, we've grown a tremendous, nationally recognized cannabis practice as this has rolled out in recent years.

But let's kind of go into the nuts and bolts of this, right? Talk to me about what this means technically. Because the DEA -- the United States Drug Enforcement Administration -- has pronounced its intention to seek rescheduling. Talk to me about mechanically how that process now will unfold in the weeks and months ahead after this announcement.

Horn: Yeah, sure, Matt. So what happens now, it goes to the Office of Management Budget, who basically, if you will, signs off on it, for lack of a better term. And then the DEA will issue a proposed rule and send it out for comment. And the typical kind of period is 60 days, but the DEA has the right to extend it.

And then once the comment period is done, it then goes to an administrative law judge, and he or she will then decide whether or not to convey public hearings with respect to the DEA's proposed rule to reschedule cannabis from Schedule I to Schedule III. You know, on a myopic view, it seems like, well, that should be done by the end of the year.

The challenge, as I see it, there'll be certainly a significant number of comments. When the DEA modified its rules with respect to hemp and there was a comment period, it was very significant, the number of comments. In the thousands and thousands and thousands of comments. And so I think it's going to take a significant amount of time for the DEA to digest and address those comments. So I think it's fair to predict that they may want to take more than the 60 days they would otherwise take. And there have already been organizations, lobbying organizations, that have been decidedly anti-cannabis forever, who said they're going to sue to stop the implementation.

So, I don't think we're going to see this happen certainly this year. Depending upon how fast potential litigation moves, hopefully next year, but I could see it being dragged out beyond that, which is unfortunate. However, I don't necessarily think that that's going to stop the industry from assuming it's going to happen. And positive things happening in the industry that have not already happened.



And in fact, from a legislative standpoint as well. I think this gives a lot more credence to the efforts of say, Chuck Schumer, who's come out in the last couple of weeks advocating for real cannabis reform. But in particular in the banking space, which is one of the biggest burdens the cannabis companies have, because most banks don't bank cannabis because of concerns over the Fed shutting the Fed window and basically putting these banks out of operation. And so, the banks that do bank in this space are limited. They have an obligation to file suspicious activity reports when they accept the money. And traditionally these banks are not engaged in traditional banking services. For the most part, they're just taking money for depository services and letting, cannabis companies write checks or ACH off of it. And that's it.

Some banks are starting to lend in the space, but there aren't that many. And so I think this will hopefully give the impetus for more banks to get involved and for more banks to provide more traditional banking services. At this point in time, it's prohibitively expensive to work with a bank. And we have had clients paying \$3,000 to \$10,000 a month in a fee just for the bank to take their money. And so, the hope is that one of the ripple effects is the banking industry will self-regulate itself and more folks will get involved in it and provide more traditional banking services.

Adams: Josh, technically, what does it mean to reclassify from Schedule I to Schedule III? You're skipping Schedule II and assumingly not considering Schedule IV under --

Horn: Right.

Adams: The DEA's proposed designation. So, what does that mean technically?

Horn: The significant thing as I see it is basically a Schedule I drug is something that is deemed to be highly addictive. It's deemed to have no medical efficacy. And for those two reasons, by moving it to Schedule III, basically the government's saying, well, it's not necessarily highly addictive and it looks as though it does, in fact, have medical properties. And so, that is significant because it sanitizes, in my view, potentially sanitizes it by, you know, the flat out known that it's just around the country in some states. And I think it also helps to soften up the regulatory schemes in states because now this is an otherwise regulated drug.

I mean, the downside is, when this is ultimately comes to pass, you know, what's the FDA going to do? And what are they going to do from an enforcement standpoint? And that's unfortunately impossible to predict at this point, but that's something that the industry is going to have to get its head around as this process moves forward.

Adams: Yeah, and from a conflict of laws perspective, or I guess a perspective of the multiple layers, I guess, that go into this pea soup that creates federal cannabis policy, where does the FDA rank and rate as it pertains to rulemaking authority and the ability to be a source of law on this subject as compared to what the DEA is proposing?

Horn: Right, well, I'm not an FDA expert, but it's my understanding that when these become a Schedule III drug, that the FDA will regulate that and its dispensation. And so, I don't know what the FDA will do about that, whether it will treat it like any other Schedule III drug that's already out there,



or whether it'll take some different [00:10:00] path because it's cannabis and it's something new to Schedule III than what has been there before. I mean, we'll have to see, but it's the great unknown.

Adams: Schedule III drugs, what are some other examples of those types of substances that marijuana, cannabis, would then be grouped with?

Horn: Ketamine, anabolic steroids and testosterone. So, all of those have legitimate medical purposes. Although, you know, anabolic steroids, you know, there's obviously issues with that. But if it's properly administered and regulated, you know, then it fits within that purview of being a Schedule III drug.

Testosterone is used for men for various ailments as well. So it'd be, you know, within that purview. The other type of Schedule III drug is products that contain less than 90 milligrams of codeine per dosage, such as, like Tylenol with codeine. So, although it's subject to FDA oversight and the prescription process that's regulated by the DEA, it's possible, as opposed to on a Schedule I it's a full stop. So I think that's the big difference that we're going to see when it's coupled with those drugs that are still highly regulated, but it's not a full stop.

Adams: Would you agree with me, this is an incremental step? If the staircase is comprised of full-on prohibition -- which we have right now at the federal level -- and say, adult-use recreational, which is, I'm on the landing I've climbed the staircase, we're only going a little ways up that staircase, right? I mean, on the continuum, this would probably open the door for the federal government to recognize medical cannabis, but not recreational, right?

Horn: Well, that is another great unknown. I mean, there are two schools of thought with respect to this. One school of thought is, the rescheduling in and of itself basically addresses both the medical and adult-use space, particularly on banking, access to capital markets such as the stock exchange -- to get listed on a U.S. exchange, it's supposed to be encoded on the exchange and listed in Canada -- as well as the financing, such as traditional lending and those things as well as the eradication of the 280E. I mean, that's one school of thought, that applies across the board.

The second school of thought is it only applies to medical. And so you still have this adult-use space that's going to be an outlier. And what then happens with companies that have both? Does that mean one side of the business that's medical gets the benefit of 280E going away and the adult-use side doesn't? Or one side gets the benefit of being in the capital markets when the adult-use side doesn't?

I mean, that's another scenario that I think will play out as this process goes forward. But I think that's the risk, that there's going to be basically two sets of oversight depending upon if you're a medical or adult-use program.

Adams: Josh, we're talking sources of law that are predominantly administrative at the moment. This seems to be an end-around Congress and we've seen that in some other very high-profile spaces throughout, this year, in particular. We've seen it where the FTC sort of blanketly prohibited the noncompete. And in a way, that's kind of an end-around the legislative branch of government at the



federal level. And there's been a lot of chatter in Congress about decriminalization, recreational cannabis. And on the one hand, we have some real staunch advocates that are trying to get bills through Congress. But on the other hand, we see some real staunch opponents. And in our last discussion in episode 11, when we were talking about these financial considerations and the anti-money laundering implications of this sort of two-tiered dichotomy of legalization at the state level and criminalization at the federal level, we talked about Congress and whether it will be spurred to act.

Could this, in fact, be sort of a kick in the proverbial you-know-what to Congress to get their act together and move on some of these bills? I mean, do you think that there is a momentum that this could achieve where we don't have to worry about the decriminalization -- or at least the baby step towards decriminalization at the federal level -- happening at the administrative level and we can skip right to the legislative branch of our government?

Horn: Yeah, my hope is yes. And I think Chuck Schumer, over the years, has been an advocate for real cannabis reform. But unfortunately, he has not pushed safe banking, for example, which everyone thought was going to pass last year and didn't. But now I think he's revisiting the strategy and he's pushing for some version of safe banking to pass, coupled with more cannabis reform.

And I think, you know, if there is an impetus to do it now, the intransigence is, I think it's the older generation that's still in our federal legislature, in the Senate and the House. Although the House has repeatedly passed safe banking with bipartisan support. And so I think it's really in the Senate where, unfortunately, it may take attrition of a newer generation who's more open minded about these things to replace the older generation that may be holding back.

And safe banking, I think we talked about it in episode 11. Basically, whatever version of safe banking you're looking at effectively says, for banks in states where there's a state legal cannabis program, we, the federal government are going to let you bank. We're not going to rip the Fed window out from underneath you. And that is so significant. And I think that probably has the most traction now, as well as maybe decriminalization, to go forward. Because like I mentioned earlier, the banking system and the taxes are the real holdup. There's people that believe and take the position that if some version of safe banking passes, again, the implications of section 280E of the Internal Revenue Code, which prohibits cannabis companies from taking any ordinary deductions, and it only allows them to take a deduction for cost of goods. So that's why it could be a monumental change from a legislative standpoint, because now there's, at least from an optics standpoint, there's a greater incentive to make a change. And I hope it'll gain traction, even with folks who are, have been against it over the years, because it's going to happen. It's just a matter of time. And quite candidly, our senators have to, have to look themselves in the mirror and figure out if they want to be on the wrong side of history or the right side of history.

I think the wrong side of history is not taking real meaningful steps to reform, particularly if the rescheduling happens.

Adams: Yeah, I mean, how much of this parallels Prohibition as it related to alcohol?



It's scary. I mean, I think it's in many ways, it's very similar. But I think the thing that makes the cannabis laws even worse -- and when the first cannabis national law in this country was Marijuana Enforcement Act from the early part of last century, the person who promoted it, it was a decidedly racist piece of legislation. And it's no mystery that the segments of our society that have been adversely punished with cannabis violations of the law are underserved communities and people of color. And so, you know, this is one way to try to, you know, right the past, if you will. And because it's just impacted these communities so adversely and something needs to be done about it. And hopefully, you know, this will give the incentive to make a real attack on these issues.

In episode 27 of "The Presumption of Innocence," our partner, Fruqan Mouzon, who played a pivotal role in helping to write New Jersey's 2021 legalization bill in the Garden State, he talked about these economic realities that really drove legalization here in New Jersey. And I know those firsthand, both having practiced here, being an elected official in a community that's opted in and reaped the benefits of the massive benefits of, of the tax that local governments are allowed to collect on cannabis sales in New Jersey.

At what point do you think, Josh, that the economic realities will overtake the remaining holdouts that may be resistant to this change? At what point does the business of legalization and all of the benefits that can come ... And I see it firsthand. I mean, New Jersey's bill allows a 2% tax on -- at the municipal level -- to legalize cannabis sales. And in just the first quarter of sales that equates to hundreds of thousands of dollars that flow in that otherwise would not, that go into things like building parks and building infrastructure and updating dated community assets. And for local governments, especially in a place like New Jersey, where we have all these lots and lots of multiple local governments, it's a dramatic and profound impact that that revenue stream has. And in days where we talk about deficits and we talk about spending and we talk about tax and tax savings, at what point do those economic reality start to trump the idea that, you know, these people that are holding out on some principle, it really just doesn't literally make sense anymore?

Horn: I think certainly on the state level that's already happening. And using New Jersey as an example -- and my point of view here is it's no different than gaming, alcohol or tobacco. No one has to do those things, but if you do want to do them, you'll be taxed. And, I don't think there's anything wrong with it.

If you ask any -- take where I live, Pennsylvania, which is now almost completely surrounded by adult-use state. It's tried to have an adult-use law passed a number of times. And finally, you know, there are people on the more conservative side who are actually, like, coming to the realization, wait a minute, we can actually make money here and fund programs. I mean, there's some states that fund educational programs with adult-use.

And so, you know, Pennsylvania, you know, at some point, maybe this year is going to come around and do that. And on the federal level, I mean, it's the same thing. I mean, the cynic in me says that the federal government doesn't necessarily have an incentive to fix it because they have to reap the benefit of 280E.



So, for example, if Fox Rothschild, in its ability to take all of its ordinary deductions that it can take under the Internal Revenue Code, you figure maybe the firm ultimately pays tax on 50 to 60 cents on the dollar. In the cannabis space, these companies, because they can't take ordinary deductions, they're paying tax on 90 to 95 cents on the dollar.

And so, it's really become a boondoggle for the federal government. So, it's going to take some strong will at the federal level to really make this change. But it could be addressed through taxing. And again, no different than tobacco, alcohol or gaming. You don't have to do any of it, but if you want to do it, you'll be taxed.

Adams: So, Josh, I don't think this is gonna be the last time that we talk about this, as the rulemaking process that can, as you mentioned at the outset, can be fairly protracted, rolls out over the next weeks and months. What technically is the very next step?

Horn: It goes to the OMB and then, and then the rulemaking process starts.

Adams: So the Office of Management and Budget does what in particular?

Horn: As I understand it, Matt, they review the proposal and they ultimately have to sign off on it. And then it goes to the formal rulemaking process.

Adams: And that's whether it's governmentally feasible to do this? Is that what OMB's looking at, both a cost-benefit analysis as well as things like, you know, the societal, broader societal implications?

Horn: I believe so. And then it's up to the DEA to promulgate its rule to address the rescheduling.

Adams: Do you anticipate any bumps in the road that could derail this process? Because now it's been announced. That's a big deal unto itself and I think advocates for legalization, decriminalization, have been waiting for this moment for quite some time. But what, if anything, could derail it after this announcement?

I don't think they would make this announcement if they didn't intend to see it through, do you?

Horn: I would agree. I mean, I would agree. It's a long time coming. You know, Health and Human Services had recommended this just about a year ago. They had a very detailed report that became public in the fall of their analysis of the medical efficacy of cannabis. And so, what would derail it is litigation to stop the process. And I think that, unfortunately, based on what I've read in the media, there are groups, anti-cannabis groups, that are going to take a shot. And so that will derail the process, probably in the rulemaking context, as opposed to where it now rests with the Office of Management and Budget.

And I think that's what's going to cause the delay unless it's handled on an expeditious basis. I'd like to believe it would be because it seems to me that the one avenue for these anti-cannabis groups to pursue would be injunctive relief. And typically, as we know as trial lawyers, and injunctive matters



where injunctive relief is sought are handled on an expedited basis. But that's my prediction, that, that one of these or more of these organizations are going to bandy together to fight the rulemaking process to prevent it from happening. I think ultimately they will lose, but it's an issue of full-timing.

Adams: Well, we're focusing on all this energy on the federal level. So it really begs the question, as the United States at a federal level takes this baby step, this incremental step towards a long chain or sequence of steps that would be necessary to bring it federally in line with a lot of what the states have done, might we see additional states come online with full-throated recreational use while the federal government chugs along, like the Little Engine That Could and does it very incrementally?

Horn: Yes, I think two states in particular, one of which has a referendum process, one does not. Florida has a referendum on the fall ballot for an adult-use legalization. They need 60% of the voters to carry that, notwithstanding Gov. DeSantis's statement he's going to oppose it. At least what I'm hearing through lobbyists, I know it's got a good chance of passing in the fall, probably better than a good chance.

And then there's the legislative process that has been started once again here in Pennsylvania. There was the Senate bipartisan adult-use bill proposed last year. The significance there, it got to committee, which is the first time it ever got to a committee and these bills have been proposed before. Now, there's a pending House bill that was proposed last month, more or less a mirror of what the Senate bill was last year. And there's a growing sense of more bipartisan support for it for people who were against it, Republicans that were against it in the past. I mean, James Carville, the Democrat political consultant, always characterizes Pennsylvania as basically three sections: you have Philadelphia in the east, you have Pittsburgh in the west and in between you have Alabama. And that's just his version of saying it's a very conservative state. And I think that's the challenge.

But it's going to happen because we're on the wrong side of history. And, you know, for many years, because we have a state liquor control system, you know, you could not buy a decent bottle of wine anywhere in Pennsylvania. So what happened? There's five bridges that go from Southeastern Pennsylvania into New Jersey. People would drive over New Jersey, get a good bottle of wine, drive back, drive to Delaware, drive to Maryland. And so Pennsylvania lost just so much revenue. And I think, at least now, that people I speak with on both sides of the aisle, they're like, we can't keep letting this happen, because there's too much money for infrastructure, for school programs, however the money is going to be chopped up whenever this legislation is adopted.

And I just think with this potential rescheduling, I think more and more states will be receptive to it. You know, like I said, with the exception of actually West Virginia, Pennsylvania is now completely surrounded by some version of adult-use. And I think you're going to see states south of the Mason-Dixon line take hold. I mean, North Carolina had a bill last year that had a lot of traction and just missed. And I think you're going to see more and more of that around the country because there's just too much money for programs that these states will not otherwise get. And if you were to ask anyone in any of these states that don't have an adult-use program or a medical and/or adult-use program, if you have a choice whether to pay more to state government in taxes, real estate, income,



sales tax, however, your local government slices that pie, or your government can approve medical and adult-use program and tax that and collect that money instead of enlarging your tax burden? I can't imagine anyone saying, wait a minute, I'd rather pay more in taxes than have some program that if people want to participate, like alcohol, gaming and tobacco, you're going to be taxed for the privilege. It's a no brainer.

Adams: Yeah, I mean, in addition to this sort of maybe opening up some additional states to accepting adult-use recreational, the sort of full-blown adoption of legalized cannabis that we've been chatting about today. I also see a research angle on this. I also see, because when you think about it, if ketamine was not a Schedule III drug I don't think some of the psychological benefits that have in recent years been discovered from ketamine therapies would actually be available had it been a Schedule I drug during that period.

I don't think at a federal level, where the lion's share of scientific research grants are available -- remember the federal government prints the money, so they're the ones in the best position to give really meaningful grants when it comes to learning about these substances, their analgesic properties, for example, and I just think that it opens up another door for research, too. Would you agree?

Horn: Absolutely. And historically, there was one university in the United States -- I think it was Mississippi State or Ole Miss, I know it was one of the two -- that had a DEA license to do research. But they couldn't produce enough cannabis on any sort of scale to do anything meaningfully. So nothing really happened.

And now more universities are being permitted to do that through the DEA, and they're in fact issuing individual licenses for people to grow under the DEA auspices, ostensibly for research purposes. And there's a lot of anecdotal evidence of it providing material assistance to people.

I mean, for just by way of example only, and a group of people in country who deserve so much better than they've gotten are our veterans. And many of our veterans, unfortunately, suffer the terrible ailment called post-traumatic stress disorder. And there's certainly a lot of anecdotal evidence that our veterans, who put their lives on the line for this country, get a real benefit from being able to have cannabis. And there are a lot of people out there who are reluctant to get a medical card in the states that only have medical because they don't want to have, you know, the kind of the paper trail that they're, you know, a certified cannabis user. Where a lot of people in adult-use states, they're not necessarily -- although there's plenty doing it for pure recreational purposes -- but a lot of people are self-medicating who don't otherwise feel comfortable getting a medical marijuana card. PTSD is just one example of a lot of benefit people have gotten. For another example, people who suffer from cancer, who are taking chemotherapy, who have no appetite because of it, cannabis gives them a material benefit to give them an appetite. There's a lot of studies on this to show the real benefit that cannabis can provide.

Adams: And this opens the door for more.



Horn: Absolutely. And it should. Because, again, just using veterans as one example. This country has not always treated them as they should have been and this is just one thing that we can do to say, you know what you matter, you put it on the line, here's something you can use. We're doing the research to help you. And so, I'm optimistic about it across the board. There will be more studies. You know, countries like Israel, for example, was a leader for many years in studying, the health benefits of cannabis. And I think other countries and the United States should do the same. Otherwise, you know, we run the risk of being irrelevant on the research front.

Adams: And I sense, Josh, that we're going to have a lot more to talk about, whether it's the changing trends at the state level, the federal level, the research opportunities that you've so eloquently and powerfully just described. Particularly as it relates to our veteran communities, who, I couldn't agree with you more, deserve a lot better than we give them sometimes. And the restorative justice components to, to all of this. I've been a student of history, and I've always enjoyed studying the period of Prohibition because I never really understood it against the backdrop of having not lived through it. But we're certainly living through a period right now, and it's perhaps going to be our children or our grandchildren who might be saying, hey, why did they have prohibitions on marijuana?

I've read and seen films on aspects of things that just didn't make sense. Like, going into a vineyard in the Napa Valley that, now, in today's standards, would be producing multiple millions of dollars of fine wine, with government agents axing open large barrels and letting it flow like rivers into drains, basically. Wasting you know, that liquid commodity that really has benefits to health and enjoyment and relaxation and things of that variety. This is going to be an interesting discussion and we're not going, this is not going to be the last time we talk about it. Because it's seldom, I think it's a once in a lifetime, really, event where you have something that was previously illegal really kind of go through the entire transformation of being recognized as mainstream and legalized. And I don't think we're going to see anything like it in our lifetime, at least.

Horn: I would agree with you, Matt. And the irony is, before the Marijuana Tax Act -- which I think it was 1927, if I recall correctly -- before that, marijuana was frequently prescribed by doctors in this country and people got a real benefit. And when President Nixon signed the Controlled Substances Law in 1971, he commissioned physicians to study cannabis. And those physicians came to the conclusion that it wasn't highly addictive and it had medical benefits. And Nixon basically said, yeah, I'm going to sign the law anyway.

Adams: And it makes you wonder what the motivations were about that, so we really can't ignore those restorative justice components of this discussion at all. So, Josh, that's all the time we have for this special edition of "The Presumption of Innocence." We've been talking with Josh Horn about sort of the breaking developments that the DEA has publicly proclaimed its intention to reclassify marijuana as a lower-risk drug, changing it from Schedule I to Schedule III.

We will be following this closely. Josh, thanks for joining us once again, my friend. That's all the time we have. We'll see you next time. Take care.



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