

the buzz:

Cannabis News & Policy Update

September Edition

FEDERAL UPDATES

Federal Rescheduling

The DEA scheduled an [administrative hearing](#) on the proposed rule to move marijuana from Schedule I to Schedule III. It will commence December 2, and insiders predict it will last two to 10 days. Any person “adversely affected or aggrieved” by the proposal who is interested in testifying must submit written notice of intent by September 30. The DEA Administrator will determine who is permitted to testify and designate a presiding officer to oversee the hearing.

The timing of the hearing makes it highly unlikely the rescheduling process will be completed this year, or before the new president takes office in January. Fortunately, it is unlikely either candidate will change course as rescheduling would be a major policy victory for the Biden-Harris administration and Donald Trump [announced](#) this month he supports moving marijuana to Schedule III. It’s also possible that fallout from the election and the subsequent power transition of power could further delay the process, especially if it entangles the Department of Justice.

H&H Insight: A delay in rescheduling delays relief from I.R.C. 280E.

LICENSING OPPORTUNITIES

Delaware : The Office of the Marijuana Commissioner adopted [final rules](#) and began [accepting license applications](#) for the state’s forthcoming adult-use cannabis market. Applications will be accepted until September 30, and then licenses will be awarded by lottery for 30 retailers, 60 cultivators, 30 manufacturers, and five testing labs. Half of the retailer licenses, one-third of the licenses for cultivators and manufacturers, and two testing licenses are reserved for social equity applicants. Licenses will be issued on a staggered basis, beginning with cultivators in November and manufacturers in December. Retailers and testing labs will follow in March 2025, at which time sales can begin.

NEW MARKETS

Nebraska: Two [medical cannabis ballot initiatives](#) qualified for the November ballot at the end of August. One of the measures would allow qualified patients to possess and use medical marijuana, while the other would regulate its production and distribution. [Nebraskans for Medical Marijuana](#) ran the initiatives separately to comply with a state rule requiring ballot measures to address only a single subject. In 2020, the state Supreme Court kept a medical marijuana initiative off the ballot because it considered legalization and regulation two separate subjects.

North Dakota: An [initiative](#) to legalize adult-use cannabis qualified for the November ballot. Initiated Measure 5, supported by [New Economic Frontier](#), legalizes possession and home cultivation. It also establishes the framework for a regulated market, but it does not include any tax provisions. The proposal authorizes seven cultivation facilities and 18 retailers, allowing businesses to vertically integrate and own up to four retail stores and one cultivation facility. If approved, the state Department of Health and Human Services must adopt regulations by October 1, 2025. Similar measures were defeated in 2018 and 2022.

Kentucky: The Kentucky Cabinet for Health and Family Services (CHFS) adopted [final medical cannabis rules](#), which took effect August 28. Nearly 5,000 total license applications were submitted during the application window that closed August 31, and a lottery will be held in October to award licenses for 48 dispensaries, 16 cultivators, and 10 processors. Patient certification and cannabis sales can begin January 1, 2025, and a [growing number](#) of city and county governments have enacted ordinances to either authorize or prohibit cannabis businesses in their jurisdictions.

STATE POLICY UPDATES

New York: The Office of Cannabis Management published several guidance documents outlining energy and environmental sustainability requirements for medical and adult-use cultivators. For example, licensees must install energy meters and track and report their resource consumption. They are also prohibited from using fossil fuel combustion as a primary energy source. Cultivators have until August 31, 2025, to submit sustainability plans.

H & H Insight: Environmental sustainability is likely the next wave of regulations in many states.

California: The state legislature approved several cannabis-related bills that Gov. Gavin Newsome must sign or veto by September 30:

- **S.B.1059** – Prohibits cities and counties from imposing compounding taxes on cannabis businesses by eliminating their ability to calculate local cannabis taxes and fees after the state excise tax is applied.
- **A.B.1111** – Requires the Department of Cannabis Control to issue a license allowing small growers to sell cannabis and cannabis products at state-licensed temporary events.
- **S.B.1064** – Creates a new combined activities license, which will authorize two or more commercial cannabis activities to take place at the same premises, except laboratory testing.
- **A.B.1775** – Authorizes local jurisdictions to allow retailers to prepare and sell non-cannabis food and beverages and sell tickets for live performances on their premises.

Rhode Island: The Cannabis Control Commission is working on draft adult-use regulations and will present them by subject matter over the next several weeks. At a September 6 meeting, the Commission discussed a process for the 24 pending retail cannabis licenses that must be awarded when adult-use regulations are finalized. Commissioners ultimately decided they should be awarded through a randomized lottery, with an initial application round to ensure businesses meet the eligibility requirements for licensure.

HEMP UPDATES

National: The US Court of Appeals for the Fourth Circuit ruled that THC-O, a synthetic cannabinoid, is federally legal under the 2018 Farm Bill. In this employment case, the court rejected the DEA's stance that THC-O is a Schedule I controlled substance. The court emphasized that a product's legality is determined by its source rather than how it is manufactured. The court agreed with a previous decision by the Ninth Circuit, which held the definition of hemp in the 2018 Farm Bill only excludes products over 0.3% delta-9 THC.

California: Earlier this month, Gov. Gavin Newsom announced emergency regulations banning detectable levels of THC and other intoxicating cannabinoids in consumable hemp products such as food and beverages. The new rules proposed by the state Department of Public Health would also set a minimum purchasing age of 21 and limit serving sizes to five per package. The rules will undergo a five-day comment period and take effect immediately upon approval by the Office of Administrative Law.

Missouri: The Missouri Hemp Trade Association filed a lawsuit to stop the state Department of Health and Human Services from enforcing Gov. Mike Parson's ban on the sale of hemp-derived THC products outside of the regulated marijuana market. The challengers contend that foods containing hemp-derived cannabinoids are not classified as "adulterated" under Missouri law and cannot be embargoed. Despite the ongoing lawsuit, regulators will begin embargoing prohibited products, and they launched a form for consumers to report retailers who sell them.

Nebraska: Nebraska Attorney General Mike Hilgers filed four new lawsuits against retailers selling delta-8 THC products. These actions address several public health and safety concerns, including hemp retailers allegedly making products attractive to children, failing to implement age verification, and mislabeling THC content. Hilgers emphasized that this is the beginning of a broader statewide enforcement effort.

New Jersey: On September 12, Gov. Phil Murphy signed a bill into law that will essentially make it illegal to sell intoxicating hemp products without a cannabis license. Under S3235, products with significant amounts of hemp-derived THC or other intoxicating cannabinoids will fall under the purview of the Cannabis Regulatory Commission. The agency has 180 days to draft rules governing the sales of these previously unregulated products by licensed marijuana businesses. The rules will also cover product testing and labeling standards.

PSYCHEDELICS

Colorado: State agencies have established the regulatory framework for the Natural Medicine Program, and applications will soon be available for prospective treatment providers. The [Department of Regulatory Agencies](#) created rules for professional licensing and training in August, and it will hold a [stakeholder meeting](#) September 25 to “clarify and simplify the rules, correct clerical errors and address public safety concerns.” The [Natural Medicine Division](#) of the Department of Revenue, which is responsible for regulating and licensing businesses and operations, held its final rulemaking hearing September 16. License fees are expected to be set by November 1. Both agencies anticipate accepting license applications no later than December 31, and treatment centers are set to start opening next year.

AICPA CANNABIS CONFERENCE

In the Weeds With IRS Counsel Luke Ortner: Top Takeaways from Fireside Chat in Denver, CO on August 12, 2024

1. Accountants can sign tax returns (subject to state licensing) without facing enforcement risk. OPR and IRS want ‘good’ accountants advising cannabis companies and properly applying 280E.
2. Despite the rise in refund claims, IRS will continue to defend and enforce 280E unless the Supreme Court issues a different interpretation, like overruling Gonzales.
3. Outside counsel opinions that 280E is unconstitutional are not “bulletproof.” An opinion has to be grounded in legal authorities, and be well reasoned. The IRS position is caselaw supports its interpretation that 280E is constitutionally valid based on the Taxation Clause, not the Commerce Clause.
4. When 280E no longer applies to cannabis businesses due to rescheduling/federal legalization, the IRS will continue to enforce 280E for years prior to rescheduling. The IRS’s policy is not to look the other way because things have changed going forward.
5. For now—unless courts say otherwise—the IRS interprets section 471(c) narrowly and will defend its position that it is not an end run around the application of 280E.
6. While marijuana remains federally illegal, the IRS has applied a policy of not seizing licenses or marijuana plants or inventory. However, if marijuana is rescheduled, the IRS could seize and sell a cannabis business’s assets—including marijuana inventory—to satisfy outstanding tax liabilities.

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Wednesday, December 4th | Early Evening

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