

**DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION**

**DOCKET NO. DEA-1362; A.G. ORDER NO.5931-2024
SCHEDULES OF CONTROLLED SUBSTANCES:
RESCHEDULING OF MARIJUANA
NOTICE OF PROPOSED RULEMAKING**

**COMMENT SUBMITTED BY
THE ASSOCIATION OF AMERICAN RAILROADS
AND
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

The Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) (jointly, the Associations), on behalf of themselves and their member railroads, submit the following comments in response to the Drug Enforcement Administration's (DEA's) May 21, 2024, Notice of Proposed Rulemaking (NPRM) proposing to transfer marijuana from schedule I of the Controlled Substances Act ("CSA") to schedule III of the CSA.

Statement of Interest

AAR is a non-profit trade association whose membership includes freight railroads that operate 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the U.S.; and passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRA is a non-profit trade association representing the interests of approximately 600 short line and regional railroad members in legislative and regulatory matters. Short lines operate 47,500 miles of track in the United States, or approximately 29% of the national freight network, touching in origin or destination one out of every five cars moving on the national railroad system, serving customers who otherwise would be cut off from the national railroad network. The members of AAR and ASLRRA will be directly affected by the proposed changes because they are

responsible for complying with the federally mandated drug and alcohol transportation workplace testing programs administered by the U.S. Department of Transportation (DOT) pursuant to 49 CFR part 40 and the Federal Railroad Administration's (FRA's) regulations at 49 CFR part 219.

Federal drug and alcohol testing is central to ensuring a safe rail transportation system and marijuana testing is a necessary component of the testing program.

All railroads that are connected to the general railroad system (with certain limited exceptions) are required to conduct drug and alcohol testing for all employees who are covered by the federal hours of service laws.¹ 49 CFR § 219.1. This includes the employees who operate trains between terminals and within yards (train and engine employees such as locomotive engineers, conductors, brakemen, etc.), who direct the movement of trains within a territory (dispatchers), and who are responsible for the visual displays along the route that provide direction to the train crew on when to start, stop, or slow a movement (signal employees). Railroads are also required to conduct drug and alcohol testing on maintenance-of-way employees and employees who perform mechanical testing and inspections on railroad rolling equipment pursuant to FRA regulations.² Some of these employee categories must be certified pursuant to FRA regulations (e.g. a locomotive engineer under 49 CFR part 240). A positive drug or alcohol test for a certified employee conducted pursuant to and in compliance with federal regulations can trigger sanctions under federal regulations, including revocation of the employee's certification.

FRA's regulations at part 219 establish protocols for drug and alcohol testing under specific circumstances. These circumstances include post-incident toxicological testing, reasonable suspicion testing, reasonable cause testing, pre-employment testing, and random alcohol and drug testing. When railroads conduct drug tests pursuant to federal regulations, they are required to test for marijuana as

¹ An overview of FRA's drug and alcohol testing requirements can be found at <https://railroads.dot.gov/railroad-safety/divisions/drug-and-alcohol/drug-and-alcohol>. The federal hours of service laws are at 49 USC 21101 *et seq.* FRA's regulations implementing the federal hours of service laws are at 49 CFR part 228.

² The applicable testing and inspection regulations can be found at 49 CFR parts 215, 221, 229, 230, 232, and 238.

well as cocaine, amphetamines, phencyclidine (PCP), and opioids. 49 CFR §§ 40.3 and 40.82. Currently, marijuana ranks as the top drug type in positive drug tests across the transportation industry. The railroad experience is consistent with that trend, as approximately 59% of all positive drug tests conducted pursuant federal regulations are attributable to marijuana.

DEA notes in the NPRM that marijuana usage does result in the potential for impairment while driving. The concern about impairment applies equally to persons who perform safety-critical work in the railroad industry covered by federal drug and alcohol testing program. The safety risks from impairment in the railroad environment are significant. As an example, the Associations point to a 1987 incident where two trains collided in Chase, MD, resulting in 16 deaths and 174 injuries. The National Transportation Safety Board (NTSB) investigated the collision and found that the probable cause of the accident was, in part, the engineer's failure to stop his train in compliance with a signal before fouling the track, which resulted from his impairment from marijuana use.³ This collision contributed to the decision by Congress to pass the Omnibus Transportation Employee Testing Act in 1991 that "require[ed] DOT Agencies to implement drug and alcohol testing of safety-sensitive transportation employees."⁴ Pub. L. 102-143.

Fortunately, railroad incidents where marijuana is a potential contributing factor are very rare—and the railroads' robust testing programs certainly contribute to that—but accidents do sometimes happen where marijuana is a potential factor. In 2008, NTSB issued a final report highlighting that a fatally injured roadway maintenance employee tested positive for marijuana following a collision between a train and roadway maintenance machine and issued Safety Recommendation R-08-07, which recommended that FRA "[r]evis[e] the definition of 'covered employee' under 49 *Code of Federal*

³ Railroad Accident Report: Rear-End Collision of Amtrak Passenger Train 94, the Colonia and the Consolidated Rail Corporation Freight Train ENS-121 on the Northeast Corridor, Chase Maryland, January 4, 1987 (NTSB/RAR-88/01), pg. 144. <https://www.nts.gov/investigations/AccidentReports/Reports/RAR8801.pdf>

⁴ <https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/overview-drug-and-alcohol-rules-employers>.

Regulations Part 219 for purposes of Congressionally mandated alcohol and controlled substances testing programs to encompass all employees and agents performing safety-sensitive functions.”⁵ More recently, in 2016 and 2023, the NTSB noted that employees involved in two collisions tested positive for marijuana in post-incident testing although it could not determine that marijuana usage was a cause of the collisions.⁶ Attributing marijuana impairment as a cause in such circumstances is difficult because, unlike alcohol, there is not a reliable drug test or standard for assessing impairment solely from the presence of marijuana on a positive test.

DEA’s proposed rescheduling has the potential to imperil the certifications of DOT drug testing laboratories.

Drug testing laboratories located in the U.S. must be certified by the Department of Health and Human Services (HHS) under the National Laboratory Certification Program (NLCP) to be able to participate in DOT drug testing.⁷ 49 CFR § 40.81(a). DOT Secretary Pete Buttigieg recently testified that “[DOT’s] understanding of the rescheduling of marijuana from Schedule I to Schedule III is that it would not alter DOT’s marijuana testing requirements with respect to the regulated community” because marijuana is identified in DOT regulations by name rather than by class.⁸ While this statement was a welcome indication that DOT intends to retain drug testing requirements for marijuana, questions remain about the effect that rescheduling marijuana will have on HHS certification of DOT drug testing labs. The rail industry remains concerned that if marijuana becomes a Schedule III drug under the CSA,

⁵ Railroad Accident Report: Collision of Massachusetts Bay Transportation Authority Train 322 and Track Maintenance Equipment near Woburn, Massachusetts, January 9, 2007 (NTSB/RAR-08/01)

⁶ Railroad Accident Report: Amtrak Train Collision with Maintenance-of-Way Equipment Chester, Pennsylvania, April 3, 2016 (NTSB/RAR-17/02), and Railroad Investigation Report: Collision between Amtrak Passenger Train and Union Pacific Railroad Roadway Maintenance Machine, Oakland, CA, July 15, 2022 (NTSB/RIR-23-11).

⁷ DOT also allows drug testing laboratories located in Canada or Mexico that are not certified by HHS under its NLCP to participate in DOT drug testing, but only if DOT approves the laboratory based on an HHS recommendation that the lab meets HHS certification standards for all testing required by DOT or based on an HHS recommendation that it recognizes a Canadian or Mexican certifying organization as having equivalent certification standards as HHS and that the lab has been certified under those standards.

⁸ <https://www.truckersnews.com/news/article/15678604/buttigieg-says-if-doj-reclassifies-marijuana-its-still-off-limits-for-truckers>.

HHS-certified drug testing laboratories will no longer be permitted to test for marijuana and the change will impact the promulgation of new or updated testing procedures used to detect marijuana. There needs to be some assurance that DEA's actions with respect to rescheduling marijuana will not negatively affect the certification of testing laboratories or the updating to testing procedures to ensure that railroads have the best assessment tools available, as they are necessary to protect safety.

Safeguards are needed to ensure that railroads can conduct drug testing of employees under DOT's federal drug testing program.

As referenced above, testing for marijuana under the DOT program serves an important role in improving railroad safety. Not only does testing for marijuana help to identify employees who present safety concerns and address those employees proactively, it also serves as an important deterrence measure. If DEA finalizes the rescheduling of marijuana, it needs to do so in a way that does not result in unintended consequences that negatively impact safety.

DEA should include a "safety carve out" to prevent the rescheduling from applying to railroad employees covered by the DOT testing program. This would protect the DOT program and help ensure that testing laboratories are properly certified to test pursuant to the DOT program requirements. It is also important for DEA (or HHS or DOT) to issue specific guidance to Medical Review Officers (MROs) on how a laboratory positive marijuana test should be addressed, as the rulemaking does not consider secondary and tertiary impacts, such as the need for an MRO to evaluate whether there is a "legitimate medical explanation" for a laboratory positive result. 49 CFR § 40.125. Under DOT's testing program regulations, an MRO must seek verification from the pharmacy and obtain information from the treating physician, but such documentation may not exist, or be difficult to verify, in the case of marijuana, which is not traditionally offered through mainstream medical facilities or pharmacies.

Conclusion

For these reasons, the Associations request that, if the NPRM is finalized, DEA take steps to ensure that DOT's existing testing program that includes marijuana remains in place and to ensure that

there is careful coordination between DEA, HHS, DOT, testing laboratories, and industry participants so that no disruptions occur to the existing DOT testing program.

Thank you for your consideration of these comments.

Respectfully submitted,



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