



July 22, 2024

THE ECONOMIC IMPACT OF CANNABIS SCHEDULING REFORM ON SMALL AND MINORITY- OWNED BUSINESSES

Economic Advisors



Legal Advisor



July 22, 2024

The Honorable Anne Milgram
Administrator
Drug Enforcement Administration
U.S. Department of Justice
8701 Morrissette Drive
Springfield, VA 22152



Re: Docket No. DEA-1362; A.G. Order No. 5931-2024; 21 CFR 1308

The Minority Cannabis Business Association (MCBA) is the first national trade association dedicated to serving the needs of minority marijuana businesses and their communities. Our mission is to empower and support minority entrepreneurs and our constituents by creating an equitable and sustainable marijuana industry. MCBA unites community and industry leaders to drive policy, programming, and outreach initiatives to achieve equity for the people most impacted by marijuana prohibition.

MCBA submits this public comment in response to the Drug Enforcement Administration's (DEA) Notice of Proposed Rulemaking (Proposed

Rule) as published in the Federal Register on May 21, 2024, 89 Fed. Reg. 44,597, in support of the reclassification of marijuana from schedule I to schedule III under the Controlled Substances Act (CSA).



The economic analysis below is particularly responsive to DEA’s request for economic data on the impact of this Proposed Rule on small businesses and pursuant to the Regulatory Flexibility Act, [5 U.S.C. 601 et seq.](#) In the Proposed Rule, DEA and the Department of Justice (DOJ) specifically requested the following:

“[T]his action may have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, [5 U.S.C. 601 et seq.](#) For example, section 280E of the Internal Revenue Code bars businesses from claiming tax deductions for otherwise allowable expenses where the business “consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act).” [26 U.S.C. 280E](#). If marijuana is ultimately transferred to schedule III, section 280E would no longer serve as a statutory bar to claiming deductions for those expenses. In addition, small entities

engaged in research on marijuana may be subject to different research protocols set by DEA if the research is conducted on a schedule III substance rather than a schedule I substance. However, DOJ is currently not in a position to estimate the number of small entities affected by these or other potential effects of this action. DOJ seeks comment and additional information to inform its analysis.”¹

As detailed below, economic data indicates this Proposed Rule would positively impact all 42,125 state-issued marijuana licenses, and in particular small and minority-owned businesses.² The excess tax payments imposed as a result of IRC § 280E currently prevent marijuana businesses from deducting ordinary business expenses, resulting in higher taxable income and federal tax expense. Rescheduling would allow marijuana businesses to claim these deductions, aligning tax treatment for these businesses with other sectors of the national economy. This change

1 Schedules of Controlled Substances Rescheduling of Marijuana, 89 Fed. Reg. 44,597, 44,621 (May 21, 2024).

2 Data from state marijuana business regulators as compiled by Whitney Economics, July 2024.

would lead to substantial tax savings and increased profitability for marijuana businesses, including small and minority-owned businesses. Removing marijuana businesses from the effects of § 280E would also allow regulated marijuana businesses to more easily compete with the unregulated, untaxed market.

“Rescheduling would ... lead to substantial tax savings and increased profitability for marijuana businesses, including small and minority-owned businesses”

Our comprehensive survey data of over 200 marijuana businesses further demonstrates that these small and minority-owned businesses, as well as women-owned businesses, have less access to capital, resulting in greater financial vulnerability. For this reason, the § 280E tax burden drains the limited funds of small businesses more rapidly than the larger pools of funds available to larger corporations. Lifting



this burden provides a disproportionate relief to small businesses. MCBA strongly encourages DEA to publish a final rule moving marijuana to schedule III. While rescheduling benefits small business owners by affording significant tax relief, the majority of our members and constituents would be better served by removing marijuana from the schedule of controlled substances entirely.

The schedule I status of marijuana, as President Biden has recognized, is part of a “failed approach to marijuana,”³ resulting in deleterious effects across the country, particularly in communities of color and other communities particularly affected by the War on Drugs. Of the 11.8 million arrests in the United States for drug-related offenses since 2011, over 80% involved simple possession.⁴ Arrests for simple possession of marijuana comprise approximately 35% of all drug arrests and 44% of drug possession arrests.⁵ Nearly 17% of all arrests in the United States since 2011 were for simple possession of marijuana.⁶ This emphasis on simple possession enforcement disproportionately affects communities of color, including

members and stakeholders of the MCBA. As President Biden recognized, the classification of marijuana under schedule I has “imposed needless barriers to employment, housing, and educational opportunities.”⁷

>80%

of the 11.8 million arrests for drug-related offenses since 2011 involved simple possession.



~35%

of all drug arrests were for simple possession of marijuana.



~44%

of all drug possession arrests were for possession of marijuana.



³ Presidential Statement on Marijuana Reform, 2022 Daily Comp. Pres. Docs., 2022 DCPD No. 883 (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/> (hereinafter Statement on Marijuana Reform).

⁴ FEDERAL BUREAU OF INVESTIGATION CRIME DATA EXPLORER, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest>. (set location filter to “National” and year filter to “2021”; then scroll down to Arrests Offense Counts in the United States and set “Include Previous Years” to “Past 10 Years”).

⁵ *Id.*

⁶ *Id.*

⁷ Presidential Statement on Marijuana Reform, 2022 Daily Comp. Pres. Docs., 2022 DCPD No. 883 (Oct. 6, 2022).

The downstream effects of marijuana's schedule I status are particularly pronounced on Black, Latino, and Indigenous people. Even though there are five times more white than Black citizens in the United States, Black Americans are incarcerated 8.2 times more frequently than white people,⁸ largely due to racial targeting associated with drug prohibition laws. Mass incarceration has left one in nine Black children with an incarcerated parent, compared to one in 28 Latino children and one in 57 white children.⁹ Data from the Current Population Survey shows that between 1960 and 2013, the proportion of Black children living with a single parent more than doubled (from 22% to 55%).¹⁰ While rescheduling will provide significant tax relief to small businesses, only descheduling marijuana can correct the racial injustices of the past.

While descheduling marijuana will provide the fullest economic and criminal justice benefits to Americans affected by the War on Drugs, rescheduling marijuana from schedule I to schedule III will have innumerable benefits for small and minority-owned cannabis businesses. As detailed below, these benefits are demonstrated by a July 2024 comprehensive business condition survey of over 200 marijuana companies and a recent economic analysis of the disproportionate burdens of § 280E on small businesses.



8 *Human Rights Watch, Punishment and Prejudice: Racial Disparities in the War on Drugs (May 2000)*, <https://www.hrw.org/reports/2000/usa/>.

9 *Collateral Costs: Incarceration's Effect on Economic Mobility*, THE PEW CHARITABLE TR. at 4 (2010), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

10 *Kathleen M. Ziol-Guest, et al., One-Parent Students Leave School Earlier: Educational attainment gap widens*, 15 *EDUC. NEXT* at 36–41 (Feb. 19, 2015), <https://www.educationnext.org/one-parent-students-leave-school-earlier/>.

I. Economic Impact

The economic impacts of § 280E relief would be profound. The marijuana industry supports almost half a million jobs, even as schedule I classification and the resulting state-federal conflict presents significant challenges to individual businesses, particularly small businesses.¹¹ Because of § 280E's effects, these businesses have expended an estimated \$2.2 billion in tax overpayments compared to American businesses in other sectors.¹² Under the proposed reclassification to schedule III, these tax overpayments could instead support additional job

creation, help businesses avoid predatory terms when accessing capital, and be reinvested in and strengthen those communities disproportionately harmed by decades of the failed status quo.

Our July 2024 comprehensive survey of marijuana companies demonstrates that marijuana businesses are overwhelmingly small businesses, mirroring national trends seen in the broader economy. Over 99% of businesses in the country are small businesses.¹³ Small businesses are the nation's job creators; between 2013 and 2023, small businesses contributed 55% of total net job creation.¹⁴ Small businesses

11 "Currently, the legal cannabis industry boasts 440,445 full-time jobs." *Why the Cannabis Industry Saw 5.4% Job Growth in 2023*, *Forbes* (April 10, 2024), <https://www.forbes.com/sites/willyakowicz/2024/04/10/why-the-cannabis-industry-saw-54-job-growth-in-2023>.

12 See *infra* Section I.E.

13 Rebecca Leppert, *A Look at Small Businesses in the U.S.*, *Pew Research Ctr.* (Apr. 22, 2024), <https://www.pewresearch.org/short-reads/2024/04/22/a-look-at-small-businesses-in-the-us/#:~:text=Among%20the%20roughly%206%20million,have%20100%20to%20499%20workers>.

14 U.S. Bureau of Labor Statistics, U.S. Department of Labor. *The Economics Daily*, *Small businesses contributed 55 percent of the total net job creation from 2013 to 2023*, <https://www.bls.gov/opub/ted/2024/small-businesses-contributed-55-percent-of-the-total-net-job-creation-from-2013-to-2023.htm>.

strengthen local communities, particularly those facing historical discrimination, even providing community health benefits.¹⁵

Reclassifying marijuana to schedule III will permit small marijuana companies to compete fairly and equally with the rest of America's small businesses, leveling the playing field and allowing these businesses to employ more people and strengthen their local communities. The benefits of reclassification to schedule III are born out by empirical evidence from a nationwide survey administered to marijuana business owners at all levels of the supply chain. The results from this survey, detailed in the sections below, are illuminating: the marijuana industry faces significant financial difficulties brought about by the effects of § 280E. But these headwinds would shift substantially with the reclassification to schedule III.

>99%

Of U.S. businesses are small businesses



A. Survey Methodology

This July 2024 survey was shared with a nationally representative group of businesses in the marijuana industry, including retailers, product manufacturers, wholesalers, and cultivators. Respondents provided demographic information related to their race, gender, and state. In addition, respondents were also asked questions related to their business operations, including (1) whether they hold a marijuana license, (2) the number of states in which they operate, (3) the number of employees, (4) estimated annual revenues, and (5)

¹⁵ SHOBAN RAMANDHAN, et al., *The role of small, locally-owned businesses in advancing community health and health equity: a qualitative exploration in a historically Black neighborhood in the USA*. CRITICAL PUBLIC HEALTH, 33(5), 633–645 (2023), <https://doi.org/10.1080/09581596.2023.2256945>.

whether they are profitable. Additional survey questions directly targeted the issue of federal taxation, including questions about whether the federal tax code had impacted their business and how they would use federal tax relief if the burdens of § 280E on their business were eliminated.

B. Survey Results

The survey was deployed on June 11, 2024, and closed on July 3, 2024, with 206 responses. Of these 206 responses, 171 were from businesses that directly cultivate, process, manufacture, distribute, test, or sell marijuana. These responses include hundreds of individual licensees across 32 states and Puerto Rico. With such a sample size, this analysis can extrapolate to the entire United States marijuana market with a 95% confidence interval and a +/- 6.5% margin of error. The following results

demonstrate how the state-regulated marijuana industry, primarily composed of small businesses, is struggling under the weight of burdensome federal § 280E taxation. With rescheduling, small and minority-owned marijuana businesses will see billions of dollars in tax relief that can be reinvested in sustainable growth and their local communities.

C. Industry Composition

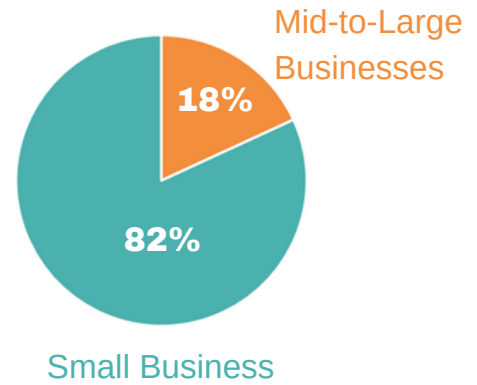
The state-regulated marijuana industry is primarily composed of small businesses owned and operated by local entrepreneurs. To determine which businesses qualified as “small businesses,” this economic study utilizes the “Small Business Size Standards by NAICS Industry,” established by the Small Business Administration (SBA).¹⁶ Since the North American Industry Classification System (NAICS) does not include

¹⁶ 13 CFR § 121.201.

marijuana businesses within its categorization, this analysis chose industries in each vertical that share important similarities.¹⁷ Based upon this size standard, over 82% of marijuana businesses are classified as small businesses. When the analysis considers companies that hold a retail license, but do not hold a cultivation, processing, or manufacturing license, this figure increases to over 94% of businesses surveyed are small businesses.

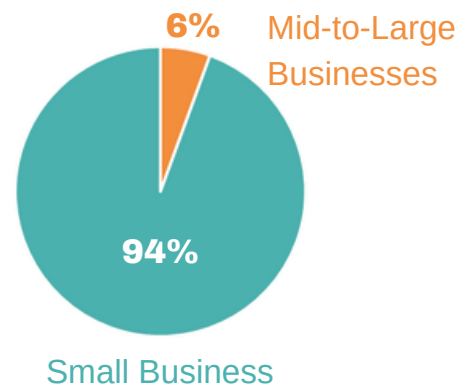


All Licensees



Only Retail

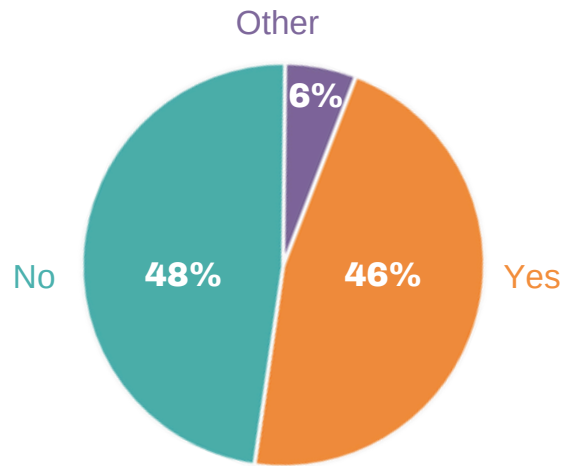
(With or Without Wholesale and Distribution)



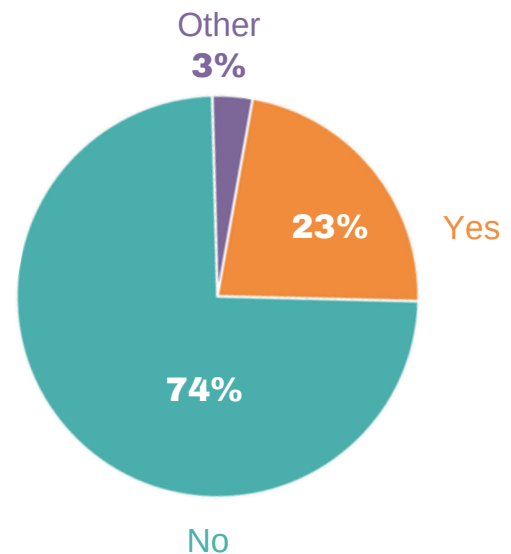
¹⁷ The following NAICS codes were used for each cannabis license type: Marijuana cultivation - (NAICS 111419) Other Food Crops Grown Under Cover & (NAICS 111422) Floriculture Production; Marijuana processing and product manufacturing - (NAICS 311942) Spice and Extract Manufacturing; Marijuana wholesale and distribution - (NAICS 424940) Tobacco Product and Electronic Cigarette Merchant Wholesalers; Marijuana retail stores - (NAICS 459991) Tobacco, Electronic Cigarette, and Other Smoking Supplies Retailers & (NAICS 459999) All Other Miscellaneous Retailers; Marijuana testing facilities - (NAICS 541380) Testing Laboratories and Services. A revenue cutoff was utilized based upon the revenue determinations set forth in 13 CFR § 121.201 for small businesses by NAICS code. For industries where the SBA uses number of employees rather than revenue, the number of employees was used in addition to an upper limit of \$15 million in annual revenue, whereby the business was no longer considered a small business. When the revenue cutoff set by the SBA fell inside one of the revenue categories in our survey, the lower limit was used, resulting in an undercounting of small businesses.

Small businesses in the state-regulated marijuana industry are much more likely to be owned by women and Black or African Americans than mid-to-large sized businesses. Small marijuana businesses are 46% women-owned and 15% Black or African American-owned. This compares to 23% women-owned and 3% Black or African American-owned for mid-to-large-sized marijuana businesses. While rescheduling will positively impact state-licensed marijuana businesses of all sizes, the fact that a majority of licensees are small businesses results in economic benefits primarily impacting local, small businesses.

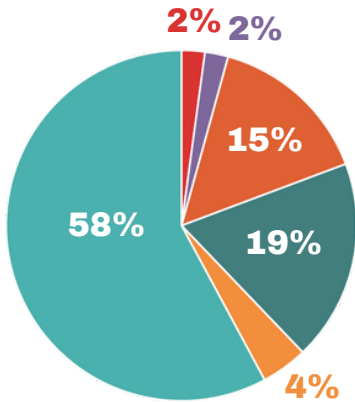
Small Business: Women Owned



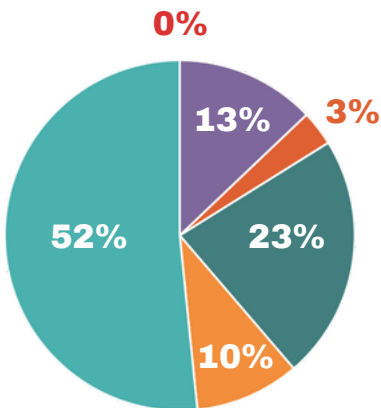
Mid-to-Large Business: Women Owned



Small Business



Mid-to-Large Business

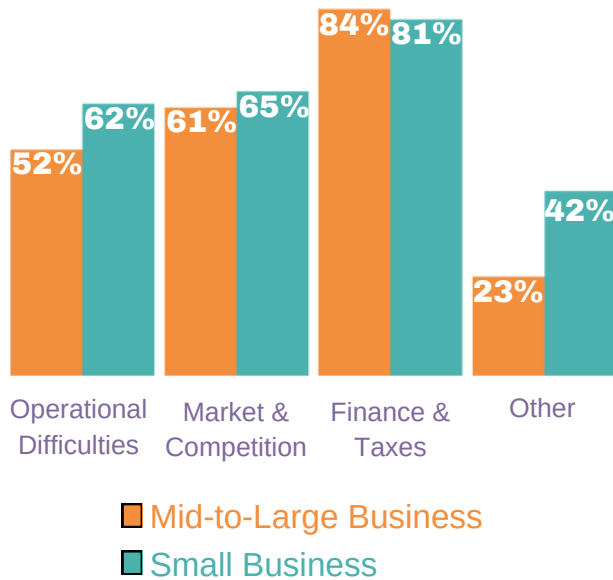


- White
- From Multiple Races
- Black or African American
- Other
- Asian
- American Indian or Alaskan Native

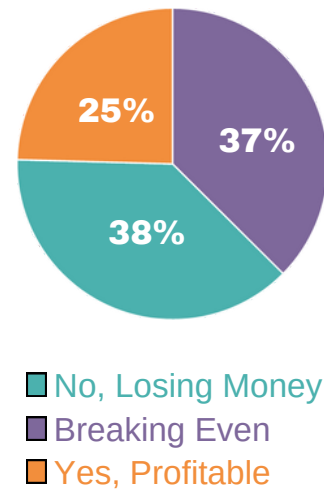
D. Marijuana Business Outlook

Marijuana businesses are struggling under the weight of heavy federal taxation. Less than 25% of marijuana businesses surveyed report being profitable, and 36% of small businesses surveyed report losing money. Across both small and mid-to-large businesses, over 80% of survey respondents cited finance and tax issues as major issues facing their business. Without tax reform that comes with rescheduling, many small and minority marijuana licensees will go out of business, resulting in major economic losses and unemployment for thousands of local employees. The dissolution of these small and minority marijuana businesses will also serve to fuel the illicit market, where taxes go unpaid.

Major Issues Facing Cannabis Businesses

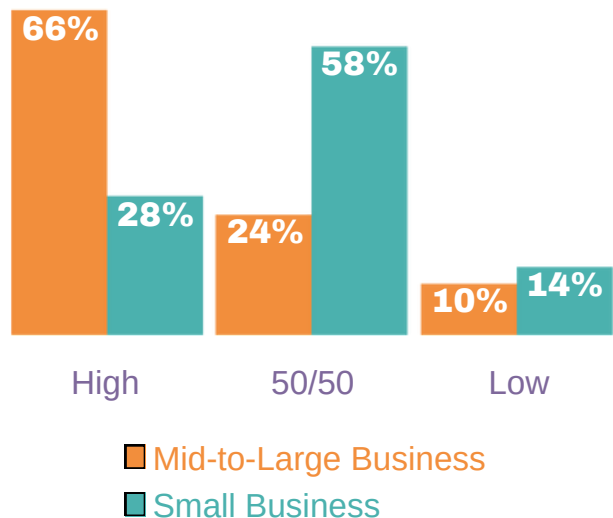


All Licensees



While small and mid-to-large-sized businesses face similar issues, they are in very different financial positions. Compared to larger-sized companies, small businesses often lack access to capital, which is necessary to pay debts and reach profitability. While 66% of mid-to-large-sized cannabis businesses have high confidence in their future success, that number is only 28% for small businesses. Rescheduling will not only help to improve market confidence, but most importantly, it will provide a necessary boost to profitability that will keep thousands of small businesses solvent and skilled workers employed.

Cannabis Business Confidence in Their Future Success

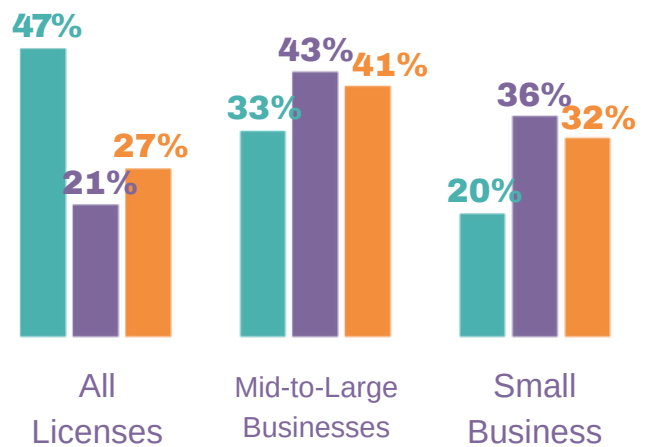


E. Benefits of § 280E Reform

The July 2024 survey indicates that low margins combined with heavy federal business taxation have steadily eroded profitability. Overall, 27% of survey respondents are profitable, 41% broke even, and 32% are losing money. Finances are much more dire for small marijuana business as only 21% of those surveyed are profitable, 43% broke even, and 36% are losing money. A major driver in these numbers is the inability to take ordinary business deductions because of § 280E, particularly at the retail level, where the effective tax rate is the highest of all marijuana business sectors at 52.5%. The marijuana industry pays a much higher effective tax rate compared to the standard 21% corporate rate for an average industry.¹⁸

This disproportionately high effective tax rate substantially reduces business cash flow and, in many cases, eliminates profitability. Tax relief from rescheduling would thus benefit many of the 42,125 state-issued marijuana licenses across the country.¹⁹

Marijuana Business Profitability



On a national level, in 2023, state-licensed marijuana businesses paid an estimated \$4.3 billion in federal

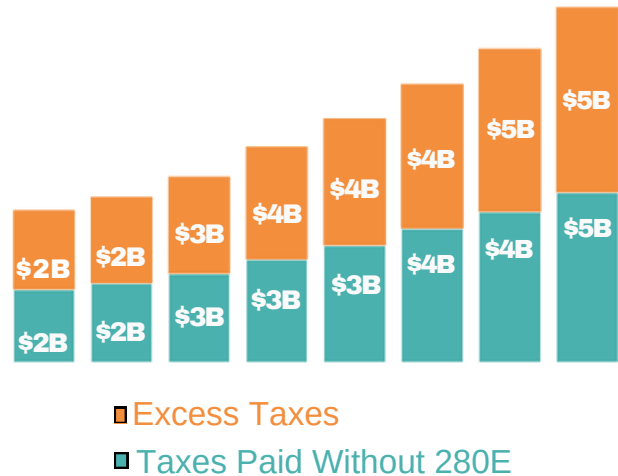
¹⁸ Garrett Watson, *Combined Federal and State Corporate Income Tax Rates in 2022*, TAX FOUNDATION (Sept. 27, 2022), “Currently, the legal cannabis industry boasts 440,445 full-time jobs.” *Why the Cannabis Industry Saw 5.4% Job Growth in 2023*, Forbes (April 10, 2024), <https://www.forbes.com/sites/willyakowicz/2024/04/10/why-the-cannabis-industry-saw-54-job-growth-in-2023>.

¹⁹ Data from state marijuana business regulators as compiled by Whitney Economics, July 2024.

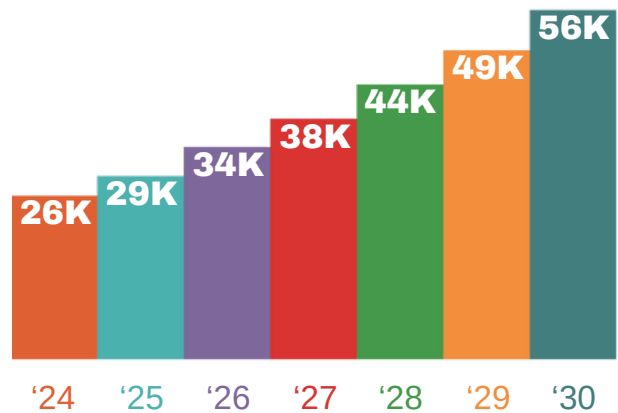
business taxes, \$2.2 billion of which were excess taxes due to § 280E relative to non-marijuana businesses. An additional \$3.3 billion was paid in federal payroll taxes. Without reform, as the market grows, excess marijuana business taxation from § 280E is forecasted to balloon 233% and reach \$5.2 billion by 2030. With rescheduling, this analysis projects significant new hiring and business expansion. Employment opportunities would increase from 25,950 to 55,500 workers from 2024 to 2030, generating an additional \$1.2 billion to \$2.7 billion in wages. With an economic multiplier effect of 2.1X,²⁰ this grows \$2.6 billion to \$5.6 billion in new economic activity, more than offsetting § 280E tax collections from scheduling reform.

“In 2023...marijuana businesses paid an estimated \$4.3B in federal business taxes, \$2.2B of which were excess taxes due to § 280E.”

Taxes Paid With and Without § 280E



Cumulative Job Creation from 280E Relief



²⁰ Whitney, B. (June-July 2016). *Cannabis Economics and its Role in Shaping Public Policy* [Word and PowerPoint Presentation]. Western Economic Association International 97th Annual Conference, Portland, OR.

II. Public Safety

Reclassifying marijuana to schedule III, as recommended by HHS, is the most effective action that the federal government can currently take to combat the illicit market and to incentivize a safe and regulated marketplace. State regulatory frameworks for marijuana establish robust safeguards, including lab testing, packaging and labeling standards, and age verification. The illicit market shares none of these consumer protections. If marijuana is not rescheduled, and thousands of small marijuana businesses fail, there is danger that the illicit market will take over, resulting in a public health and safety crisis.

MCBA membership urges DEA to consider this economic data in its analysis of the public safety implications of its Proposed Rule. Many of our members grew up in communities disproportionately impacted by the schedule I

classification of marijuana, incurring social and economic costs, such as family separation and a lack of access to quality healthcare and education. The policy of mass arrests, reliant on the schedule I classification of marijuana, has driven the persistent gap in high school graduation rates between white, Black, and Latino students. In 1980, about 10% of young African American men who dropped out of high school were in prison or jail. By 2008, this incarceration rate had climbed to 37%, a jaw-dropping number when compared to the general population incarceration rate of 0.76%.²¹

Marijuana use did not cause these social harms in minority communities; the failed approach of marijuana enforcement did so, prioritizing mass arrests while ignoring scientific and medical evidence of its low abuse potential. When reviewing HHS's recommendation and this proposed reclassification of marijuana to schedule III, we implore DEA to consider how schedule I has made our communities less safe.

²¹ Bruce Western & Becky Pettit, *Incarceration & social inequality*, *Daedalus: j. am. acad. art & sci.* at 8, 10 (Summer 2010), <https://www.amacad.org/publication/incarceration-social-inequality>

III. Research

To the extent that reclassification would expand research capacity, we urge DEA to take steps so that minority-serving higher education institutions and institutions like historically Black colleges and universities (HBCUs) are better able to participate in researching marijuana. The overly restrictive paths to research permitted under schedule I have deprived these institutions of grants and resources that could lead to pioneering medical findings.

IV. Conclusion

MCBA and its members and constituents ask DEA to follow the science and reclassify marijuana to schedule III. Reclassification to schedule III will have significant positive economic impacts on small businesses. Our comprehensive survey and detailed economic analysis projects that rescheduling and the resulting § 280E reform would result in the creation of 55,500 jobs by 2030,

generating as much as \$2.7 billion in wages and \$5.6 billion in new economic activity. We therefore encourage DEA to act with deliberate speed in publishing a final rule moving marijuana to schedule III.

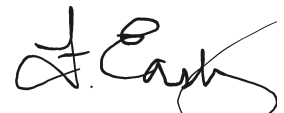
As we suggest in ATACH’s petition to intervene, Tahir Johnson stands ready to testify on the economic impact of § 280E relief on small businesses, as well as the impact of descheduling on our members and constituents, in any administrative law judge hearing should DEA grant one.

You may reach us at tahir@minoritycannabis.org and frederika@minoritycannabis.org with any questions.

Sincerely,



Tahir Johnson,
President



Frederika McClary Easley,
Vice President



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²² The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates or its other professionals. FTI Consulting, Inc., including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm.