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**OPINION ON THE FEDERAL LEGAL STATUS OF
HEMP-DERIVED CANNABIDIOL (CBD)**

October 2, 2017

In recent weeks, misinformation about the legality of hemp-derived CBD products has been spreading throughout the industry and social media. A drug policy expert at a leading national think tank has opined that all CBD products are illegal. Meanwhile, a few companies that sell imported CBD oils in the U.S. have been warning retail stores and customers that most CBD products are illegal (except, of course, their own). Specifically, they allege that the Drug Enforcement Administration (DEA) only recognizes the legality of CBD that is derived from hemp stalks and seeds imported from overseas.

Please be warned that these blanket claims are not justified.

First, the DEA has officially opined that it rejects the idea that CBD can be derived from hemp stalks and seeds.¹ The scientific literature the DEA cites is thin and decades old. But the notion that the DEA favors imported CBD over products manufactured in the U.S. is untrue.

Indeed, it would be a fool's errand to define precisely the federal government's position on hemp. In recent months, various federal agencies have issued conflicting public statements: Many have been adverse to the industry; but others have been favorable, such as a DEA spokesperson's July 2017 statement that CBD would not be an enforcement priority: "DEA says it's got bigger issues to focus on...DEA's primary concern is addressing the opioid crisis that is affecting the United States. CBD oil/hemp plant enforcement is not where the DEA is prioritizing its resources."²

In the end, however, federal agency statements are not dispositive law. Laws are made by Congress, signed by the President, and interpreted by the courts. That's why the U.S. Hemp Roundtable, representing nearly two dozen firms from across the country, at every link of the hemp supply chain -

¹ https://www.dea diversion.usdoj.gov/schedules/marijuana/m_extract_7350.html

² Robert McCoppin, "From dog treats to massage oils, hemp sales soar, and medical pot industry wants in," CHICAGO TRIBUNE, <http://www.chicagotribune.com/news/local/breaking/ct-marijuana-industry-hemp-cbd-illinois-met-20170702-story.html> (Jul. 12, 2017).

- and boasting the ex officio membership of all the industry's major grassroots organizations -- is working so hard to strengthen and secure passage of H.R. 3530, the Industrial Hemp Farming Act of 2017, to forever remove hemp from the purview of the Controlled Substances Act (CSA).

Until then, the legal status of hemp, and products such as hemp-derived CBD, is dictated by the following laws and court opinions:

- In the federal Agricultural Act of 2014, P.L. No. 113-79 (the "Farm Bill"), Congress specifically permitted the growth, cultivation and study of industrial hemp under agricultural pilot programs authorized by state law. In this context, federal laws that might otherwise restrict, regulate, or prohibit the use or production of industrial hemp, including the CSA, do not apply. The Farm Bill also enumerated an important precedent: defining industrial hemp as "any part" of the cannabis plant. This standard legitimizes and legalizes all parts of the plant, including flowering tops, so long as the product does not exceed 0.3% tetrahydrocannabinol (THC) content.
- When federal agencies attempted to block the import of hemp seeds for these pilot programs, I participated in a legal challenge in federal district court to compel DEA to release the seeds.³ The litigation was settled informally in a manner that permitted seed importation and cultivation. The settlement also addressed explicitly that, contrary to DEA's original opinion, state departments of agriculture could contract out, or license out, their authority under the Farm Bill to private growers and firms.
- Questions were also raised about the ability of pilot program participants to sell their products into interstate commerce as part of pilot program marketing studies authorized by the Farm Bill. Congress resolved this issue in the Consolidated Appropriations Act for Fiscal Year 2016 (the "Omnibus Law"), which prohibits agencies, including DEA, from expending federally-appropriated monies to interfere with or otherwise frustrate agricultural pilot programs established under the Farm Bill. The prohibition against interference specifically extends to intrastate and interstate transportation, processing, sales, and use of industrial hemp grown or cultivated pursuant to the Farm Bill. Demonstrating the strength of Congress' convictions in the regard, this Omnibus Law language has been reintroduced and renewed on several occasions.
- In *Hemp Industries Ass'n v. Drug Enforcement Administration*⁴, the U.S. Court of Appeals for the Ninth Circuit affirmed that non-psychoactive hemp products do

³ See *Kentucky Dept. of Agriculture v. Drug Enforcement Administration*, Civil Action No. 3:14cv-372-H (W.D.Ky. 2014).

⁴ 357 F.3d 1012 (9th Cir. 2004).

not contain any controlled substance as defined by the CSA. The Ninth Circuit's order enjoined DEA from engaging in enforcement actions against these products. Never overturned, the ruling remains good federal law and legal authority for distributing hemp-derived products. Indeed, the plaintiff in this case recently filed suit to enforce the court order against recent DEA actions.

Taken together, the Ninth Circuit's order in *Hemp Industries Ass'n v. Drug Enforcement Administration* and the Farm Bill and appropriations bills constitute an expansive, permissive federal legalization regime for industrial hemp. These authorities legitimize industrial hemp and derivative products such as hemp-derived CBD, and immobilize federal agencies that might otherwise pursue enforcement.

Additional concern has been raised by an interagency "Statement of Principles" (SOP) issued in August 2016 by DEA, the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA). Please be aware that the SOP states clearly that it "does not establish any binding legal requirement." Please also be aware that upon challenge by leading Members of Congress, including Senate Majority Leader Mitch McConnell, USDA has subsequently clarified that the SOP does not purport to limit the Farm Bill's definition of hemp – which includes all parts of the plant – nor does it prohibit the interstate sale of hemp products that are part of Farm Bill-approved marketing studies.

It is important to understand that state laws vary, and individual states can and have placed specific controls on hemp and hemp-derived products. Further, due to the confusing nature of current law enforcement agency policies and priorities, it is impossible to predict with absolute certainty how local, state, or federal law enforcement officials will treat industrial hemp and derivative products, particularly CBD. We are hopeful that Congress will address ambiguities soon by passing the Industrial Hemp Farming Act of 2017. Until then, however, we encourage you not to accept as fact any blanket statements about the legality or illegality of hemp and CBD products, particularly those made in a self-interested commercial mode. If you have any specific questions, please do not hesitate to contact me.

Sincerely,



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