CONFIDENTIAL MEMORANDUM

To: Josh Raderman, Leotele LLC

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RE: 2018 Farm Bill and August 2020 DEA Interim Final Rule Regarding "Hemp" Definition as Applied to Extraction of CBD

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Issue: Does the definition of "hemp" in the 2018 Farm Bill, as applied to the Controlled Substances Act by the Drug Enforcement Agency in its recent Interim Final Rule, make extraction of CBD illegal if it results in a product with a Δ^9-THC concentration of greater than 0.3% by dry weight at any point during the process?

Brief Answer: Yes. The current DEA Interim Final Rule is clear that any substance containing greater than 0.3% Δ^9-THC by dry weight is considered "marijuana" and is therefore a schedule I controlled substance, possession of which is illegal under the Controlled Substances Act. There is no exception for non-final products produced during the CBD extraction process.

Detailed Answer:

The Agricultural Improvement Act of 2018, Pub. L. 115-334 (the "2018 Farm Bill") introduced a new statutory definition of "hemp" and amended the definition of marihuana under the Controlled Substances Act ("CSA") at 21 U.S.C. 802(16) and the listing of tetrahydrocannabinols under 21 U.S.C. 812(c). Specifically, the 2018 Farm Bill amended the definition of "marihuana" to exclude "hemp" and to define "hemp" as:

> "…the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."

7 U.S.C. 1639*o*. This definition was expressly adopted in 21 U.S.C. 802(16), which is the operative definition of "marihuana" for the CSA. As such, the official definition of "marihuana" for CSA purposes includes cannabis with a delta-9 tetrahydrocannabinol (Δ^9-THC) concentration of greater than 0.3%, and expressly excludes cannabis with a Δ^9-THC concentration of 0.3% or less (i.e., hemp). This change in the law was widely viewed as opening the doors for a federally legal hemp industry in the United States, since producers could now grow industrial hemp without

worry that it would be technically classified as marijuana by the federal government and therefore deemed an illegal schedule I controlled substance under the CSA.

More recently, on August 21, 2020, the U.S. Drug Enforcement Agency (the "DEA") adopted an Interim Final Rule titled "Implementation of the Agriculture Improvement Act of 2018" (the "IFR") apparently intended to harmonize DEA enforcement rules with the new definition of "marihuana" under the 2018 Farm Bill and the CSA. This new IFR strictly adheres to the Δ^9-THC limitations present in this definition, making it appear that the DEA does not view the 2018 Farm Bill definition of "hemp" as allowing for any exceptions. Specifically regarding processing of hemp, the IFR states that all derivatives, extracts and products resulting from processing of hemp that exceed the 0.3% Δ^9-THC limitation are schedule I controlled substances:

> "…the definition of hemp does not automatically exempt any product derived from a hemp plant, regardless of the Δ^9-THC content of the derivative. In order to meet the definition of "hemp," and thus qualify for the exemption from schedule I, the derivative must not exceed the 0.3% Δ^9-THC limit. The definition of "marihuana" continues to state that "*all* parts of the plant Cannabis sativa L.," and "*every* compound, manufacture, salt, derivative, mixture, or preparation of such plant," are schedule I controlled substances unless they meet the definition of "hemp" (by falling below the 0.3% Δ^9-THC limit on a dry weight basis) or are from exempt parts of the plant (such as mature stalks or non-germinating seeds). *See* 21 U.S.C. 802(16) (emphasis added). As a result, a cannabis derivative, extract, or product that exceeds the 0.3% Δ^9-THC limit is a schedule I controlled substance, even if the plant from which it was derived contained 0.3% or less Δ^9-THC on a dry weight basis."

IFR at 5 (emphasis in original). The IFR applies the same requirement to the revised definition of "marijuana extract," meaning that any extract containing greater than 0.3% Δ^9-THC remains a controlled substance as well. IFR at 10.

This IFR language does not appear to leave any room for interpretations that would allow processors to create and possess unfinished extracts or materials having greater than 0.3% Δ^9-THC content during the CBD extraction process. Such materials would be unlawful for the processor to possess, since they would be deemed schedule I controlled substances with no exception allowing for their possession.[1]

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[1] Colorado utilizes a different approach, which implicitly allows for unfinished product to be produced during processing even if it exceeds the 0.3% Δ^9-THC threshold, as long as such unfinished product is not sold to consumers. According to a Colorado Department of Public Health and Environment FAQ, "Raw unprocessed hemp flower containing less than 0.3% THC when initially processed may contain a higher concentration of THC (over 0.3%). These extracts are considered unfinished products and cannot be sold to consumers. All unfinished products, regardless of the type of processing used, must be secondarily processed to lower the THC concentration to 0.3% or below before it can go onto the consumer market and be considered a legal hemp product." *See* "Frequently Requested Information" link at https://www.colorado.gov/pacific/cdphe/industrial-hemp-food (last viewed 9.10.20). However, this state approach does not affect the federal approach of the DEA.

Accordingly, any CBD hemp extraction process that utilizes a concentration approach (i.e. temporarily concentrating the active cannabinoids in hemp in order to create concentrated CBD) that also concentrates the Δ^9-THC content of the raw hemp above the 0.3% threshold, even if only temporarily and even if such Δ^9-THC extract is not sold to consumers, would be a violation of the schedule I controlled substance possession provisions of the CSA and the IFR, and would be subject to criminal enforcement action by the DEA.

Conversely, a CBD hemp extraction process which utilizes a dilution approach wherein the Δ^9-THC content of the raw hemp begins at less than 0.3% and is never increased throughout the process would comply with the CSA and IFR's definition of "hemp" and therefore would avoid any criminal enforcement issues relating to creation or possession of marijuana as a schedule I controlled substance. Under the current IFR, an extractive process like dilution that does not increase concentration of Δ^9-THC at any point in the process appears to be the only legal approach to produce CBD from raw hemp.

Importantly, the DEA has prosecutorial discretion in determining what cases to pursue in enforcing the CSA, and it is not clear whether prosecution of CBD processors whose unfinished products temporarily exceed the 0.3% Δ^9-THC limit will be a priority. An LA Weekly article published on August 26, 2020, asked a DEA spokesperson this question directly, and they indicated that the DEA's priorities were currently focused on combating opioid and methamphetamine trafficking, rather than enforcing hemp production regulations. *See* Jimi Devine, "The DEA Told Us It's Aware of the CBD Industry Freaking Out, Looking at Policy Options," LA Weekly, August 26, 2020, https://www.laweekly.com/the-dea-told-us-its-aware-of-the-cbd-industry-freaking-out-looking-at-policy-options/. Thus, it is not clear whether the new DEA IFR will actually change DEA actions in practice.

One final factor to note is that the IFR is currently an "interim" final rule, meaning that it has not yet been subject to public comment or adopted as a final regulation. The public comment period remains open until October 20, 2020, and thereafter the DEA will consider the public's comments and determine whether to revise the IFR (in which case another IFR will be issued for comment), or to adopt the existing IFR as a final regulation. This means that, while the IFR provides a window into current DEA interpretation and priorities, it is subject to change – especially if hemp industry stakeholders provide a high volume of comments to the DEA causing reevaluation of the economic impacts this rule could have. Therefore, at this time it is not clear whether the current IFR will remain the official policy stance of the DEA.