

Practice Update

CBD Rules Remain Murky After Ninth Circuit Court of Appeals Decision

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On April 30, 2018, the U.S. Court of Appeals for the Ninth Circuit rejected the Hemp Industry Association’s challenge to a 2016 Drug Enforcement Administration (DEA) rule that, among other things, classified cannabidiol (CBD) as a Schedule 1 controlled substance (Rule).

CBD is non-psychoactive compound that is typically derived from industrial hemp, which is a variety of the cannabis plant. Industrial hemp has low levels tetrahydrocannabinol (THC) – the psychoactive compound in marijuana – and high levels of CBD. CBD’s sales have skyrocketed because it is seen as a viable treatment for epilepsy, pain, anxiety, and other ailments without the psychoactive effects caused by THC. CBD has also become more accessible due to an amendment to the 2014 Farm Bill that legalized industrial hemp containing less than 0.3% THC for pilot programs at research institutions in states where industrial hemp has been made legal.

Although hemp is not psychoactive, the DEA Rule did not differentiate between hemp and marijuana but rather classified all extracts derived from Cannabis plants as Schedule 1 controlled substances, including hemp-derived CBD. Consequently, Hemp Industries Association and other petitioners challenged the DEA Rule, arguing that the DEA

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overstepped its rulemaking authority by adding CBD to the Controlled Substances Act – an action that requires an act of Congress. They also argued that the 2014 Farm Bill’s hemp provision prevents law enforcement officials, including the DEA, from interfering industrial hemp cultivation that was legalized by the 2014 Farm Bill.

The 9th Circuit panel upheld the DEA’s Rule and found that DEA has authority to list CBD as a marijuana extract as defined by the Rule ([click here to view the opinion](#)). The court also found that although the 2014 Farm Bill allowed certain parties to grow industrial hemp, the DEA’s Rule does not interfere with those parties’ right to cultivate industrial hemp pursuant to that law. The decision also clarifies that states that permit the sale of CBD are violating federal law because CBD is classified as a Schedule 1 controlled substance, which was previously a legal gray area.

While the decision may chill the CBD boom taking place across the country, it may also spur action at the federal level. For instance, the Hemp Farming Act of 2018 introduced by Republican Senator Mitch McConnell (R-KY) earlier this year would remove hemp, and therefore hemp-derived CBD, from the Controlled Substances Act, and would effectively supersede the DEA’s Rule if passed into law.

Disclaimer

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states’ laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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