akerman

Blog Post

Marks For Hemp and Cannabis

May 10, 2019

The United States Patent and Trademark Office recently issued a new Examination Guide relating to trademarks for cannabis and cannabis-related goods and services.

This much-anticipated guide comes after the December 20, 2018 enactment of the Farm Bill.

Until now, USPTO Trademark Examining Attorneys have had little guidance on how to treat trademark applications for cannabis-related goods. Though the USPTO never approved trademarks for goods that violated the Controlled Substances Act ("CSA"), there was some confusion concerning trademarks for hemp-derived products after the enactment of the 2018 Farm Bill. The CSA defines "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 [THC] concentration of not more than 0.3 percent on a dry weight basis." The 2018 Farm Bill removed "hemp" from the CSA's definition of marijuana, which means that cannabis plants and derivatives such as cannabidiol (CBD) that contain no more than 0.3% THC on a dry-weight basis are no longer controlled substances under the CSA.

After passage of the 2018 Farm Bill, Trademark Examining Attorneys sometimes believed that goods derived from industrial hemp and derivatives of

Related Work

Cannabis
Intellectual Property
Trademarks

Related Offices

West Palm Beach

hemp including CBD were lawful, and that they were able to approve trademarks for such goods. The new Examination Guide basically affirms this.

There is a big caveat, however. Trademark applicants should be aware that even if the identified goods are legal under the CSA, the 2018 Farm Bill explicitly preserved U.S. Food and Drug Administration's (FDA) authority to regulate products containing cannabis or cannabis-derived compounds under the Federal Food Drug and Cosmetic Act (FDCA). The new Examination Guide notes that the use of CBD in foods or dietary supplements of a drug or substance undergoing clinical investigations without approval of the FDA violates the FDCA. CBD is an active ingredient in FDA-approved drugs and is a substance undergoing clinical investigations.

Therefore, registration of marks for foods, beverages, dietary supplements, or pet treats containing CBD will still be refused as unlawful under the FDCA, even if derived from hemp, as such goods may not be introduced lawfully into interstate commerce.

This change to the examination process should help some applicants to obtain registration for their marks associated with hemp-related goods and services (including hemp-derived CBD), but applicants should carefully consider how the USPTO requirements will affect their trademark rights before taking advantage of the opportunity to obtain their registrations.

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.