Has the DEA Overstepped by Codifying Marijuana Extracts, Including CBD, as Schedule 1 Substances?

Robert D. Lee
Member
rlee@cozen.com
Phone: (206) 224-1244
Fax: (206) 456-4350

Industry Sectors
- Cannabis

At the end of 2016, the Drug Enforcement Agency (DEA) issued a new ruling, codified at 21 C.F.R. § 1308.11(d)(58), establishing all marijuana extracts, not just THC, as illegal under federal law. This has led to a controversy over the DEA's decision to include cannabidiols (CBD) as a Schedule 1 substance. The previous ambiguity of CBD's legal status led to an industry of marijuana-infused products such as edibles, oils, and topical products, but the DEA's new rule, effective as of January 13, 2017, clarifies that all marijuana extracts are Schedule 1 drugs illegal under federal law. These extracts are now coded 7350, adding to the previous DEA codes for marijuana (7360) and THC (7370).

In explaining the reasoning behind this new rule, the DEA cited the need to track quantities of this "material separately from marihuana" to comply with relevant international drug control treaties administered by the United Nations:

> To better track these materials and comply with treaty provisions, [the] DEA is creating a separate code number for marihuana extract with the following definition: 'Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.'

While this explanation appears to imply the rule is more of an internal accounting mechanism for the DEA, there has been little discussion or clarification with regard to enforcement.

This change, however, has been received with great resistance. One issue raised with the DEA's new rule comes from the fact that CBD can be extracted from marijuana plants **and** hemp plants. By leaving this distinction ambiguous, or intending to include both, the rule potentially creates a conflict with other laws regarding regulation of Schedule 1 substances, leaving open the question of whether the DEA had the authority to make such a change. The DEA is limited to enforcing existing laws created by Congress, but by enacting administrative changes like updating codes, they can essentially include a product that hadn't been defined before, as in this case. Whether the DEA has overstepped their authority is unclear, but this rule has certainly brought the issue to the forefront.

Opponents of this rule have cited to the 2004 *Hemp* case as a basis for refuting the DEA's actions. In *Hemp Industries Ass'n v. Drug Enforcement Admin.*, 357 F.3d 1012 (9th Cir. 2004), the Ninth Circuit held that because the DEA failed to follow the correct procedures for scheduling a substance, it had no authority to regulate drugs that were not scheduled. Specifically, the DEA's attempt to ban hemp products (with naturally occurring THC), which were not included as Schedule I substances, could not be enforced by it. The *Hemp* decision was not appealed, allowing hemp to be imported before the 2014 Farm Bill legalized hemp cultivation in the United States as part of a five-year, state-regulated pilot program. Further, the 2015 and 2016 Congressional Appropriations Act prohibited the DEA from going after the products produced under these pilot programs.

Accordingly, and in line with the reasoning in *Hemp*, the argument could be made that by including CBD products as a Schedule I drug, the DEA overstepped their bounds and created a conflict with the Farm Bill and Controlled Substances Act regarding regulation of Schedule 1 substances. The rule is currently being challenged by the Hemp Industries Association in the Ninth Circuit on the basis that the DEA's rule unilaterally created a new drug code without following the proper administrative procedures. *See Hemp Industries Association, et al v. USDEA, et al*, Case No. 17-70162 (9th Cir. filed Jan. 13, 2017). The DEA has until May 3, 2017, to file a response. Until this issue is decided, the legal status of CBD products is unclear. Practically speaking, a concerning aspect of this legal ambiguity is that the DEA's rule could nonetheless be treated by other federal

and state agencies, such as the U.S. Customer and Border Protection, as essentially a codification of CBD as a Schedule I drug. Whether the DEA's action is the first step in a push back against the states by the federal government remains to be seen.

If you want to learn more about the issues discussed in this Alert, please contact a member of Cozen O'Connor's Cannabis Industry Team.
