HEMP PROCESSORS BEWARE: DEA INTERIM FINAL RULE HAS CRIMINAL LIABILITY IMPLICATIONS

Hodgson Russ Hemp & Medical Cannabis Alert
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The 2018 Farm Bill legalized hemp, as well as its derivatives, extracts, and cannabinoids, by removing it from the definition of "marihuana" under the Controlled Substances Act. But a new Interim Final Rule published last week by the Drug Enforcement Agency ("DEA") adopts a regulatory interpretation that essentially criminalizes routine hemp processing, such as separating hemp stalks, stems, and seeds from biomass and flower.

Hemp is defined under the Farm Bill 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.

Under the federal definition, cannabis and its "derivatives, extracts, [and] cannabinoids" are not "marihuana" for the purposes of the Controlled Substances Act—and therefore not under the authority of the DEA—so long as the THC content of the cannabis is below 0.3% on a dry weight basis. Consequently, since 2018, it was generally considered permissible to freely process hemp cannabis into a variety of derivatives, extracts, and cannabinoids, so long as the final product remained below the THC threshold.

But the DEA's new Interim Final Rule adopts an interpretation that would mean hemp processors can turn otherwise legal hemp into illegal "marihuana"—bringing it back under the DEA's authority—if processing causes hemp derivatives to exceed the 0.3% THC threshold, even momentarily. Specifically, the Rule states:

> [T]he definition of hemp does not automatically exempt any product derived from a hemp plant, regardless of the [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% [THC] limit. … [A] cannabis derivative, extract, or product that exceeds the 0.3% [THC] limit is a schedule I controlled substance, even if the plant from which it was derived contained 0.3% or less [THC] on a dry weight basis.

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This results in a real risk for hemp processors. As part of manufacturing derivatives and extracts, the separation and extraction process necessarily creates hemp that can temporarily exceed 0.3% THC content, even if the final intended product does not. The DEA's new Rule appears to explicitly recognize this fact, but nonetheless adopts an interpretation that would essentially criminalize the production of hemp extracts. As it stands, the new Rule could deal a crippling blow to the hemp industry as a whole. Hemp processors, and those who interact or do business with hemp processors, must take note of this significant development in the DEA's position.

Hodgson Russ's Hemp and Medical Cannabis attorneys continue to monitor the DEA's Rule, and the notice and comment period which will continue through October 20, 2020. You can submit comments on DEA's new Rule by clicking here. Hodgson Russ attorneys can help craft your comments to best communicate how the Rule affects you and your business. If you have questions about DEA's Rule, or if you have any other questions concerning regulation of hemp or medical cannabis, contact Patrick Hines (716.848.1679) or any member of Hodgson Russ's Hemp and Medical Cannabis Practice.

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