

Cannabis Business Blog

No Small Matter: Why Participation in the Administrative Process Matters for CBD and Hemp Industry Groups Hoping to Accelerate Progress

on 8.31.18 | Posted in CBD, Federal Law, Ninth Circuit

Monitoring and participating in administrative notice-and-comment periods may pave the road to faster access to market for CBD (cannabidiol) and hemp purveyors. While we are all familiar with lawsuits and litigation, not everyone is as familiar with the government's regulatory administrative procedures, and in particular, the notice-and-comments period that commonly accompanies proposed rules. In order to bring suit to challenge a proposed rule in a court of law, a group must first "exhaust all administrative remedies." In other words, if you don't submit questions and arguments to the government during the notice-and-comment period, then a court likely won't help you change the rule at a later date.

Ninth Circuit denies petition from Hemp Industries Associations seeking to review DEA's rule

Case-in-point, on April 30, 2018, the Ninth Circuit denied a petition from the Hemp Industries Association, et al. ("HIA") to review the Drug Enforcement Administration ("DEA")'s rule establishing a new Schedule 1 drug code for marijuana extract—including CBD containing below .3% THC. Though the Court clarified that this does not contravene any rights as granted under the 2014 Farm Bill regarding hemp production, it did confirm that CBD—despite its lack of psychoactive properties—is a Schedule 1 drug under this rule.

The Court did not indicate that it agreed with the rule or even that the rule is beyond judicial review, but rather stated that judicial review will not be a substitute for meaningful and timely participation in the administrative processes of the DEA. HIA failed to participate in the notice-and-comment period for the rule and could not point (to the Court's satisfaction) to any other comment or question proposed during the open period that spoke to HIA's concern. Therefore, all but two of HIA's arguments were waived on administrative grounds.

This comes just months after the U.S. District Court for the Southern District of New York granted a motion to dismiss against plaintiffs' challenge to the DEA's classification of cannabis generally as a Schedule 1 drug on several constitutional grounds. The Court held, among other things, that plaintiffs had not availed themselves of the administrative remedy provided to

No Small Matter: Why Participation in the Administrative Process Matters for CBD and Hemp Industry Groups Hoping to Accelerate Progress

them, namely petition the DEA to reclassify cannabis, and therefore the case was not appropriately brought before the Court.

Courts have on occasion voiced sympathy for the plaintiff's in these cases, but they have consistently required administrative action before judicial review. Unfortunately, once a rule is set and a court decides intervention is improper, either new legislation to override the rule must be passed (a lengthy process) or the agency must of its own volition agree to open comment again (very unlikely).

If the industry hopes to make progress in these cases, it needs to either more significantly participate in administrative rulemaking or find a more compelling argument that the federal government lacks a rational basis for its rulemaking.

How to Participate

So how do the cannabis and hemp industries go about monitoring proposed rules and when they must submit comments and questions? Luckily, there is a single repository for all agency notice-and-comment periods and comments may be submitted via <https://www.regulations.gov/>. The site allows users to narrow dockets by category, comment closing date, as well as agency.

As the two cases above illustrate, the administrative process may be more important than the legal process when it comes to heavily regulated industries such as the cannabis and hemp industries. The courts have shown sympathy to plaintiffs in these cases, but until these industries get fully activated and involved the administrative process, it will be an uphill battle to garner change and specifically, legally get CBD and other non-THC substances to market at the federal level.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government's jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

No Small Matter: Why Participation in the Administrative Process Matters
for CBD and Hemp Industry Groups Hoping to Accelerate Progress

Tags: administrative notice-and-comment periods, cannabis businesses, CBD, hemp, Hemp Industries Associations, THC