GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

MEMORANDUM

TO: **Jonathan Berman**
Assistant General Counsel
Alcoholic Beverage Regulation Administration

FROM: **Brian K. Flowers** BKF
Deputy Attorney General
Legal Counsel Division

DATE: **April 28, 2021**

SUBJECT: **Legal Analysis – Whether CBD is Cannabis (AL-21-222)**

You asked whether cannabidiol, more commonly known as CBD, is considered cannabis under the District of Columbia Uniform Controlled Substances Act of 1981 ("CSA").[1] You indicated that, in your view, it is. We agree. District law plainly makes it cannabis, and federal law does not provide otherwise. We caution, however, that federal law may affect the enforcement of District law with respect to CBD derived from hemp.

I. CBD is cannabis under District law

Since your question is about cannabis, we start with background on cannabis and CBD. As the federal Food and Drug Administration ("FDA") explains, cannabis "is a plant of the Cannabaceae family and contains more than eighty biologically active chemical compounds."[2]

[1] Effective Aug. 5, 1981 (D.C. Law 4-29; D.C. Official Code § 48-901.02 *et seq.*).

[2] FDA, "What You Need to Know (And What We're Working to Find Out) About Products Containing Cannabis or Cannabis-derived Compounds, Including CBD," https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis (all websites last visited Apr. 22, 2021).

And as the Department of Health ("DC Health") observed in 2018, CBD is one of those compounds.[3]

That makes CBD cannabis under the CSA. The CSA uses the term "cannabis" as an umbrella term that reaches "all parts of the plant genus Cannabis, including both marijuana and hashish."[4] Since CBD is drawn from a "part of the plant genus Cannabis," it is cannabis. And this is true even when that CBD is derived from hemp. This is because hemp, too, is derived from the cannabis plant. As the Congressional Research Service noted in a 2019 report, "hemp and marijuana are from the same species of plant, *Cannabis sativa*, but from different varieties or cultivars."[5] Moreover, nothing in District law carves hemp out from the definition of cannabis.

The legal significance of CBD falling under the definition of cannabis will depend on whether District law classifies it as "marijuana" or whether it classifies it as "hashish." That, in turn, depends on where the CBD is drawn from. If it is drawn from the resin, it is hashish, not marijuana, since the term "hashish" refers to the "resin extracted" from this plant genus, as well as "every compound, manufacture, salt, derivative, mixture, or preparation from such resin."[6] Conversely, if that CBD is drawn from the "leaves, stems, flowers, and seeds" of the Cannabis plant, and not drawn from the mature stalks of the plant or from certain other sources like the plant's oil or cake, it is marijuana.[7]

II. Federal law does not provide otherwise

Since our analysis reaches hemp-derived CBD, we considered whether a recent federal law involving hemp affects that analysis. It generally does not. The federal Agriculture Improvement Act of 2018 ("2018 Act")[8] gave the District and other jurisdictions more flexibility to allow (and regulate) hemp. The Act does not affect whether CBD derived from hemp

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[3] Letter from DC Health Dir. LaQuandra S. Nesbitt to Business Owner, July 31, 2018, at 2, *available at* https://dchealth.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Smoking%20or%20consumption%20of%20cannabis%2C%20marijuana%2C%20or%20hashish%20in%20food%20establishments-Letter%20from%20the%20Director%207-31-2018.pdf; *see Cannabidiol (CBD*, WebMD, https://www.webmd.com/vitamins/ai/ingredientmono-1439/cannabidiol-cbd ("Cannabidiol is a chemical in the Cannabis sativa plant").

[4] D.C. Official Code § 48-901.02(3).

[5] Congressional Research Serv., "Defining *Hemp*: A Fact Sheet," Mar. 22, 2019, at 1, *available at* https://fas.org/sgp/crs/misc/R44742.pdf. *See* 7 U.S.C. § 1639o(1) (Defining "hemp" as "the plant Cannabis sativa L. and any part of that plant . . . with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis").

[6] D.C. Official Code § 48-901.02(3)(B).

[7] *Id.* § 48-901.02(3)(A). Just as the term "marijuana" excludes parts of the Cannabis plant defined as hashish, it excludes:

> the mature stalks of the plant, fiber produced from such stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

Id. We note that page 2 of the Letter from DC Health Director Nesbitt, which is cited in footnote 3 and agrees with our conclusion that CBD is cannabis, also, appears to suggest that CBD is ordinarily drawn from cannabis resin, since it identifies CBD as "hashish."

[8] Approved Dec. 20, 2018 (Pub. L. 115-334).

constitutes cannabis. Nor does it require the District to permit hemp-derived CBD. It does, however, preclude the District from regulating the interstate transport of hemp.

A. Background on the 2018 Act

The 2018 Act, which "provide[d] for the reform and continuation of agricultural and other programs of the Department of Agriculture through fiscal year 2023,"[9] included several provisions related to hemp. For example, it authorized the Secretary of Agriculture to research industrial hemp and products that may be derived from it;[10] made industrial hemp eligible for funding under the Critical Agricultural Materials Act;[11] and removed industrial hemp from the federal definition of marijuana.[12] The critical provisions, however, come from sections 10113 and 10114 of the Act, which involve state regulation of hemp.

Section 10113 enables state regulation of hemp production. That section adds a new subtitle G to the Agricultural Marketing Act of 1946, codified at 7 U.S.C. §§ 1639o through 1639s. The two relevant provisions in that subtitle – codified at 7 U.S.C. §§ 1639p and 1639q – do not preempt a District law that treats hemp-derived CBD as a banned controlled substance.

The first of those two provisions, codified at section 1639p, allows a "State" (including the District[13]) "or Indian tribe desiring to have primary regulatory authority over the production of hemp in the State or territory of the Indian tribe" to submit to the Secretary of Agriculture a "plan under which the State or Indian tribe monitors and regulates that production."[14] But it does not "preempt[]or limit[] any law of a State or Indian tribe" that "regulates the production of hemp" and "is more stringent than this subtitle."[15] The second provision, codified at section 1639q, says that "[i]n the case of a State or Indian tribe for which a State or tribal plan is not approved under [section 1639p], the production of hemp in that State or the territory of that Indian tribe shall be subject to a plan established by the Secretary [of Agriculture] to monitor and regulate that production."[16] If the Secretary establishes such a plan, he or she will also "establish a procedure to issue licenses to hemp producers in accordance with" that plan.[17] But implementing regulations issued by the Department of Agriculture clarify that this licensing process applies only to the extent that "the production of hemp is not prohibited by the State or territory of an Indian Tribe where production will occur."[18]

Section 10114 is more limiting. That section, which is not codified in the U.S. Code except in a note to 7 U.S.C. § 1639o, states that "no State or Indian tribe shall prohibit the transportation or

[9] H.R. Rep. 115-1072 (2018), at 1.
[10] *See id.* at 684 and 699.
[11] *Id.* at 694.
[12] 2018 Act § 12619(a)(2) (codified at 21 U.S.C. § 802(16)(B)).
[13] *See* 7 U.S.C. § 1639o(4)(B) (the term "State" includes the District).
[14] *Id.* § 1639p(a)(1).
[15] *Id.* § 1639p(a)(3)(A)(i) and (ii).
[16] *Id.* § 1639q(a)(1).
[17] *Id.* § 1639q(b).
[18] 7 C.F.R. § 990.20(a).

shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 . . . through the State or the territory of the Indian tribe, as applicable."[19]

Case law indicates that sections 10113 and 10114, put together, mean that the District cannot ban the interstate transportation of industrial hemp, but can continue to ban the possession or transportation of hemp within its confines. In *C.Y. Wholesale, Inc. v. Holcomb*,[20] the sole federal court decision construing these aspects of the 2018 Act, the Seventh Circuit held that the 2018 Act did not preempt an Indiana law that prohibited what the law referred to as "smokable hemp."[21] According to the Seventh Circuit, the 2018 Act "authorizes the states to continue to regulate the production of hemp," and the express preemption clause in section 10114 "places no limits on a state's right to prohibit the cultivation or production of industrial hemp."[22] Nor does that express preemption clause "preclude[] a state from prohibiting the possession and sale of industrial hemp within the state."[23] It merely prohibits restrictions on "interstate transportation."[24] The court also held that Indiana's ban on smokable hemp did not otherwise conflict with the 2018 Act because Congress' objectives in adopting the 2018 Act did not include requiring states to legalize hemp; states "were to remain free to regulate industrial hemp production within their own borders," and are expressly permitted to "adopt rules regarding industrial hemp production that are 'more stringent' than the federal rules."[25]

B. Applying *Holcomb* to CBD-Derived Hemp

The 2018 Act, as interpreted by *Holcomb*, does not mean that hemp-derived CBD is not cannabis. Nor does it prohibit the District from applying the same restrictions to hemp-derived CBD as apply to other types of CBD, just as it did not preclude Indiana from restricting the cultivation, production, possession, and sale of "smokable hemp." The only thing the District may not do is restrict the interstate transportation of hemp. Any District law applicable to hemp-derived CBD must be implemented in a manner consistent with that singular restriction.

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[19] 2018 Act § 10114(b).

[20] 965 F.3d 541 (7th Cir. 2020).

[21] *See id.* at 543.

[22] *Id.* at 547.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 548.