AMERICAN BAR ASSOCIATION
Tort Trial and Insurance Practice Section

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COMMITTEE NEWS

Cannabis Law and Policy

FDA Demands Congress Create New Regulatory Pathway for CBD



William Garvin
FDA Practice Group

Tina Hu-Rodgers
FDA Practice Group

Natalie Oehlers
FDA Practice Group

In recent years, there has been a political shift regarding the popularity of cannabis products. This has led to the proposal and enactment of certain legislation dealing with the legality of cannabis products under both federal and state law. These various pieces of legalization have included decriminalization, legal access to medical cannabis, banking reform, descheduling and rescheduling, and veterans' access to cannabis products, among other things.

Despite these legislative initiatives at both the federal and state level, the U.S. Food and Drug Administration ("FDA" or "the Agency") has yet to create a clear regulatory pathway for cannabidiol ("CBD") consumer products. Instead, the Agency has stated that it will continue to take the same regulatory action against CBD and certain other cannabis-derived products that it has taken to date, until Congress establishes by law a new regulatory framework for FDA to regulate these products. *See,* FDA Statement, *FDA Concludes that Existing Regulatory Frameworks for Foods and Supplements are Not Appropriate for Cannabidiol, Will Work with Congress on a New Way Forward* (January 26, 2023).

Read more on page 11

In This Issue

Chair Message

Roscoe Mutz
Farhang & Medcoff PLLC

***Roscoe Mutz** is an Arizona attorney with a broad litigation background, including commercial litigation, employment, real estate disputes, financial regulatory compliance and audit advice, the Arizona Medical Marijuana Act, as well as personal injury and products liability. Roscoe can be reached at RMutz@Farhang-Medcoff.com*

Dear Cannabis Law and Policy Committee (CLPC) Members:

In perhaps the most obvious "You have big shoes to fill" situation in TIPS history, I have the privilege (or curse) of following two outstanding past chairs of CLPC: the two Lisas. The "First Lady of Cannabis Law in Texas," Lisa Pittman, was instrumental in forging the strong committee we have today, and Lisa Dickinson is simply a powerhouse leader who ensured CLPC not only became one of the fastest growing TIPS committees, but also a perennial award winner. I am deeply indebted to the Lisas and very relieved to have both to lean on for guidance during my chair year.

Thank you again to all of the committee members who contributed to CLPC this past year, whether in drafting articles for our newsletter and other TIPS publications, serving on panels at the Business Litigation Committee (BLC) / CLPC standalone meeting in New Orleans and TIPS Section Conference in New York, putting together webinars, and engaging in monthly meeting discussions on cannabis issues, as well as emerging areas of law involving psychedelics. CLPC is large enough to house big ideas and initiatives in this exciting practice. We are always looking for articles for our newsletter and other publications, so please contact me or our newsletter vice chairs, Becky Farina (becky.farina@zurichna.com) and Chris Kreiner (Chris.Kreiner@wbd-us.com).

Please also spread the word if you know of others who would like to join CLPC. Our committee can be a great resource for referrals and staying on top of cannabis law and policy issues. We also meet via Zoom monthly (when we do not have in-person meetings at conferences) on the second Thursday at 2:00pm (Central). Please let me know if you would like the Zoom link for our meetings.

Thank you again for your participation in CLPC and TIPS. I look forward to another successful year!

Editor Message

Chris Kreiner
Womble Bond Dickinson LLP

Chris Kreiner is a Partner at Womble Bond Dickinson (US) LLP in their Winston-Salem, North Carolina office. He leads his firm's cannabis group and focuses his litigation practice on product liability and personal injury defense. He can be reached at (336) 721-3748, or chris.kreiner@wbd-us.com

The Cannabis Law and Policy Committee (CLPC) traces its origin back to a small task force formed in 2018. From the kick-off meeting back then in a conference room in Chicago to having grown to formal TIPS committee status, I continue to be impressed by the commitment of the people dedicated to the CLPC and the quality of the deliverables to its members. One of those deliverables, the CLPC Newsletter, is now under my editorial direction. I am grateful for this responsibility entrusted to me by the Committee leadership and look forward to the challenge of meeting the high standards set by my predecessors. I hope everyone enjoys the Fall 2023 issue, which includes a message from our new Chair, Roscoe Mutz, and several informative articles on the evolving cannabis space.

No spoilers here, though!

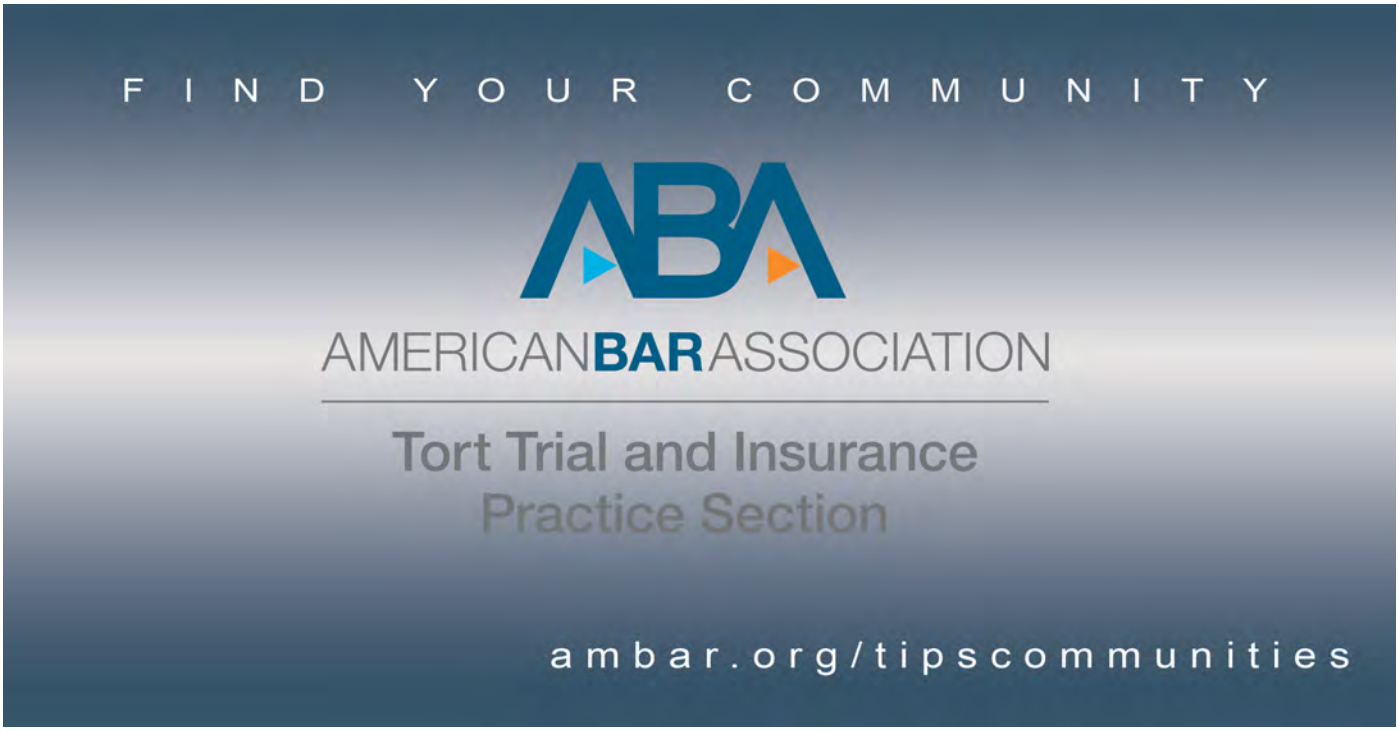
Want some perspectives on federal rescheduling issues? Read the article by Daniel Shortt of McGlinchey Stafford.

Curious about potential regulatory pathways for CBD? Read the article by William Garvin, Tina Hu-Rodgers and Natalie Oehlers of Buchanan Ingersoll & Rooney.

Need some insight on drug testing and college student-athlete employees? Read the article by Kayla Jacob and David Fleshman of Breazeale, Sachse & Wilson LLP.

Want some inside scoop on the legislative and regulatory landscape on CBD? Read the interview of two powerhouses taken by Lisa Pittman of Pittman Legal.

On behalf of the CLPC, I thank our contributors to the Fall 2023 Newsletter. The benefits of our newsletters to our members are only as good as the articles we publish. I invite anyone who wants to share their knowledge, experience and expertise with our members to submit an article for publication. Please contact me directly if you wish to do so.



Cannabis Law and Policy

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Wasting Away Again in FDAville – Interview with Jessica Wasserman (Wasserman Rowe in DC) and Patty Power.

Lisa L. Pittman
Pittman Legal

Lisa Pittman, *"The First Lady of Texas Cannabis" practices cannabls law and business law and litigation in Austin, TX and can be reached at lisa@pittman.legal*

This interview is with two attorneys at the top of their game when it comes to the FDA and the future of cannabinoid regulation and the political forces behind it. Jessica Wasserman is an attorney and government relations expert based in Washington, DC and the founder of the Wasserman Rowe Law Firm, which advises clients on FDA matters, including cannabinoids, CBD law and regulations. Currently, she's engaged with the 2023 Farm Bill reauthorization process and whether the FDA cannabis issues will be addressed in the next Farm Bill definition of hemp. Patty Power is a principal with Bose Public Affairs Group and a lawyer with Bose, McKinney and Evans. She has honed her career as a DC Advocate, working in the federal government on behalf of clients to influence the laws pertaining to agriculture, energy, infrastructure, and the environment.

Lisa: The FDA recently issued an announcement that it would not allow CBD as a supplement in food, and many in the industry are, of course, disappointed. The FDA held hearings and took lots of public comment toward regulating CBD in 2019. We were really hoping for a different result. What's your take on that?

Jessica: I think the first reaction was extreme frustration on the part of industry because hemp was made legal. Everyone was so excited about the 2018 Farm Bill, and folks thought they were free to jump in and create these products and create markets, not realizing that FDA had all these complicated, difficult steps and hoops to go through. But that had to do with what people in the industry know of as "drug preclusion" and the fact that there already was a CBD drug Epidiolex that had been approved.

FDA's interpretation of their own regs and laws is that when that happens, it's kind of a race. Epidiolex got there first and got the grip on this CBD molecule so it couldn't be used in food and supplements. But, at the same time, the then Commissioner [Scott] Gottlieb stood up before Congress and said FDA is going to create a regulatory pathway for this, so don't worry. Everybody was like, "yay, this is going to work out," yet here we are all this time later, since 2018? Industry had invested millions of dollars in the studies that FDA indicated they needed and going through the approval process for supplements and then were turned down even with all the science more recently.

Read more on page 15

Weeding Out: Marijuana as Doping for Student-Athlete Employees

Picture it: March Madness 2025 is about to begin. And while there are still brackets, buzzer beaters, the Elite Eight and the Final Four, this March Madness is a tad different. Stepping onto the court for the first time ever are student-athlete *employees*.

Consistent with the opinion of the National Labor Relations Board, student-athletes participating in March Madness 2025 are joint employees of their academic institutions and the National Collegiate Athletic Association (NCAA). But there may be cause to blow the whistle on the unresolved issue of drug testing these student-athlete employees for marijuana.

Historic perspective of marijuana in sports

"Doping" regards athletes using banned substances in competitive sports to gain a competitive advantage. In an effort to prevent doping, sports organizations, like the NCAA, maintain a prohibited list of substances they deem to be performance-enhancing drugs, such as human growth hormones, stimulates, diuretics, and anabolic steroids.

Historically, the prohibition of marijuana in sports has been a result of anti-doping efforts. From an anti-doping perspective, marijuana use in competition may endanger athletes and others because of increased risk taking, such as slower reaction times. Marijuana use is also viewed as inconsistent with the athlete as a role model, and thus, is said to violate the spirit of sport.

The NCAA has opined that marijuana is not considered a performance-enhancing substance; yet, marijuana remains banned alongside doping agents and illicit substances, such as cocaine and fentanyl.

Current buzz about marijuana in collegiate sports

Now less polarizing, the stigma of marijuana use is evolving and has become more socially acceptable. On trend, many sports leagues are changing marijuana drug testing policies.

The NCAA announced last year that it was changing its approach to cannabis testing. Although marijuana is still a prohibited substance, the NCAA has increased the threshold levels of marijuana that trigger a positive test result, which could potentially lower the number of student-athletes who test positive for marijuana.

Read more on page 18

Kayla M. Jacob
Breazeale, Sachse & Wilson, LLP

***Kayla Jacob** is an associate in the Labor and Employment section of the New Orleans office of Breazeale, Sachse & Wilson, LLP. She received her Juris Doctor, magna cum laude, from Southern University Law Center in May 2021 where she served as a member of the Southern University Law Review and SBA Diversity Committee. Kayla can be reached at kayla.jacob@bswllp.com*

David Fleshman
Breazeale, Sachse & Wilson, LLP

***David Fleshman** focuses his practice on a blend of general litigation, business transactions, construction law, sports law, and contract law in the Baton Rouge office of Breazeale, Sachse & Wilson, LLP. David can be reached at David.Fleshman@bswllp.com*

DEA Likely to Reschedule Marijuana Based on Congressional Report

Daniel Shortt, Esq.
McGlinchey Stafford

***Daniel Short** is a Seattle-based corporate and regulatory attorney who works extensively with entrepreneurs in the cannabis industry. He advises clients on matters related to both hemp and marijuana and frequently speaks on legal issues relating to cannabis across the country and abroad. Daniel can be reached at dshortt@mcglinchey.com*

According to a report from the Congressional Research Service (the Report), the Drug Enforcement Administration (DEA) is likely to follow the Department of Health and Human Services (HHS) and the Food and Drug Administration's (FDA) recommendation to move marijuana from Schedule I to Schedule III under the Controlled Substances Act (CSA). According to the Report, the DEA confirmed in a 2020 congressional hearing that it will be bound by the FDA's recommendation, "and if past is prologue, it could be likely that DEA will reschedule marijuana according to HHS's recommendation." The FDA operates under the umbrella of the HHS, so the Report interchanges references to whether the recommendation comes from the HHS or the FDA. In turn, the Department of Justice (DOJ) oversees the DEA.

To recap, in October, President Biden requested that the DOJ and the HHS evaluate marijuana's status as a Schedule I substance under the CSA. The CSA places drugs into one of five schedules; Schedule I is the most restrictive and seen as having no medical use and a high potential for abuse. Due to these restrictions, Schedule I substances are nearly impossible to research. Schedule III substances are considered to have an accepted medical use and a relatively lower potential for abuse compared to Schedule I and II substances. The CSA grants the HHS and the DEA the authority to reschedule or deschedule substances.

Could Congress get Involved with Rescheduling?

Although the headline from the Report is that the DEA is likely to reschedule marijuana, there are other provisions of note, including that the de- or re-scheduling of marijuana could occur in other ways. For example, the Report lists the following "Considerations for Congress":

> *Congress may choose to address any number of issues related to the potential rescheduling of marijuana. First, Congress could take legislative action to keep marijuana on or remove marijuana from Schedule I. If Congress removed marijuana from Schedule I, it might (1) place marijuana on one of the other schedules of controlled substances, (2) create another schedule or separate classification for marijuana under the CSA, or (3) remove marijuana as a controlled substance altogether. If the administrative scheduling process moves forward, Congress may consider whether to devote additional resources to the FDA and the U.S. Department of Agriculture (USDA) to ensure the safety and quality of the many different products already available in many state markets.*

While the rescheduling pathway currently in progress is being handled through an administrative channel, that would not stop Congress from acting to re- or de-schedule marijuana in the meantime. Administrative agencies are creatures of statute. They operate based on the legislation passed by Congress, subject to oversight through the executive branch. It is the CSA that grants the authority to the HHS/FDA and the DOJ/DEA to reschedule marijuana. In other words, Congress could place marijuana in any schedule it wanted, remove it entirely, regulate it in some new novel manner, or get rid of the CSA altogether. It seems unlikely that Congress would do any of these options, but it certainly has the legal authority to do so.

Congress also has the power of the purse. It can allocate resources to government agencies such as the FDA or the USDA, who, in turn, could take increased roles in the marijuana context. Marijuana is in the FDA's jurisdiction, and the FDA has broad jurisdiction over food, drugs, and cosmetics. The FDA has worked with pharmaceutical companies to develop cannabis-based or cannabis-related drugs, such as Epidiolex and Marinol. However, when it comes to state-legal recreational or medical marijuana programs, the FDA has largely stayed out of the fray. After all, although state-legal marijuana programs operate outside of federal law, they are – across the board – very tightly regulated. The Report considers what might change with regards to the FDA should marijuana be de- or re-scheduled:

> *The scope of and demand for FDA oversight for medical marijuana and related products may grow considerably. In the short term, FDA may need to generate or update a substantial amount of technical information to clarify its regulatory approach to marijuana for relevant stakeholders. Given that marijuana is a complex substance containing various pharmaceutical components and is available to consumers in numerous formats, FDA may also need to consider long-term resource allocation to ensure that marijuana products consistently meet applicable regulatory standards.*

While these are all possibilities, it remains to be seen how Congress and the relevant government agencies will react to marijuana if the DEA reschedules.

How Could DEA Rescheduling Impact Medical Marijuana?

The Report lists several potential impacts of rescheduling. As reported elsewhere in-depth, rescheduling would make Internal Revenue Code Section 280E inapplicable to marijuana businesses, allowing marijuana and marijuana-related businesses to take deductions. In addition, the Report states, "[t]hose who use medical marijuana lawfully may now be eligible to (1) access public housing, (2) obtain immigrant and nonimmigrant visas, and (3) purchase and possess firearms." The Report also

states, "[t]hose who use medical marijuana lawfully may contend with fewer barriers to federal employment and eligibility to serve in the military."

While these potential changes are substantial, it is also important to recognize that a person's use of medical marijuana pursuant to a state-legal program would not be legalized or allowed under the CSA, per se, if marijuana is rescheduled as recommended by the HHS. If marijuana is moved to Schedule III, its use would require a person to hold a prescription. The prescription would need to be obtained through the proper channels, such as through a doctor or other healthcare provider directly or from a pharmacy. In medical marijuana states, doctors currently recommend or authorize the use of marijuana; they do not write "prescriptions," as that term is used in the context of the CSA.

The production, processing, sale, and use of medical marijuana outside of the CSA is, and will remain, illegal. Unless and until marijuana drugs are developed and distributed in compliance with the CSA, the use of medical marijuana can still impact access to public housing, immigration status, and the ability to possess firearms. The development of new marijuana-based drugs and compounds could take years. Due to this protracted timeline, federal rescheduling is not likely to make much of an impact on state-legal medical marijuana programs for many years.

The Takeaway

Congressional Research Service provides reports to Congress that are not binding. While cannabis insiders do not know for certain what the DEA will do or when it will do it, the Report is well-researched, and it does appear the DEA is on record stating that it will follow the FDA's recommendation. We will continue to monitor these developing issues on the Green Leaf Brief.

FDA Demands... Continued from page 1

Historic Regulation of Cannabis & Cannabis-Derived Products

As controlled substances, cannabis and cannabis-derived products have historically fallen under the jurisdiction of the Drug Enforcement Administration ("DEA"). Prior to 2018, DEA oversight of cannabis and cannabis-derived compounds were quite broad. However, in December 2018 Congress passed the Agriculture Improvement Act of 2018 (Public Law 115-334) ("2018 Farm Bill") that revised the definition of marijuana and allowed more cannabis products to be considered to be hemp-derived rather than marijuana-derived. For many in the industry, the 2018 Farm Bill was a clear signal from Congress of its intent to significantly reduce DEA's restrictions and support the production and sale of certain hemp and hemp derivatives.

The 2018 Farm Bill also removed certain cannabis compounds from schedule I of the Controlled Substances Act by amending the definition of marijuana under 21 U.S.C. § 802(16) and listing tetrahydrocannabinols under 21 U.S.C. § 812(c). Additionally, the 2018 Farm Bill provided a new statutory definition of "hemp" that included cannabis, derivatives or extracts of cannabis with no more than 0.3% by dry weight of the compound delta-9 tetrahydrocannabinol ("delta-9 THC"). A recent 9th Circuit ruling further expanded this definition, holding that delta-8 tetrahydrocannabinol ("delta-8 THC") products containing no more than 0.3% delta-9 THC can fall within the statutory definition of "hemp" federally legalized under the 2018 Farm Bill. *See, AK Futures LLC v. Boyd St. Distro, LLC,* No. 21-56133 (9th Cir. 2022).

While the 2018 Farm Bill greatly changed DEA's jurisdiction over cannabis products, it did not affect FDA's authority to regulate products that contain cannabis or cannabis-derived compounds if they are sold in FDA-regulated products. Thus, with DEA no longer the primary regulatory body for certain cannabis consumer products, the burden then fell to FDA to determine whether these products could be legally marketed under the law. Recognizing the public's desire for and increasing interest in the potential utility of cannabis and cannabis-derived compounds for a variety of medical conditions, FDA has tried to be clear that it does not oppose the development of cannabis-related medicine; the Agency simply wants those products to be developed as human drug products with approved New Drug Applications ("NDAs"). In fact, FDA sought to clarify the regulatory framework for such drug products and issued a guidance document outlining the Agency's position on several topics relevant to the development of human drugs containing cannabis and cannabis-derived compounds. *See,* FDA Guidance Document, *Cannabis and Cannabis-Derived Compounds: Quality Considerations for Clinical Research Guidance for Industry* (January 24, 2023). This guidance includes discussion of the source of cannabis for clinical research, general quality considerations, as well as the calculation of the percentage of delta-9 THC in botanical raw materials,

William Garvin *focuses his practice on issues related to the approval, regulation, promotion, sale and reimbursement of drugs, medical devices, biologics, excipients, dietary supplements, foods and cannabis-related products. William can be reached at william.garvin@bipc.com*

Tina Hu-Rodgers *focuses her practice on issues related to the approval, regulation, promotion, sale and reimbursement of drugs, medical devices, biologics, dietary supplements, foods and cannabis-related products. Tina can be reached at tina.hu@bipc.com*

Natalie Oehlers *focuses her practice on counseling clients on matters including product development, pre-approval and post-approval sale and marketing, compliance with state or federal regulation, and various reimbursement determinations. Natalie can be reached at natalie.oehlers@bipc.com*

intermediates, drug substances, and drug products to determine their status as a controlled substance. FDA also recommended specific principles and documents be considered by those pursuing the development of drugs containing cannabis or cannabis-derived compounds.

Concerns About the Safety of CBD in Consumer Products

Despite the Agency's support for use of cannabis in human drug development, FDA has not been as supportive of use of CBD in consumer products. Instead, FDA has continuously determined that it is unlawful to sell ingestible hemp-derived CBD products, and the Agency has repeatedly warned the public about illegally marketed CBD-containing products, citing concerns about the potential for harm to the liver, the harm to the male reproductive system, as well as harm to children and pregnant persons.

Significantly, in September of 2021, the U.S. Centers for Disease Control ("CDC") issued an official health advisory relating to delta-8 THC and the potential for adverse events due to insufficient labeling of products containing THC and CBD. *See,* CDC Health Advisory, *Increases in Availability of Cannabis Products Containing Delta-8 THC and Reported Cases of Adverse Events* (September 14, 2021). More specifically, CDC warned that products containing delta-8 have the potential to be confused with hemp or CBD products that are not intoxicating, thus exposing consumers to the risk of an unexpected or increased intoxication.

Likewise, in the past year FDA has issued several Warning Letters to companies selling products containing CBD and delta-8 THC, stating that such products are potentially unsafe or make unlawful claims that the products can treat certain medical conditions, in violation of the Federal Food, Drug, and Cosmetic Act ("FFDCA"). *See,* FDA News Release, *FDA Issues Warning Letters to Companies Illegally Selling CBD and Delta-8 THC Products* (May 4, 2022). Similar Warning Letters have been issued by FDA relating to foods and beverages containing CBD. *See,* FDA News Release, *FDA Warns Companies for Illegally Selling Food and Beverage Products that Contain CBD* (November 21, 2022). In spite of these Warning Letters, however, the CBD market has continued to grow.

Need For New Regulatory Pathway for CBD

Faced with the increase in popularity of CBD products and the safety concerns surrounding food and supplements containing CBD expressed by various federal agencies, as well as the requests of members of Congress to review this issue, FDA convened a "high-level internal working group" to explore potential regulatory

pathways for CBD products. The working group reviewed studies related to Epidiolex, published scientific literature, information submitted to a public docket, and studies conducted and commissioned by the Agency. Based on this review, FDA concluded that it was not apparent that CBD products could meet applicable safety standards to allow the use of CBD in dietary supplements, conventional foods, food additives, or even animal food. More specifically, FDA emphasized there was not "adequate evidence to determine how much CBD can be consumed, and for how long, before causing harm." Similarly, the Agency found insufficient evidence to determine how CBD products could meet the safety standard for substances in animal food.

Accordingly, in light of these safety concerns FDA has stated that it will not pursue rulemaking to allow the use of CBD in dietary supplements, conventional foods, or animal food due. Simultaneous to this announcement, FDA also denied three citizen petitions asking the Agency to conduct rulemaking to allow the marketing of CBD products as dietary supplements. *See,* FDA News Release, *FDA Issues Response to Three Citizen Petitions Related to CBD and Dietary Supplements* (January 26, 2023); *see also,* Docket Number FDA-2019-P-5394-0001; Docket Number FDA-2020-P-1582-0001; Docket Number FDA-2022-P-0600-0001.

Instead of rulemaking, FDA has proposed that Congress create an altogether new regulatory pathway that would provide access and appropriate oversight for CBD-containing products for humans and animals. What this regulatory pathway will look like and when Congress would, if ever, make it law, remains to be seen. FDA's announcement stated only that a new regulatory pathway should provide safeguards (e.g., clear labels, prevention of contaminants, CBD content limits, minimum purchase age) and oversight to manage and minimize risks related to CBD products and that the Agency is "prepared to work with Congress on this matter."

In response to FDA's statement, various new Federal legislation has been introduced or reintroduced that is aimed at creating potential pathways for regulation of CBD consumer products. For example, one piece of legislation recently introduced would make hemp, CBD-derived from hemp, and other hemp-derived products lawful for use as an ingredient in a dietary supplement. *See,* Hemp and Hemp-Derived CBD Consumer Protection and Market Stabilization Act of 2023, H.R.1629, 118th Congress (2023). A different piece of legislation directs FDA to regulate food products containing CBD in the same manner as other food ingredients. Both pieces of legislation have been endorsed by various advocacy organizations within the cannabis industry. *See,* CBD Product Safety and Standardization Act of 2023, 118th Congress (2023).

It will be quite some time before this new regulatory framework for CBD is implemented, if ever. However, until that time, FDA will continue to monitor the marketplace and exercise its enforcement discretion to take action against CBD and other cannabis-derived products. Thus, companies that create and sell products in this space should take appropriate actions to ensure that they minimize risk of FDA enforcement action against their CBD products.

Wasting Away... Continued from page 5

I think that, at a minimum, industry felt like, "okay, but why didn't you tell us this five years ago before we relied on it so much, and again took you at your word that if we came up with the drug studies that you would work with us?" So that's the bad news. I think calming down a little bit, that the FDA did say very clearly, "we will continue to work on this, we will work with Congress." And at first everyone was "yeah, sure, we've heard that before," but FDA did.

Janet Woodcock, who was the former acting commissioner for a long time of FDA, so very high level, has been put in charge of this by current Commissioner [Robert] Califf to get something done on it. I know that she is trying and that she has already met with couple of the key members of Congress and is scheduling stakeholder meetings. I guess it's possible that they are going to try to create some other sort of … not supplements, not food, but something more like maybe the Tobacco Center or something like that. But I'll stop there. But no matter what, unless there's litigation or some other forcing event, it probably will be still years more before they come up with this alternative pathway. In the meantime, the status quo maintained, so it's not the end of the world.

Lisa: Are there any other governmental agencies involved in this decision besides the FDA or is just the FDA making that decision?

Jessica: Well, it is really FDA and Congress, I would say, on this one, specifically on whether there will be this supplement or food pathway. But the other thing that we should mention here is that at the same time that FDA said no supplement or food pathway, they also denied three citizens' petitions, which sounds fancy, but it's just a way of suing FDA to do something. Basically, they said those petitions were saying all the same things that FDA needed to get going and made all kinds of legal arguments about why they needed to create this pathway. It's likely that somebody will appeal. One of the litigants there will appeal and it does force FDA to do something within about an eight-month time frame. So that's the only kind of hope for a quicker time frame is if those lawsuits go forward as kind of just to put leverage on Congress and FDA to get a move on.

Lisa: So what would it take from Congress to achieve what we're hoping, or what the FDA is asking?

Patty: There are a number of bills. There was a lot of legislation that was introduced by the end of the last Congress. Not all of it has been reintroduced, but we expect to see a lot of it back. And there were some smaller, very specific bills that directed FDA to allow everything that the 2018 Farm Bill made legal to be designated as a food. One does food and one supplement in these two House bills. There's another bill in

the Senate that would do the same. And then these kinds of things are incorporated in some of the broader based legislation as well. But some of it is like the big Senate bill. The CAOA [Cannabis Administration and Opportunity Act].

Lisa: Do you think that the definition of hemp would be changed as it was in the 2018 Farm Bill?

Patty: That's our main focus on The Hill for this year, and our messaging on that is that there's no analysis that shows justification to change it beyond maybe some of the competition issues … farmers and other players in the industry have invested heavily in bringing hemp back onto the market. And you just need to give it more time. In the absence of something harmful, why would you change it? Or in the absence of any research showing that 0.3 was the incorrect number, why would you change it?

One of the issues that's raised often, and fortunately has been addressed by USDA is the issue of a "hot hemp crop." Initially, farmers were evaluated on their level of THC in their plants and they would just take a snip of it and measure it. And if it came up above 0.3% Delta 9 THC by dry weight, they pretty much condemned the whole crop, said you have to destroy your crop. They would have to then burn it and that's the most horrifying thing, you work and you just end up burning it. It turned out that method was not a very accurate way to take the measurement, so USDA changed their rules and increased the mitigation approaches. Now, if you test hot, they allow you to go back in and process the actual plant. So you test the level of Delta 9 THC in the whole plant, not just in that one snip. What we hear is then farmers find there's no problem because a hemp plant doesn't have more than that, so they're not losing their crops on that side of it, I think, which is really the only valid, real concern there. It's really not a concern anymore because USDA has addressed it.

Lisa: Do you have any predictions on things to look forward to in the next year or the next farm bill?

Jessica: Well, despite all that we're saying, FDA is not taking the stuff off the market, nor is DEA. They're all just kind of hanging around, arguably letting the states kind of do their thing. … We can chug along until the stars line up a little bit better. But again, as we all know, in the long term, there's going to be full legalization and it's going to all get straightened around. Our hope and role, I think, is just to try to make it happen in our lifetimes, at least.

Patty: I would say if you're trying to get something done on Capitol Hill or not done on Capitol Hill, it's a lot easier to not have something happen. So the fact that we're asking that Congress not change the definition in the 2018 Farm Bill of hemp, I think

as a threshold issue, we're in a stronger place, but beyond that, we've done a lot of meetings. We've been in pretty much ever agricultural committee member office since last year. Without some solid justification, not a commercial justification, but a scientific, health based justification, there's no reason to change it. We are guardedly optimistic, but are planning on working very hard this year to make sure that that happens or that doesn't happen. I don't know that Congress will be successful in getting the Farm Bill reauthorized by the end of September, if at all, in 2023. I think that's what everyone's planning on. The Farm Bill does have a history of getting extended, so we might see that. But we are assuming they're going to get it done on time, but we're ready if they don't.

Lisa: I've really appreciated interviewing both of you. How can people contact you?

Patty: Probably best by email: ppower@boselaw.com

Jessica: I'm jessica@wassermandc.com

Weeding Out... Continued from page 6

Additionally, the NCAA proposed a new penalty structure to lower the marijuana penalties for student-athletes who test positive for marijuana.

Drug testing student-athlete employees – game changer or status quo?

In a 1995 landmark decision, the United States Supreme Court held that drug testing student-athletes is constitutional.

Similarly, in 1994 the California Supreme Court opined that there is no constitutional violation when the NCAA's drug testing program is enforced as a student-athletes' lower expectations of privacy is balanced against the NCAA's countervailing interests.

Subsequently, a Louisiana appellate court held that a state university's athletic drug testing program was constitutional considering the diminished expectation of privacy in the context of intercollegiate sports and the university's shared interest with the NCAA to ensure fair competition in intercollegiate sports and protect the health and safety of student-athletes.

However, these decisions were based on collegiate sports being voluntary and, at least in part, the NCAA's classification as a voluntary, unincorporated, private association. But what happens if the NCAA is classified as an employer?

As an employer the NCAA may be forced to develop a new playbook on drug testing with consideration of the following:

Players may have greater protections under federal anti-discrimination laws as employees. If classified as an employer, NCAA's drug testing policies could be scrutinized under federal anti-discrimination laws like Title VII (which covers discrimination based on race, color, sex, national origin, religion) and the ADA (which covers disability discrimination). Thus, players may have a cause of action against the NCAA if its drug testing policies are not uniformly applied or its selection criteria for random drug testing is discriminatory. These federal laws provide additional protections to student athletes as employees that would not be available without employment status.

Players may have the right to unionize and bargain. If found to be employees, student-athletes may choose to unionize. Unions in sports are common and unions often bargain with sports associations/employers for the benefit of professional athletes. For example, the National Basketball Players Association is a labor union that represents NBA players. Recently, that union successfully negotiated a collective bargaining agreement that ditches marijuana testing.

College athletes could soon be just as empowered to negotiate drug testing policies. Such negotiations and participation in unionized activity would be protected under federal laws governing unions.

Compliance with state marijuana laws. Several states have passed anti-discrimination laws that prohibit employers from discriminating against employees who use marijuana. Compliance with some state laws could restrict the penalties that the NCAA currently enforces. These penalties would be equivalent to adverse employment actions if the NCAA is reclassified as an employer. Moreover, as a multi-state employer, the NCAA would need to comply with laws in each state in which it operates which may not fit a national, one policy fits all approach.

Revisions to local drug testing policies. Colleges and universities that are members of the NCAA typically implement local drug testing policies for student athletes that comply with NCAA standards. If classified as employers, these educational institutions would also have to comply with relevant state laws that govern the procedures for drug testing in the workplace (e.g. requiring a confirming test if positive and confidentiality of results). Some states also limit testing to reasonable suspicion or probable cause situations. These restrictions may sometimes be imposed on only public universities and not private universities in some states. Thus, college athletes at public educational institutions may be subject to different drug testing criteria than athletes at private educational institutions.

Bottom line

The move from student-athletes to student-athlete employees will not be a slam dunk. One critical issue to consider is how colleges, universities and the NCAA will eliminate potential exposure when implementing drug testing policies under their new status as employers and with deference to marijuana's complex legal landscape.

Cannabis Law and Policy Roster

Chair
Roscoe Mutz
Farhang & Medcoff, PLLC
100 S Church Ave, Ste 100
Tucson, AZ 85701
(520) 214-2000
rmutz@farhangmedcoff.com

Chair-Elect, Membership Vice-Chair
Olia Wall
3951 Howell Park Rd
Duluth, GA 30096-1729
oliawall@gmail.com

Diversity Vice-Chair
Jamese Hawkins
2969 Brinkley Rd, Apt 202
Temple Hills, MD 20748
(412) 378-9922
hawkins.jamese@gmail.com

Immediate Past Chair
Lisa Jill Dickinson
Dickinson Law Firm Pllc/Ofc of Admin Hrgs
1020 N Washington St, Ste 3
Spokane, WA 99201-2237
(509) 3260636
lisa@dickinsonlawfirm.com

Law Student Vice-Chair
Alyssa Whitcomb-Zeidel
620 E 33rd Ave
Eugene, OR 97405-3831
awhitco3@uoregon.edu

Membership Vice-Chair
Charles Stoecker
McGlinchey Stafford PLLC
101 NE 3rd Ave, Ste 1810
Fort Lauderdale, FL 33301-1279
(954) 356-2514
cstoecker@mcglinchey.com

Plaintiff Vice-Chair
Richard Vanderslice
Richard L Vanderslice PC
1445 Snyder Ave
Philadelphia, PA 19145-2317
(215) 667-8070
Fax: (215) 279-9229
rlv@vanderslicelaw.com

Scope Liaison
Juanita Luis
175 County Road B2 E, Apt 201
Little Canada, MN 55117-1513
(651) 483-2583
Fax: (952) 979-7810
nitaluis@comcast.net

Social Media Vice-Chair
Kayla Jacob
Breazeale Sachse & Wilson LLP
909 Poydras St, Ste 1500
New Orleans, LA 70112-4016
(504) 584-5451
kayla.jacob@bswllp.com

Technology Vice-Chair
Lee Diamondstein
1614 Flat Rock Rd
Penn Valley, PA 19072
(215) 266-3118
Fax: (215) 735-1856
ldiamondstein@magnals.com

Vice-Chairs
Rachael Ardanuy
3013 Southmoor Court
Fort Collins, CO 80525
(303) 586-5020
rachael@rzalegal.com

Kate Bally
15 Mill Valley Ln
Stamford, CT 06903-1610
(203) 559-7094
Fax: (646) 562-3401
katebally@yahoo.com

Michael Beaver
Holland & Hart LLP
555 17th St, Ste 3200
Denver, CO 80202-3921
(303) 290-1631
Fax: (303) 290-1606
mbeaver@hollandhart.com

David Becker
Dickinson Wright PLLC
55 W Monroe St, Ste 1200
Chicago, IL 60603-5127
(312) 377-7881
Fax: (312) 360-6594
dbecker@dickinsonwright.com

Susan Burns
S Burns Legal PLLC
420 Summit Ave
Saint Paul, MN 55102-4680
(612) 3064143
Fax: (612) 925-8320
susan@sburnslegal.com

Shannon Davis
Davis Legal
PO Box 2801
Bentonville, AR 72712
(662) 617-9028
Shannondavis@davislegalpi.com

Marla Dickerson
Southern University Law Center
Po Box 9294
2 Roosevelt Steptoe Dr
Baton Rouge, LA 70813-0001
(225) 771-2155
Fax: (225) 771-2474
mdickerson@sulc.edu

Kristian Dobard
Pusateri Johnston Guillot & Greenbaum, LLC
1100 Poydras St, Ste 2250
New Orleans, LA 70163-2300
(504) 620-2506
kristian.dobard@pjgglaw.com

Adam Doeringer
Swanson Martin & Bell LLP
330 N Wabash Ave, Ste 3300
Chicago, IL 60611-3764
(312) 222-8587
Fax: (312) 321-0990
adoeringer@smbtrials.com

Michael Drumke
Swanson Martin & Bell LLP
330 N Wabash Ave, Ste 3300
Chicago, IL 60611-3604
(312) 222-8523
Fax: (312) 321-3898
mdrumke@smbtrials.com

Rebecca Farina
Zurich North America
4345 Pleasant CT
Huntington, MD 20639-3625
(213) 952-6645
becky.farina@zurichna.com

Benjamin Fliegel
Reed Smith
355 S Grand Ave, Ste 2900
Los Angeles, CA 90071
(213) 4578000
bfliegel@reedsmith.com

William Garvin
Buchanan Ingersoll & Rooney PC
1700 K St NW, Ste 300
Washington, DC 20006-3807
(202) 452-5471
Fax: (202) 452-7989
william.garvin@bipc.com

Sarah Gossett Parrish
Sarah Lee Gossett Parrish PLLC
6608 N Western Ave, #338
Nichols Hills, OK 73116
(405) 8206205
slgparrish@slgparrishlaw.com

Daniel Gourash
Seeley Savidge Ebert & Gourash Co LPA
26600 Detroit Rd, Ste 300
Westlake, OH 44145-2397
(216) 566-8200
Fax: (216) 566-0213
dfgourash@sseg-law.com

Mathew Grimes
Grimes Law Group
1418 W Cortez St, Ste 3
Chicago, IL 60642-4382
(312) 925-8786
matt@grimeslawgroupllc.com

Christopher Kreiner
Womble Bond Dickinson (US) LLP
1 W 4th St, Ste 100
Winston Salem, NC 27101-3846
(336) 721-3600
ckreiner@wcsr.com

Richard Luis
175 County Road B2 E, Apt 201
Little Canada, MN 55117-1513
(651) 483-2583
luis@luislegal.com

Michael Martin
Texas Municipal League
1005 Congress Ave, Ste 510
Austin, TX 78701-2463
(512) 590-1633
mlmartin1@icloud.com

Roster, cont...

John McMeekin
Rawle & Henderson LLP
1500 Market St, Fl 19W
Philadelphia, PA 19102-2126
(215) 370-9626
Fax: (215) 563-2583
jmcmeekin@rawle.com

Diane Nergaard
XLNT Insurance Co
1177 High Ridge Rd
Stamford, CT 06905-1221
(203) 359-3736 Ext 3736
Fax: (203) 353-9305
dnergaard@xlntinsurance.com

David Pardue
Parker Poe Adams & Bernstein LLP
336 Lands Mill Road SE
Marietta, GA 30067
(404) 889-1866
davidpardue@parkerpoe.com

Amber Peckio Garrett
Amber Law Group
2727 E 21st St, Ste 100
Tulsa, OK 74114-3523
(918) 895-7216
amber@amberlawgroup.com

Lisa Pittman
Pittman Legal
1200 Miami Dr
Austin, TX 78733-2548
(512) 900-6310
lisa@pittman.legal

Katherine Poirier
Borden Ladner Gervais LLP
1000 Rue De La Gauchetire Ouest
Bureau, Ste 900
Montreal, QC H3B 5H4
(514) 954-3175
KPoirier@blg.com

Albert Randall
Franklin & Prokopik PC
2 N Charles St, Ste 600
Baltimore, MD 21201
(410) 230-3622
Fax: (410) 752-6868
arandall@fandpnet.com

Tracie Rose
RHP Risk Management Inc
8745 W Higgins Rd, Ste 320
Chicago, IL 60631-9830
(773) 8676000
trose@rhprisk.com

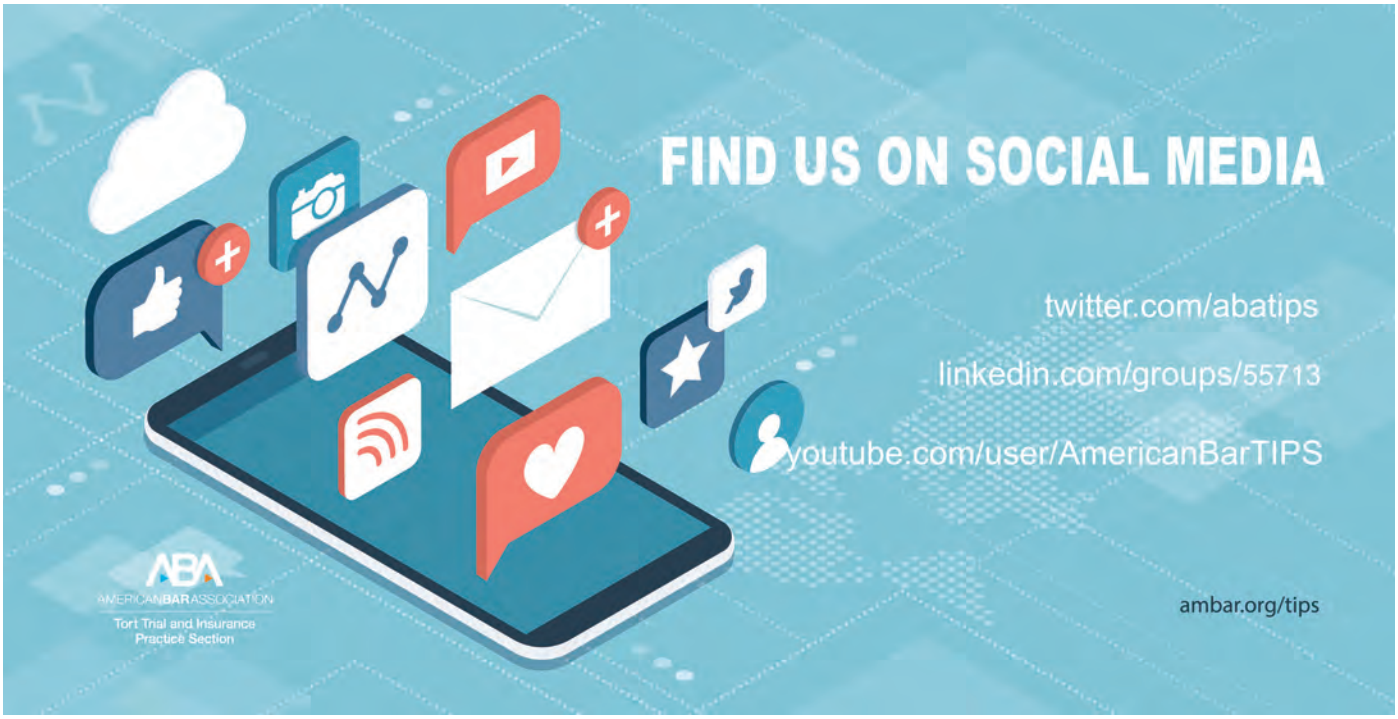
Lauren Rudick
HILLER PC
641 Lexington Ave, Fl 29
New York, NY 10022-4503
(212) 319-4000
lrudick@hillerpc.com

Andrea Steel
Frost Brown Todd LLC
4400 Post Oak Pkwy, Ste 2850
Houston, TX 77027-3453
(281) 755-3850
Fax: (713) 731-9895
asteel@fbtlaw.com

Wesley Sunu
Sentry Insurance
1800 North Point Dr
Stevens Point, WI 54481
(715) 3466818
Fax: (715) 346-7028
wesley.sunu@sentry.com

Tara Tedrow
Lowndes Drosdick Doster et al
215 North Eola Dr
Orlando, FL 32802-2809
(407) 645-1704
Tara.tedrow@lowndes-law.com

Hannes Zetzsche
Baird Holm LLP
1700 Farnam Street, Ste 1500
Omaha, NE 68102
(402) 636-8210
hzetzsche@bairdholm.com



Calendar

October 26-27, 2023	**Aviation and Space Law Conference** Contact: Theresa Beckom – 312/988-5672 Cameron Witbeck – 312/988-5668	**Ritz-Carlton Pentagon City** Arlington, VA
January 24-26, 2024	**Fidelity & Surety Law Midwinter Conference** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**The Roosevelt New Orleans** New Orleans, LA
January 31- February 5, 2024	**ABA Midyear Meeting** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Omni/Marriott** Louisville, KY
February 1, 2024	**Business Litigation Conference** Contact: Theresa Beckom – 312/988-5672	**TBD**
February 22-24, 2024	**Insurance Coverage Litigation Conference** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Estancia La Jolla Hotel** La Jolla, CA
February 23-24, 2024	**Life Health & Disability Conference** Contact: Theresa Beckom – 312/988-5672 Janet Hummons – 312/988-5656	**Estancia La Jolla Hotel** La Jolla, CA
March 2024	**Cyber Security Conference** Contact: Theresa Beckom – 312/988-5672	**TBD**
March 2024	**Workers Compensation Conference** Contact: Janet Hummons – 312/988-5656	**TBD**
April 10-12, 2024	**Motor Vehicle Product Liability Conference** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Omni Scottsdale Montelucia** Scottsdale, AZ