

SJ 31: DEFINITION OF HEMP ANALYSIS

BACKGROUND

At its April meeting, the Economic Affairs Interim Committee (EAIC) requested additional analysis on how to address the definition of hemp.

Section 16-12-102, MCA, provides for the following definitions:

16-12-102. Definitions. As used in this chapter, the following definitions apply:

- (20) (a) "Marijuana" means all plant material from the genus *Cannabis* containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination.
- (b) The term does not include *hemp*, including any part of that plant, including the seeds and all derivatives, extracts, *cannabinoids*, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis, or commodities or products manufactured with hemp, or any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products. (emphasis added)
- (24) "Marijuana product" means a product that contains marijuana and is intended for use by a consumer by a means other than smoking. The term includes but is not limited to edible products, ointments, tinctures, marijuana derivatives, and marijuana concentrates.
- (26) "Mature marijuana plant" means a harvestable marijuana plant.

Section 16-12-208, MCA, restricts dispensaries from selling all forms of hemp:

16-12-208. Restrictions.

- (7) An adult-use dispensary or medical marijuana dispensary may not sell or otherwise transfer hemp or alcohol from a licensed premises.

Section 16-12-224, MCA, authorizes licensed dispensaries to sell the following:

16-12-224. Licensing of dispensaries.

- (4) A medical marijuana dispensary is authorized to sell exclusively to registered cardholders *marijuana, marijuana products, and live marijuana plants*. (emphasis added)
- (5) An adult-use dispensary is authorized to sell *marijuana, marijuana products, and live marijuana plants* to consumers or registered cardholders. (emphasis added)

Questions were raised during the rulemaking process regarding the interpretation of the definition of hemp and whether the Legislature intended cannabidiol (CBD) products to be excluded from sales at dispensaries. After multiple hearings with the EAIC and the public, the Department of Revenue revised ARM 42.39.409:

(13) The prohibition in 16-12-208, MCA, on marijuana dispensaries selling hemp is limited to hemp flower and hemp plants.

ANALYSIS

The language in 16-12-102(20)(b) is derived from the United States Department of Agriculture's (USDA) definition of hemp:

The 2014 Farm Bill defines "industrial hemp" as "the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentrate of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 5940(a)(2). The 2018 Farm Bill added a new, slightly different definition of "hemp" in section 297A of the AMA, defined 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 concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o(1). Both definitions require a THC concentration of not more than 0.3 percent for a *Cannabis sativa* L. plant to be considered hemp versus marijuana.¹

The definition of hemp in the Montana Code Annotated (MCA) is driven by the USDA's definition, as seen in 80-18-101, MCA:

80-18-101. Definitions. As used in this part, the following definitions apply:

- (1) "Hemp" means all parts and varieties of the plant *Cannabis* consistent with the United States department of agriculture's definition of hemp and rules established by the department.
- (2) "Hemp crude" means a hemp derivative in a temporary state of not complying with the legal definition of hemp, the amount of tetrahydrocannabinol, or the amount of tetrahydrocannabinolic acid that will be further processed in order to comply.
- (3) "Hemp derivatives" means all products that contain or are processed from, extracted from, or manufactured from hemp.
- (4) "Marijuana" means all plant material from the genus *Cannabis* containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination.

Modifying the definition of hemp in 16-12-102, MCA, to clarify the allowance of CBD sales in dispensaries creates inconsistency with the definition of hemp in 80-18-101, MCA.

The rule of statutory construction, *expressio unius est exclusio alterius*, means the expression of one thing is the exclusion of the other. Therefore, if permissive language is added in both 16-12-208, MCA, and 16-12-224, MCA, the implication is the only allowable sales are the products listed in the statute. This may create an issue since dispensaries are also allowed to sell paraphernalia, t-shirts, stickers, and the like.

ARM 42.39.409 provides a clarifying statement regarding the Legislature's intent to allow dispensaries to sell CBD products by saying "the prohibition in 16-12-208, MCA, on marijuana dispensaries selling hemp *is limited to hemp flower and hemp plants.*" (emphasis added)

Adding similar limiting language only to 16-12-208, MCA, creates consistency with the rule and complies with the rules of statutory construction.

¹ <https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf>

ORIGINAL RECOMMENDATION

The original committee options were to revise the definition of hemp, add permissive language to either or both 16-12-208, MCA, and 16-12-224, MCA, revise more than one statute, or keep the updates as an administrative rule. The EAIC requested additional research regarding implications on revising the definition of hemp and adding permissive language, and based on the analysis provided above, the recommendation is to add limiting language to 16-12-108:

16-12-208. Restrictions.

(7) An adult-use dispensary or medical marijuana dispensary may not sell or otherwise transfer hemp flower, hemp plants, or alcohol from a licensed premises.

DOR RECOMMENDATION

From a July 12 e-mail from the Department of Revenue:

What the Department hopes to accomplish with Delta-8, Delta-10, and other intoxicating cannabinoids cannot be accomplished with just changing the definition of hemp. Based on other states and their respective struggles with these products, it will likely take comprehensive legislation to address. [We] can elaborate at the July 19 EAIC meeting and explain that we are studying these products and potential solutions.

In the meantime, we think the most reasonable solution to the hemp/CBD issues is to amend 16-12-208 as [above].

COMMITTEE OPTIONS

Option A: Revise 16-12-208, MCA, (Restrictions) to add limiting language consistent with ARM 42.39.409.

Option B: Leave as is (remain as an administrative rule update).