Alert

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Controlled Substances, CBD and COVID-19

While the country wrestles with the coronavirus pandemic, the federal government and many state governments recently made key determinations that could shape the future of the cannabis, hemp, and CBD industries for years to come.

First, is the Drug Enforcement Agency's (DEA) removal of the CBD drug Epidiolex from the Controlled Substances Act's (CSA) Schedule of Controlled Substances, in its entirety. Epidiolex, the only FDA-approved cannabis-derived drug, was previously classified as a Schedule V drug by the DEA. It is also the only cannabis-derived drug product considered to be "lawful" and therefore capable of trademark registration by the U.S. Patent and Trademark Office (USPTO). This declassification of Epidiolex can have significant ramifications for the future of CBD drugs and products generally, as this paves the way for those items get to the marketplace whenever the FDA ultimately approves CBD for public consumption.

Next, is the USPTO's allowance and registration of a litany of patents including or relating to cannabis and CBD. Most recently, the USPTO issued a notice of allowance for U.S. Patent App. No. 15/494,514, purported to be a method to use chewing gum composed of cannabinoids (including CBD) and tobacco to treat nicotine addiction. Interestingly, this trend reveals that the USPTO's patent division appears to be far more progressive than its trademark division, which generally refuses to register trademarks used in connection with cannabis goods and services.

The trademark division currently allows for the registration of many goods and services relating to "hemp" (which is defined as cannabis containing a THC concentration of not more than 0.3 percent on a dry weight basis). However, it refuses to register trademarks used in connection with the most common CBD products on the market — dietary, nutritional, and ingestible hemp products containing CBD — on the basis that, since the FDA has not approved CBD generally, the sale of those products is unlawful in interstate commerce. Hopefully, either the FDA approves the use of CBD generally in the near future (although that is unlikely), or at the very least, the USPTO revises their approach to the registration of these trademarks.

Lastly, but perhaps the most important development, is the determination by 28 states and the District of Columbia, that cannabis dispensaries are "essential businesses," allowing those businesses to continue operating despite the ongoing pandemic. In fact, every state that allows the use of medical and/or recreational cannabis, which has enacted some type of stay-at-home order, has designated cannabis dispensaries as essential, with the exception of Missouri and West Virginia. One caveat however, is the fact that three states (Maine, Vermont, and Massachusetts), as well as Washington, D.C., which typically allow recreational dispensaries, are currently only allowing medical dispensaries to remain open.

Regardless, with at least 56 percent of states declaring at least medical cannabis to be essential to their constituents during a time of crisis, along with the federal government's recent actions, we may be witnessing the turning point in the cannabis, hemp, and CBD industries unfold before us. Moreover, as a result of the ballooning federal deficit, which is growing larger in light of the COVID-19 stimulus bill, the country may look for new ways to decrease the deficit when the pandemic ends. Hopefully, this will include further relaxation of the federal government's current position on cannabis and CBD products, which will jumpstart these industries and generate significant additional tax revenue for the country.

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Related Practice Areas

- Intellectual Property
- Patents
- Trademark & Brand

Industry Sectors

- Cannabis

DISCLAIMER: Cannabis is still classified as a Schedule I controlled substance by the U.S. Drug Enforcement Agency, and as such it remains a federal crime to grow, sell and/or use cannabis. Any content contained herein is not intended to provide legal advice to assist with violation of any state or federal law.