Lack of Clear Federal Guidance on CBD Exposes Sellers to Continued Risks of Enforcement by the FDA, FTC and State AGs

大成 DENTONS

June 8, 2021

In 2019, the vast majority of State Attorneys General ("AGs") urged the Food and Drug Administration ("FDA") to partner with States to protect consumers from false advertising and potential harms of hemp-derived products, including cannabidiol ("CBD"). [1] The AGs sought research into the risks and benefits of cannabinoid products and encouraged the FDA to work with the states on guidelines. Previously, the 2018 Farm Bill removed hemp products with less than .3% of THC from the Schedule I list and permitted states to create their own regulatory plan reviewed by the federal government for approval. In the absence of clear government guidance, CBD products and their manufacturers have faced, and will likely continue to face, uneven enforcement by different federal agencies and even State Attorneys General

Following six enforcement actions on deceptive representation claims in December 2020, the Federal Trade Commission ("FTC") in March approved final administrative consent orders against these same sellers of CBD products, for alleged unsupported claims to treat health conditions such as cancer, heart disease and Alzheimer's disease. The orders prohibited the allegedly illegal conduct and required several companies to pay money to the FTC.

On May 17, 2021, the FTC announced their seventh enforcement action to halt deceptive health and efficacy claims for CBD products. The company agreed to not make false or unsupported claims or falsely claim that scientific studies or research exists to support the use of their products. The company, Arizona-based Kushly Industries LLC, allegedly did not substantiate its claims that their products effectively treat or cure common ailments such as acne and psoriasis, as well as serious diseases such as cancer and multiple sclerosis. The proposed settlement will preclude the company from making such claims in the future as well as notify consumers and affected businesses about the complaint, along with requiring a payment of the amount consumers paid for the products.

Such actions by the FTC are designed to deliver two main messages to the CBD industry. First, unfair and deceptive acts and practices ("UDAP") will bring enforcement action to protect consumers. Second, advertising claims must be based on competent and reliable scientific evidence.

Concurrently, a group of bipartisan senators have introduced federal legislation, known as the Hemp Access and Consumer Safety Act to permit CBD to be marketed in dietary supplements, food and beverages under the Food Drug and Cosmetic Act. Similar legislation has been reintroduced in the House.

Importantly, such legislation does not provide relief for companies alleging health claims that are not the result of valid scientific evidence. The FTC, FDA and the States through their own consumer protection statutes will seek relief where consumer protections are not fully afforded.

Companies manufacturing, distributing or selling CBD protects must continue to ensure that all health claims are the result of thorough scientific studies that will satisfy both the FTC and FDA along with State Attorneys General. Advertising claims must meet the same high standard as other consumer and healthcare products.

---

1 https://www.naag.org/policy-letter/naag-urges-fda-to-include-ags-in-oversight-of-cannabis-derived-products/

Your Key Contacts

Samuel S. Olens
Partner, Atlanta
D +1 404 527 4108
M +1 404 483 2477
samuel.olens@dentons.com

Daniel C. Gibb
Partner, Washington, DC
D +1 202 496 7163
dan.gibb@dentons.com

Eric P. Berlin
Partner, Chicago
D +1 312 876 2515
eric.berlin@dentons.com

Kathryn B. Ashton
Partner, Chicago
D +1 312 876 3157
kathryn.ashton@dentons.com