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**PUBLIC NOTICE**

**FROM:** Steve Marshall, Alabama Attorney General; Hal Taylor, Secretary of the Alabama Law Enforcement Agency; Angelo Della Manna, Director of the Alabama Department of Forensic Sciences

**SUBJECT:** Guidance on Alabama Law Regarding the Possession, Use, Sale, or Distribution of CBD

**NOTE:** On December 20, 2018, the President signed into law the Agricultural Improvement Act of 2018.<sup>1</sup> The law contains a provision legalizing industrial hemp beyond the existing pilot programs authorized by Congress in 2014.<sup>2</sup> As a result of the law's enactment, followed by state legislative action, cannabidiol (CBD) derived from industrial hemp, with a tetrahydrocannabinol (THC) concentration of not more than 0.3% on a dry weight basis, can be legally sold and possessed in the State of Alabama.<sup>3</sup> However, the U.S. Food and Drug Administration has only approved one CBD-based product for medicinal use—the prescription drug Epidiolex—and closely scrutinizes the legality of CBD products sold or marketed as consumables, dietary supplements, or medicines.<sup>4</sup> The federal law does not prevent the state from restricting or regulating the production of industrial hemp,<sup>5</sup> and Alabama is preparing its own regulatory plan.<sup>6</sup> Industrial hemp in plant form can only be legally possessed by licensees of the Alabama Department of Agriculture and Industries.<sup>7</sup>

**CBD with above a 0.3% (three one-thousandths) THC concentration on a dry weight basis is illegal.**

Background

Section 13A-12-212 of the Alabama Criminal Code makes it illegal to possess or receive a controlled (regulated) substance, while Sections 13A-12-213 to -214 specifically address the possession of marijuana—punishable by a Class A misdemeanor when possessed for personal use or by a Class C felony when possessed for reasons other than personal use.

Section 13A-12-211 of the Alabama Criminal Code makes it illegal to sell, furnish, give away, deliver, or distribute a controlled substance, including marijuana. A violation of this section is punishable by a Class B felony. Section 13A-12-231 of the Alabama Criminal Code makes it illegal to “traffic”—sell, manufacture, deliver, or bring into the state—any part of a cannabis (marijuana) plant in an amount greater than 2.2 pounds. This crime carries mandatory prison time that increases with the weight of the marijuana in question.

In 2014, the Alabama Legislature passed Carly’s Law.<sup>8</sup> Carly’s Law provides an affirmative defense to a narrow class of individuals—those who have a debilitating epileptic condition *and* who have a prescription for CBD authorized by the UAB Department of Neurology—who would otherwise be in illegal possession of CBD. The law also provides an affirmative defense to possession of CBD by a parent or caretaker of an individual who has both the required condition and prescription. The law included a sunset provision specifying that it would be automatically repealed on July 1, 2019, but later legislation extended the date to July 1, 2020.<sup>9</sup>

The effect of Carly’s Law is that an individual who has a debilitating epileptic condition and receives a prescription for CBD approved by the UAB Department of Neurology, who is then criminally prosecuted for unlawful possession of marijuana,<sup>10</sup> may be excused for his or her otherwise unlawful conduct. The same would apply to possession of CBD by the individual’s parent or caretaker. Carly’s Law did not legalize the possession or use of CBD.

In 2016, the Alabama Legislature passed Leni’s Law.<sup>11</sup> Leni’s Law provides an affirmative defense for another class of individuals—those who have a chronic or debilitating disease or medical condition that produces seizures for which they are being treated—who would otherwise be in illegal possession of CBD. For the affirmative defense to apply, the CBD must have been tested by an independent third-party laboratory.<sup>12</sup> The law also extends the affirmative defense to possession of CBD by a parent or guardian of a minor with such a condition.

The effect of Leni’s Law is that an individual who has a chronic or debilitating disease or medical condition that produces seizures, who is criminally prosecuted for unlawful possession of marijuana for personal use,<sup>13</sup> may be excused for his or her otherwise unlawful conduct. The same would apply to possession of CBD by the individual’s parent or guardian. Leni’s Law did not legalize the possession or use of CBD.

Carly’s Law and Leni’s Law include a provision that, for an individual to successfully assert the affirmative defense, the THC level of the CBD must be “no more than” 3%. To be clear, CBD with a concentration of more than 0.3% (three one-thousandths) THC according to dry weight is illegal under Alabama law. The affirmative defense provided to a narrow class of individuals under Carly’s Law and Leni’s Law is available when the THC level is at or below 3%

(three one-hundredths) relative to CBD, but unavailable if the CBD in question has a THC level above 3% (three one-hundredths) relative to CBD.

On October 28, 2018, the Alabama Department of Public Health adopted a rule allowing for the medical use of FDA-approved drugs that contain CBD (i.e., Epidiolex). In other words, Epidiolex is now legal for a doctor to prescribe for the treatment of two forms of epilepsy—Lennox-Gastaut syndrome and Dravet syndrome. While Carly’s Law and Leni’s Law provide only an affirmative defense to the otherwise illegal possession of CBD, Epidiolex will be regulated in the same way as any other prescription drug.

Selling, delivering, or distributing CBD with a concentration of more than 0.3% THC on a dry weight basis is illegal in Alabama, except for the prescription drug Epidiolex. The affirmative defenses found in Carly’s Law and Leni’s Law can only be raised by individuals prosecuted for unlawful possession of marijuana. In other words, Carly’s Law and Leni’s Law offer no “safe harbor,” even to the narrow class of individuals covered, for selling or distributing marijuana,<sup>14</sup> or for trafficking in marijuana.<sup>15</sup> This is a conclusion of law based on a plain reading of the statute, regardless of what the Alabama Legislature may have intended. Carly’s Law protects *only* the UAB Department of Neurology and the UAB School of Medicine from being prosecuted for marijuana-related crimes (such as distribution) arising out of the prescription of CBD to those with a debilitating epileptic condition.<sup>16</sup> It is illegal for CBD with a concentration of more than 0.3% THC on a dry weight basis to be sold by any convenience store, gas station, or private individual.

As the law enforcement agencies of the State of Alabama and its subdivisions, it is our responsibility to interpret and enforce the law as written by the Alabama Legislature. This public notice does not fully address federal law pertaining to CBD, which is enforced by the U.S. Department of Agriculture and the U.S Food and Drug Administration. If you have questions about this guidance or its application to your situation, please contact your local district attorney’s office. Law enforcement officials with questions may contact the Alabama Attorney General’s Office or the Alabama Law Enforcement Agency (ALEA). All health-related questions should be directed to the Alabama Department of Public Health.

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<sup>1</sup> Agriculture Improvement Act of 2018, Pub. L. 115–334, 132 Stat. 4490 (2018). This Act is commonly known as the “2018 farm bill.”

<sup>2</sup> The pilot programs permitted state departments of agriculture and state institutions of higher education “to study the growth, cultivation, or marketing of industrial hemp.” *See* 7 U.S.C. § 5940.

<sup>3</sup> The 2018 farm bill defined “hemp” 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. Applying that definition to other sections of the law, the 2018 farm bill also distinguished hemp from marijuana and removed hemp from the list of federally controlled substances. *See* 21 U.S.C. §§ 802(16)(B)(i), 812(c) sched. I(c)(17). Following suit, a 2019 state law enacted in Alabama made analogous changes with regard to hemp. *See* Act of June 10, 2019, No. 2019-502 (to be codified at Ala. Code §§ 2-8-381, 2-8-383, 20-2-2, 20-2-23), <http://arc-sos.state.al.us/pac/sosacpdf.001/a0013422.pdf> [<http://perma.cc/W8SP-WS6E>].

<sup>4</sup> *See* 7 U.S.C. § 1639r(c); *Statement from FDA Commissioner Scott Gottlieb, M.D., on Signing of the Agriculture Improvement Act and the Agency’s Regulation of Products Containing Cannabis and Cannabis-Derived Compounds*, U.S. FOOD & DRUG ADMIN. (Dec. 20, 2018), <http://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys> [<http://perma.cc/DPW6-T4ZH>].

<sup>5</sup> *See* 7 U.S.C. § 1639p (stating that “[n]othing in this [law] preempts or limits any law of a [s]tate . . . more stringent than this [law]” with regard to regulating the production of hemp).

<sup>6</sup> Act of June 10, 2019, sec. 1, § 2-8-383(e) (requiring the Alabama Department of Agriculture and Industries to “develop a plan under which the state monitors and regulates the production of hemp”).

<sup>7</sup> *See* Ala. Code § 2-8-380.

<sup>8</sup> Carly’s Law, No. 2014-277, 2014 Ala. Laws 881 (codified at Ala. Code § 13A-12-214.2).

<sup>9</sup> *See* Act of June 10, 2019, No. 2019-511, § 2 (to be codified at Ala. Code § 13A-12-214.2), <http://arc-sos.state.al.us/pac/sosacpdf.001/a0013431.pdf> [<http://perma.cc/N9SE-SWPC>].

<sup>10</sup> Carly’s Law does not specify whether the affirmative defense applies to unlawful possession of marijuana in the first and second degree; however, because the affirmative defense requires an individual to have a prescription, the defense may not be successful in a prosecution for unlawful possession of marijuana not for personal use (or marijuana possession in the first degree). *See* Ala. Code § 13A-12-214.2(c)–(d).

<sup>11</sup> Leni’s Law, No. 2016-268, 2016 Ala. Laws 663 (codified at Ala. Code § 13A-12-214.3).

<sup>12</sup> *See* Ala. Code § 13A-12-214.3(a)(2)(a) (setting forth the statutory definition of CBD, which must be “tested by an independent third-party laboratory”).

<sup>13</sup> *See generally id.* § 13A-12-214 (defining the crime of unlawful possession of marijuana in the second degree).

<sup>14</sup> *See generally id.* § 13A-12-211 (defining crimes relating to the distribution of controlled substances).

<sup>15</sup> *See generally id.* § 13A-12-231 (defining crimes relating to the trafficking of illegal substances).

<sup>16</sup> *See id.* § 13A-12-214.2(g), (i).