

DEA's FINAL RULE LISTING MARIJUANA DERIVATIVES AS SCHEDULE I DRUGS MAY PROHIBIT HEMP-INFUSED BEVERAGES

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On February 6, 2017, the Oregon Liquor Control Commission (OLCC) released guidance for Oregon alcohol beverage producers that prohibits the production of cannabis-infused beverages. While marijuana-infused alcohol beverages remain prohibited by the state agency, the same guidance outlines an exception for using industrial hemp in hemp-infused alcohol beverages if certain conditions are met. However, for the reasons outlined below, we caution that the Policy for Beverage Alcohol Products Made with Hemp that was issued on April 6, 2000, by the U.S. Bureau of Alcohol, Tobacco and Firearms (ATF) is likely superseded by the Final Rule that was promulgated by the U.S. Drug Enforcement Agency (DEA) and published in the Federal Register on December 15, 2016, that added all cannabis extracts to the list of Schedule I drugs regulated by the Controlled Substances Act (CSA). Should the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) revisit its 2000 policy and revise it to conform with the DEA's new Final Rule on marijuana derivatives, the result effectively could eliminate the market for hemp-infused beverages.

The OLCC's guidance was issued in response to that Final Rule of the DEA, which has the effect of adding tetrahydrocannabinol (THC) and cannabidiol (CBD) as Schedule I drugs that are illegal under the CSA. On December 14, 2016, the DEA published its Final Rule in the Federal Register creating a new Administration Controlled Substances Code Number for "Marihuana Extract."¹ As provided in 21 CFR 1308.03, each controlled substance is assigned a four digit Administration Controlled Substance Code Number that is used to track quantities of the controlled substance imported and exported to and from the United States.

Through publication of its Final Rule, the DEA amended 21 CFR 1308.11(d) to include a new subparagraph (58) which creates a new code number in Schedule I as follows:

¹ The DEA's Final Rule on Marihuana Extracts is accessible online at:
<https://www.federalregister.gov/documents/2016/12/14/2016-29941/establishment-of-a-new-drug-code-for-marihuana-extract>

“(58) Marihuana Extract—7350

“Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.”

Marijuana is a Schedule I controlled substance because of the presence of THC, marijuana’s psychoactive ingredient. Because CBD contains less than one percent (1%) THC and has shown some potential medicinal value, there is great interest in studying it for medical applications. Nevertheless, the creation of this new drug code in the DEA regulations for marijuana extracts further confirms that products containing CBD or THC are now considered subject to Schedule I restrictions under the Controlled Substances Act. This would include alcohol beverages infused with marijuana or otherwise containing either THC or CBD.

Interestingly, the OLCC has created an exception for hemp-infused beverages that meet certain conditions. Specifically, hemp-infused alcohol beverages are allowed in Oregon they meet all of the following regulatory criteria:

1. the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) has approved the beverage formula, in accordance with the April 2000 Hemp Policy;² a copy of that federal agency policy is accessible online at:
https://www.ttb.gov/press/fy04press/092904hemppolicy.pdf?cm_sp=ExternalLink--Federal--Treasury .
2. Hemp-infused alcohol beverage labels must comply with all TTB requirements.
3. An OLCC liquor licensee must provide proof of all TTB formula and labeling requirements, and receive approval from the OLCC, prior to the hemp-infused beverage being manufactured, imported, or sold in Oregon.

HOWEVER, when ATF issued its Policy for Beverage Alcohol Products Made with Hemp, the agency specifically noted that it was contingent on the incomplete status of DEA’s rules regarding marijuana extracts. AS ATF noted in a January, 2002 Newsletter:

On April 6, 2000, ATF issued a policy on the use of hemp or hemp components in alcohol beverages and on the use of the term “hemp” or depictions of the hemp plant on labels for alcohol beverages. The policy does not ban the use of hemp in alcohol beverages, but was created to assure that beverage alcohol products do not contain a controlled substance (tetrahydrocannabinol (THC)). ATF also determined that the appearance of the word “hemp” or depictions of hemp plants on labels was likely to create a misleading impression as to the true identity or quality of the product. As of this writing, there are no approved certificates of label approval for products containing hemp. **On October 9, 2001,**

² On April 6, 2000, TTB’s predecessor, the U.S. Bureau of Alcohol, Tobacco and Firearms (ATF) issued a policy on the use of hemp or hemp components in alcohol beverages and on the use of the term “hemp” or depictions of the hemp plant on labels for alcohol beverages. The policy when issued did not ban the use of hemp in alcohol beverages, but was created to assure that beverage alcohol products did not contain a controlled substance (tetrahydrocannabinol (THC)).

the Drug Enforcement Administration (DEA) published in the Federal Register an interpretive rule stating that under the Controlled Substance Act and DEA regulations, any amount of THC, including microscopic traces, is a schedule I controlled substance. The intent of this rule is to ban from importation or sale foods made from or containing hemp because they contain traces of THC, the primary active constituent of marijuana. Products on the market that might be affected by this action include some alcohol beverages, cheeses, coffees, corn chips, energy drinks, flours, ice creams, snack bars, salad oils, sodas and veggie burgers. The comment period for the proposed rule (DEA-205) ended December 10, 2001.

ATF will not change our April 6, 2000, hemp policy pending finalization of DEA's rulemaking process on this issue. When DEA's final rule is published, ATF will apply it to alcohol beverages containing hemp.³

Now that DEA has finalized its rule adding all marijuana derivatives containing any amount of THC to Schedule I, it is likely that the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) will reconsider the continuing efficacy of its April 6, 2000 Policy for Beverage Alcohol Products Made with Hemp.

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³ Vol. 3, Issue 1, The Alcohol and Tobacco Newsletter, published by the U.S. Bureau of Alcohol, Tobacco and Firearms (Washington D.C. January 2002) at pp. 1-2. This document is accessible online at: https://www.ttb.gov/press/fy04press/092904hemppolicy.pdf?cm_sp=ExternalLink-_-Federal-_-Treasury