

February 2, 2022

One of the CDPH industrial hemp FAQs decrees that out-of-state manufacturers cannot be registered by the State of California and thus cannot ship product into the state. This provision is completely at odds with the spirit and letter of AB 45. It undercuts a primary objective of the author, the proponents, the Legislature and, we believe, the Administration - to ensure that all hemp CBD products sold in California, no matter their source, are safe for consumers. Finally, it is contrary to the agreement between the author, the Governor, the Legislature and the industry that was memorialized in AB 45.

It also slams the door on countless manufacturers across the country who were assured by the statutory framework and content of AB 45 that their compliant products would be welcome in California as they have been in the other states that have adopted hemp CBD laws regardless of federal policy.

In fact, most manufacturers do extraction as well as product manufacturing, and all manufacturers are subject to the same regulatory framework. AB 45 anticipated that all manufacturers, in-state and out-of-state, would be registered.

The department has interpreted the language in AB 45 as only allowing state registration for in-state manufacturers, unless an out-of-state entity is intending to only import raw hemp extract into the state. They have created a new category of manufacturer that does not occur anywhere in the hemp statute: an extract manufacturer (as opposed to a product manufacturer). However,

- There is no language in the definitions of “hemp manufacturer,” “manufacture” or “manufacturing” (BPC 111920) that in any way suggests a distinction between in-state and out-of-state manufacturers or between extractor manufacturers or product manufacturers and no provision that prohibits out-of-state manufacturers from importing their product to California.
- BPC 111923.3(d) further defines who has to register. Again, this section does not create different requirements for in-state and out-of-state manufacturers or extract or product manufacturers. The one exception is that that section explicitly references extractors to ensure that entities that are only producing raw extract for importation to the state are subject to the same registration obligation as other manufacturers.
- BPC Section 111923.7 requires out-of-state manufacturers to reimburse CDPH for the cost of inspecting the manufacturer’s facility to ensure compliance with California law. That provision was added at the request of the Administration, does not apply to any specific type of manufacturer and would never have been necessary if the bill prohibited out-of-state manufacturers from importing into California.

For the department to create something that the Legislature and the Governor did not include in the final agreement is not statutorily authorized. If the Legislature and the Governor had wanted the law to treat extractors differently, then the bill would have done that. Over three long years of negotiations on this bill, there was ample opportunity for the Department, the Governor or the Legislature to request this bifurcation between manufacturers. At no point in those negotiations was the issue ever mentioned or language requested.

The Department is justifying their action by claiming that they are aligning with the FDA’s position on hemp CBD; because the FDA makes a distinction between CBD as an extraction and CBD as an ingredient, CDPH believes they can make the same distinction and exclude manufacturers who use the extraction as an ingredient. However, it was clear to all stakeholders over the bill’s travels that

California law would not be aligned with federal policy, and if alignment was a prerequisite for enactment of the law, the bill would have done that.

Further, CDPH's position ignores the fact that even the FDA is not enforcing against companies that are shipping finished products across state lines (a fact that CDPH acknowledges in their BCP on AB 45 implementation). The handful actions taken by the FDA have been in regard to companies making inappropriate health and medical benefit claims.

CDPH seems to believe they can and should prohibit interstate commerce even though the federal government doesn't and even though California law does not give the department the authority to do so relative to hemp CBD products.

Because this is a nascent industry, it is difficult to assess exactly how many manufacturers would be impacted by this FAQ. However, while the numbers ultimately are expected to be in the thousands, the US Hemp Roundtable currently has 45 members nationally that are manufacturers but estimates indicate that there are at least 1000 nationally; USHRT does not distinguish between extractors and other manufacturers. The California Hemp Council estimates 150 manufacturers in California, many of which are California-based but have manufacturing facilities in other states (which creates another uncertainty about whether an in-state company can be registered by CDPH and ship products from their out-of-state facilities into the state).

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