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PUBLIC NOTICE

FROM: Steve Marshall, Alabama Attorney General; Hal Taylor, Secretary of the Alabama Law Enforcement Agency; Barry Matson, Executive Director of the Office of Prosecution Services; 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: This notice has been updated to reflect recent action by the U.S. Congress regarding cannabidiol (CBD) derived from industrial hemp. On December 12, 2018, the U.S. House of Representatives gave final passage to the Agricultural Improvement Act of 2018ⁱ which is expected to be signed into law. This bill contains a provision legalizing industrial hemp, beyond the existing pilot programs passed by Congress in 2014. As a result of this Congressional action, CBD derived from industrial hemp, with a THC concentration of not more than .3% on a dry weight basis, can be legally produced, sold, and possessed in the State of Alabama. However, as stated in the bill, the new federal law will not prevent states from adopting laws to restrict or regulate the production of industrial hemp. Furthermore, prescription drugs and other consumables containing CBD will be regulated by the U.S. Food and Drug Administration. **The guidance below still applies to CBD derived from marijuana or CBD derived from hemp with above a .3% (three one-thousandths) THC concentration on a dry weight basis.**

Recent questions surrounding the legality of cannabidiol (CBD) suggest that a brief explanation and review of several relevant Alabama criminal laws might be helpful to the public.

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 Lawⁱⁱ to provide an affirmative defense to a narrow class of individuals—those with 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 extends the affirmative defense to possession of CBD by a parent or caretaker of an individual who has both the required condition and prescription. The Legislature included a “sunset date” of July 1, 2019 in the law, which means that the law and its protections will no longer exist as of that date.

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,ⁱⁱⁱ 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.

Two years later, the Alabama Legislature passed Leni’s Law^{iv} to provide an affirmative defense for another class of individuals—those who have a chronic or debilitating disease or medical condition that produces seizures for which a person is 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.^v 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,^{vi} 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.

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—other than the FDA-approved prescription drug Epidiolex—is illegal under Alabama law. 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,^{vii} or trafficking in marijuana.^{viii} 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 (like distribution) arising out of the prescription of CBD to those with a debilitating epileptic condition.^{ix} It is illegal for CBD to be sold by any convenience store, gas station, or private individual.

It is also worth noting that 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% relative to CBD according to the rules adopted by the Alabama Department of Forensic Sciences.” To be clear, all CBD—whether above or below 3% THC—is illegal under Alabama law, except for the prescription drug Epidiolex. 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 below 3% relative to CBD, but unavailable if the CBD in question has a THC level above 3% relative to CBD.

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 address federal law pertaining to CBD, which is enforced by federal law enforcement agencies. 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 ALEA or the Opinions Division of the Alabama Attorney General’s Office. All health-related questions should be directed to the Alabama Department of Public Health.

ⁱ Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018).

ⁱⁱ Carly’s Law, No. 2014-277, 2014 Ala. Laws 881 (codified at Ala. Code § 13A-12-214.2).

ⁱⁱⁱ 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).

^{iv} Leni’s Law, No. 2016-268, 2016 Ala. Laws 663 (codified at Ala. Code § 13A-12-214.3).

^v *See* Ala. Code § 13A-12-214.3(a)(2)(a) (setting forth the statutory definition of CBD, which must be “tested by a[n] independent third-party laboratory”).

^{vi} *See id.* § 13A-12-214.

^{vii} *See generally id.* § 13A-12-211 (relating to distribution of controlled substances).

^{viii} *See generally id.* § 13A-12-231 (relating to trafficking in illegal substances).

^{ix} *See id.* § 13A-12-214.2(g), (i).