HEMP INDUSTRIES ASSOCIATION

August 15, 2016

MEMORANDUM FOR HEMP INDUSTRIES ASSOCIATION MEMBERS

FROM: Joe Sandler & Patrick Goggin, HIA Legal Counsel

SUBJECT: Joint "Statement of Principles on Industrial Hemp"

On August 12, 2016, the US Department of Agriculture (USDA), with the concurrence of the Drug Enforcement Administration (DEA) and Food and Drug Administration (FDA), issued a joint "Statement of Principles on Industrial Hemp" in the Federal Register. The Hemp Industries Association (HIA) is encouraged that, in this Statement, the USDA has acknowledged the legitimate role of hemp pilot programs in the 2014 Farm Bill and has specifically agreed to support hemp research. The HIA looks forward to working with the USDA to ensure that hemp pilot programs are supported by USDA similar to other crops including access to research funding, participation in USDA programs such as the National Organic Program and others.

While some of the positions taken are helpful to the industry, some other positions taken by the agencies in this document are highly detrimental to the industry and, in our view, are contrary to federal law (see our positions below). The USDA makes it clear in the Statement, however, that it is not intended as a binding rule and "does not establish any binding legal requirements." We believe that nothing in the Statement requires anyone involved in any facet of the industry to change their practices or activities. As noted below, if and to the extent the Drug Enforcement Administration (DEA) should announce or seek to take any enforcement action based on the problematic positions set out in the Statement, that DEA pronouncement or action could be challenged at the appropriate time.

On the positive side, the Statement:

- Confirms that private farmers licensed by a State Department of Agriculture or under contract with an institution of higher education, can grow or cultivate industrial hemp as part of a pilot program.

- States that institution of higher education and other participants authorized to carry out pilot programs under the 2014 Farm Bill provision "may be able to participate in USDA research or other programs to the extent otherwise eligible for participation in those programs."

On the other hand, the Statement:

- Purports to redefine the term "industrial hemp" in a manner wholly different from, and inconsistent with, the definition set out in the 2014 Farm Bill. The Statement's definition is troublesome, in two respects. *First,* the Statement's

definition would require that to be considered "industrial hemp," any part of the plant must be "used exclusively for industrial purposes (fiber and seed)." That implies that the flowering tops of the plant would not be considered "industrial hemp," even though they clearly are so considered under the statutory definition. *Second*, the Statement defines "industrial hemp" as having a "tetrahydrocannabinols" (plural) concentration of not more than 0.3 percent, with the term "tetrahydrocannabinols" to include "all isomers, acids, salts and salts of isomers …." That expanded definition could be read to require that cannabinoids other than THC—such as cannabidiol (CBD)—actually be considered in determining whether the 3/10 of one percent threshold has been exceeded—which would exclude much legitimate industrial hemp from the definition.

- Suggests that "industrial hemp product" may not be sold in states without an agricultural pilot program. Of course, to the extent that this assertion implies that products made from the exempt parts of the plant—fiber, stalk, sterilized seed, oil-cannot be sold in states without agricultural pilot programs, it would be contrary to the plain language of the Controlled Substances Act, which for decades has permitted such sales. Hemp products which are currently sold legally in the US continue to be legal in all 50 states and the Hemp Industries Association would strongly take issue with any attempt to limit the sales of legal hemp products in all states and territories of the US.

- Claims that industrial hemp products may be sold in a state with an agricultural pilot program "for purposes of marketing research by institutions of higher education or state Departments of Agriculture…. but not for the purpose of general commercial activity." To the extent the Statement is suggesting that persons licensed by a State department of agriculture or under contract with an institution of higher learning, cannot themselves market industrial hemp products, that is contrary to the language of the 2014 Farm Bill. Further, to the extent that the agencies are attempting to impose limits on the scope of marketing activity by suggesting that sales cannot be for the purpose of "commercial activity," such a limitation is not found in, and would be contrary to, the language of the Farm Bill.

- Takes the position that industrial hemp product may be sold in states with pilot programs "or among States with agricultural pilot programs" but that "[I]ndustrial hemp plants and seeds may not be transported across state lines." That would mean non-exempt parts of the plant cultivated in a pilot project could not be transported, even to another state where cultivation and sale of hemp is legal. That is directly contrary to the language of section 763 of the Consolidated Appropriations Act, 2016, P.L. 114-113, which prohibits DEA from expending any funds "to prohibit the transportation, processing, sale or use of industrial hemp that is grown or cultivated" under the 2014 Farm Bill, "*within or outside the State* in which the industrial hemp is grown or cultivated" (emphasis added).

- Takes the position that the importation of viable seed, even for an approved agricultural pilot project, requires a DEA import license. In our view, that position is clearly wrong in view of the Farm Bill's language exempting qualified pilot programs from the requirements of the CSA. This issue was raised in the case of *Kentucky Dept of Agriculture v. U.S. Drug Enforcement Administration*, Civ. Action 3:114CV-372 (W.D. Ky.), but the case was settled and there was never a judicial determination of this issue.

- Takes the position that, in addition to any required FDA approvals, the manufacture or distributions of "drug products derived from cannabis plants"—clearly referring to CBD—must obtain a DEA license as well. To the extent CBD is derived from hemp produced in a pilot project, we believe this position is legally incorrect insofar as it restricts CBD extract sold as a food or dietary supplement.

As noted, as a procedural matter, the USDA asserts in the Statement that it "does not establish any binding legal requirements" and it therefore was exempt from notice and comment rulemaking requirements under the Administrative Procedure Act. Indeed, were those requirements in effect, the public would have had an opportunity to comment on the above points before the agency adopted them.

Given that the issuing agency (USDA) has stated unequivocally that the Statement does not establish any new binding legal requirements, in our view, nothing in the Statement requires any HIA member to change any current business practice, program or operation. If and when DEA indicates that is contemplating enforcement action, or threatens or takes enforcement action, based on any of the problematic legal positions described above, HIA and/or the affected member(s) can certainly take legal action at that time.

# # #

Contact HIA Executive Director Eric Steenstra if you have any questions. Members of the media, please contact Hemp Industries Association Media Relations Director, Lauren Stansbury, at (402) 540-1208 or Lauren@wearemovementmedia.com