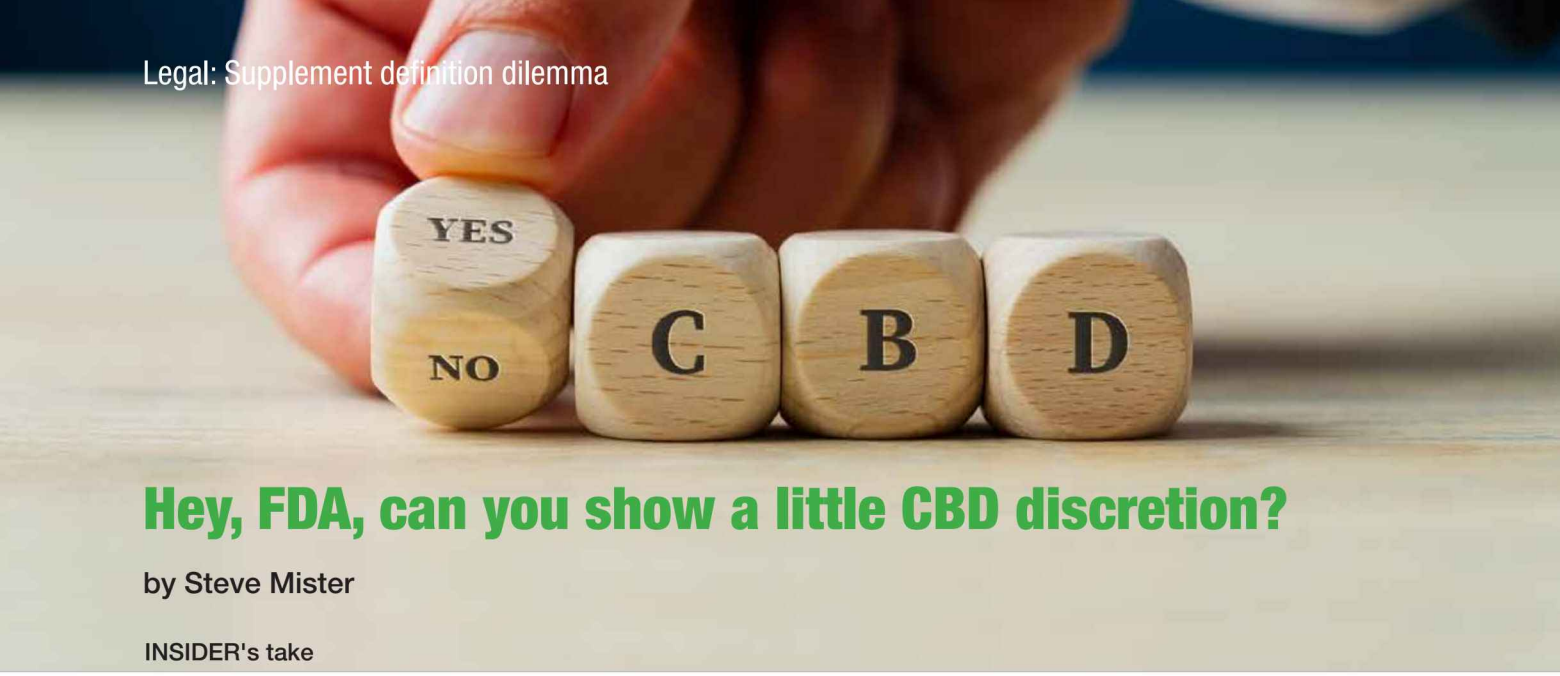

Hey, FDA, can you show a little CBD discretion?

by Steve Mister

INSIDER's take

- CBD got a boost with the passage of 2018's Farm Bill, but FDA action slowed the momentum due to prior drug research.
- Federal regulators have been reluctant to exercise the discretion sought by many in the emergent industry.
- The unique properties of hemp-derived cannabinoids may open them up to exceptional treatment.

Hemp-derived CBD was removed from the federal controlled substances list last year, when Congress enacted the latest Farm Bill.

At that point, industry, as well as members of Congress, presumed the action paved the way for CBD to come to market in both ingestible and topical products, and provided a valuable new crop for America's farmers. FDA thought differently.

Despite the new legal status for hemp and its non-THC constituents, the Farm Bill expressly recognized FDA's authority to regulate CBD-containing products under the existing provisions of the Federal Food, Drug & Cosmetic Act (FD&C). Before the ink was dry on the new law, FDA announced CBD was subject to a provision in the definition of a "dietary supplement" (21 USC § 321(ff)) that precludes bringing an ingredient to market in a supplement if the article was already approved as a drug; or if it had previously been authorized for investigation as a new drug, and substantial clinical investigations had been instituted and made public.

The provision essentially creates a race to market to preserve the financial incentives to conduct research on new pharmaceuticals. If the drug companies investigate a substance first, they get a monopoly over the ingredient; if it's already in a supplement or food, the drug companies may still commercialize it as a drug, but they have to coexist with supplements and food containing the same ingredient (recognizing, of course, that food and supplements would still be prohibited from making any disease claims for their products). A similar provision imposes the same prohibition on food (21 USC § 331(ii)). Because CBD was already the subject of clinical trials for potential use in anti-seizure medicines when the Farm Bill passed, FDA reasoned CBD could not be brought to market in ingestible form as either a food or a dietary supplement.

The industry quickly reminded FDA another alternative exists. Within the exclusionary provisions of 321(ff) is a clause allowing FDA to determine, in its discretion, through issuance of a notice and comment rulemaking, that the substance would be lawful in a supplement or food. In other words, FDA can overlook the race-to-market outcome and allow the article in supplements and food anyway.

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In the intervening year, FDA has demonstrated reluctance to use that statutory discretion given to the agency by the law. Admittedly, FDA has never invoked that provision, so this is new territory. In the most closely analogous case in which FDA could have used its rulemaking discretion, the agency asserted lovastatin found in red yeast rice was subject to the exclusionary provision in situations where the lovastatin level was manipulated above the level that naturally occurs in the botanical. In that litigation, FDA argued because a drug company marketed lovastatin first, before it was concentrated or isolated in a supplement, the drug companies got a monopoly over the article. FDA could have, but did not, use its rulemaking discretion to allow companies to market lovastatin as a dietary supplement—leaving companies in a position today where they can market red yeast rice, but cannot manipulate the level of lovastatin above naturally occurring levels.

But hemp-derived cannabinoids, like CBD, are different for three reasons. First, FDA's reluctance to invoke its discretion and declare CBD lawful in supplements is understandable. The agency worries that allowing CBD to be marketed in this context would set a precedent for other botanicals in the future that get embroiled in the race to market set up by the law. If FDA invokes discretion here, does that open the floodgates for all future ingredients researched as pharmaceuticals first? That does not have to happen, as just a little discretion for CBD is all that's called for here.

Hemp-derived cannabinoids are a one-of-a-kind ingredient uniquely deserving of this special treatment. Unlike other botanicals, hemp-derived cannabinoids like CBD were on the federal controlled substances list up until December 2018. During that time of restricted access to CBD, pharmaceutical firms began to research CBD for its drug benefits, but it would have been impossible for a supplement manufacturer to lawfully market a supplement containing CBD at the time those clinical investigations were being instituted. That makes CBD a rare commodity worthy of FDA's discretion—one can't have a fair race to market if one side is hampered by a law that forbids it to market the ingredient.

Second, FDA also has expressed concern publicly that it is not convinced of the safety of CBD in supplements and needs that assurance before granting discretion. FDA has declined to use its discretion because it wrongly reads a safety evaluation into the exclusionary clause for a dietary supplement. Industry agrees that a dietary supplement must be safe for consumers. Numerous provisions in the law provide FDA with authority to ensure these products are not adulterated or misbranded, and that they are "reasonably expected to be safe" and "do not present a significant or unreasonable risk of injury or illness"—but that evaluation does not exist in 321(ff); the exclusionary clause is not about safety.

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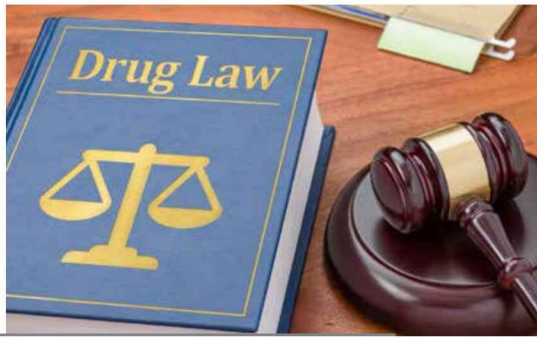

The safety assessment should occur when a firm brings a product to market as a new dietary ingredient (NDI), through the same assessment that all other new dietary ingredients must go through. An unsafe or unproven ingredient would be excluded through that process, not from a definitional roadblock. Indeed, if 321(ff) was intended as a safety measure, it wouldn't have created a race against drug companies. Had CBD not been investigated as a pharmaceutical before supplement companies were legally permitted to market the ingredient (due to its prior status as a controlled substance), FDA would have no choice but to accept CBD as a dietary ingredient subject to the same safety pathways as all other dietary ingredients on the market. Thus, the definitional issue should be addressed for what it is: an economic evaluation of the relative merits of having two regulated categories of products competing for consumers, not a question of safety.

Finally, FDA should be compelled to act because a US$238 million (per *Nutrition Business Journal*) CBD marketplace has exploded over the past year while the agency stood on the sidelines. The proverbial toothpaste can't be put back in the tube, and FDA's inaction has allowed the market to mushroom with 20 million Americans using CBD supplements, according to the Council for Responsible Nutrition's (CRN) 2019 consumer survey. While FDA has cautioned firms in warning letters against making drug claims for their products, these letters only have been issued to a handful of companies making egregious disease claims that are not permitted for any supplement, regardless of the ingredient.

Further, FDA has indicated it cannot enforce its own supplement regulations against these companies because these products legally do not fall within the definition of "dietary supplement." FDA's only pragmatic course of action is to recognize a lawful pathway to market for CBD-containing supplements and impose the regulatory structure around these new products that all other supplements must follow (i.e., proper Supplement Facts labeling, accurate disclosure of ingredient contents, facility registration, adherence to dietary supplement cGMPs [current good manufacturing practices], a robust adverse event reporting [AER] system and more).

So, yes, FDA can exercise discretion here while fencing in the terms of that discretion. CBD is different and calls for a new approach. FDA's worries—that invoking discretion would interfere with the incentives to pursue robust clinical research for pharmaceuticals—are misdirected. The features that make hemp-derived cannabinoids so unique are precisely the factors that will allow FDA to distinguish its decision on CBD from other articles under study.

So c'mon, FDA, show a little discretion. ✦

Steve Mister is the president and CEO of the Council for Responsible Nutrition (CRN), the leading trade association for the dietary supplement and functional food industry.