Steve Fenberg
Senate President
Colorado State Senate
200 E Colfax
Denver, CO, 80203

Dear Senate President Fenberg,

The Natural Products Association (NPA) is the leading and largest trade association representing the entire natural products industry. We advocate for our members who supply, manufacture, and sell natural ingredients or finished products for consumers. NPA is the voice of responsible industry stakeholders before federal, state, and local governments. Founded in 1936, NPA represents approximately 700 members accounting for more than 10,000 locations of retailers, manufacturers, wholesalers, and distributors of natural products, including foods, dietary supplements, and health/beauty aids. As the leading natural product industry trade association, we have spearheaded the charge to include the cannabidiol (CBD) food pathway to the market. However, no regulatory guidance from the United States Food and Drug Administration (FDA) has been provided. As the former Director of the Office of Dietary Supplement Programs for the FDA and now an industry executive, I write you with grave concerns regarding Senate Bill 23-271, a bill related to the regulation of compounds that are related to cannabinoids.

Background

The Dietary Supplement Health and Education Act of 1994 (DSHEA) created a new class of foods products, dietary supplements, containing one or more "dietary ingredients," which the law defined as a vitamin; a mineral; an herb or other botanical; a dietary substance for use by humanity to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract, or combination of any of these ingredients. 21 U.S.C. § 321 (ff)(1). CBD is a constituent of a botanical – in most cases, the cannabis plant – and so it meets the definition of a dietary ingredient.

However, there is an exclusion clause in the definition of "dietary supplement" that provides that any article that is an approved new drug or was authorized for research purposes as an investigated new drug (IND) before it was marketed as a food or dietary supplement cannot be marketed as a dietary supplement if the drug is approved or if substantial clinical investigations of the article have already begun and the existence of those investigations has been made public. 21 U.S.C. § 321(ff)(3)(B)(i), (ii). This is the clause that FDA alleges applies to CBD supplement products and is part of their loosely formed basis on why the agency needs a new regulatory system for hemp/CBD.

An additional piece of the story is the debate over CBD being a new dietary ingredient (NDI). It is important to note that the NDI section of DSHEA provides that a dietary supplement is adulterated unless it 1) contains only dietary ingredients that have been present in the food supply as an article used for food in a form in which the food has not been chemically altered or (2) the manufacturer or distributor notifies FDA that it intends to introduce a new dietary ingredient into the US market and provides evidence of safety. 21 U.S.C. §§ 350b, 342(f). The law defines a new dietary ingredient as an ingredient that was not marketed in the U.S. before October 15, 1994. While CBD has always been present in hemp, the question pivots on whether it qualifies as an article used for food versus FDA's interpretation that it was a constituent of a food.

On March 1, 2019, the FDA submitted a federal register notice involving cannabidiol for stakeholder notice and comment. The FDA allowed interested persons to submit comments about the World Health Organization (WHO) recommendations to impose international manufacturing and distributing restrictions under international treaties on certain substances. The comments received were considered in preparing the United States' position on these proposals for a meeting of the United Nations Commission on Narcotic Drugs (CND) in Vienna, Austria. As a party to the 1971 Convention on Psychotropic Substances, whenever the CND proposes to add, transfer, or remove a drug from one of the

schedules, the Secretary of State must transmit a notification of this process to the Secretary of Health and Human Services (Secretary of HHS) and allow for public notice and comment. WHO and its Expert Committee on Drug Dependence (ECDD) prepared a health hazard evaluation regarding CBD preparations.[1] Cannabidiol, while found in cannabis and cannabis resin, is not found to have the same psychoactive properties and results in no potential for abuse and potential to produce dependence.

FDA contains a page on their website titled "FDA and Marijuana," where they clearly state that "FDA has concluded that THC and CBD products are excluded from the dietary supplement definition under sections 201 (ff)(3)(B)(i) and (ii) of the Federal Food, Drug, and Cosmetic Act (FD&C Act, respectively. Under those provisions, if a substance (such as

THC or CBD) is an active ingredient in a drug product that has been approved under 21 U.S.C. § 355 or has been authorized for investigation as a new drug for which substantial clinical investigations have been instituted and for which such investigations have been made public, then products containing that substance are outside the definition of a dietary supplement. FDA considers a substance to be "authorized for investigation as a new drug" if it is the subject of an Investigational New Drug application (IND) that has gone into effect. Under FDA's regulations (21 CFR 312.2), unless a clinical investigation meets the limited criteria in that regulation, an IND is required for all clinical investigations of products that are subject to section 505 of the FD&C Act. Moreover, the page goes on to add further clarity that "[t]here is an exception to section 201 ff)(3)(B)(i) and (ii) if the substance was 'marketed as' a dietary supplement or as a conventional food before the drug was approved or before the new drug investigations were authorized, as applicable." However, based on available evidence, FDA has concluded that this is not the case for THC or CBD. Despite, the FDA's actions and message, the market for CBD products in the United States is surging. According to a report issued by New Frontier Data, the United States CBD industry grew by nearly 40% in 2017, reaching $367 million in annual sales across hemp-derived and marijuana-derived markets. At present, the only federal-approved CBD product is Epidolex, a pharmaceutical product manufactured by GW Pharma and approved by the FDA in 2018.

State of Regulatory Status

The time for enforcement of CBD is long overdue. Across the country, we are seeing state after state recognizes the gaps left by the FDA and begin to develop their regulatory standards. Currently, over two dozen states have introduced or passed legislation regulating CBD as a dietary supplement or food ingredient.[2] While it is our opinion that the best approach is for one uniform national standard. We understand the FDA has yet to take responsibility for this public health issue and establish a regulatory framework for manufacturers that would include establishing a safe daily level of consumption, inspecting facilities for manufacturing practices, and testing products for impurities such as high dosages of tetrahydrocannabinol (THC), pesticides and heavy metals.

In the past five years, over 3,000 CBD products have come to market without a consistent approach to regulation or any plan on how consumer access will be balanced with consumer safety by our public health officials at the Food and Drug Administration. NPA commissioned a poll that found seven in ten Americans believe the FDA is overdue to establish safety standards for CBD products in the marketplace. To make matters worse, 41% wrongly assumed the FDA had already developed these safety standards.

CBD was first marketed as an active pharmaceutical ingredient (API), which creates some legal hurdles in marketing it as a dietary supplement or conventional food. The industry needs to be provided with guidelines they need and consumers the assurance that what they are consuming is safe and is manufactured to quality standards. FDA has previously

[1] World Health Organization. (2017). Cannabidiol (CBD) Pre-Review Report Agenda Item 5.2. Expert Committee on Drug Dependence. Thirty-ninth Meeting. Geneva, 6-19 November 2017.

[2] FDA Doesn't Allow CBD In Food and Drinks, But Many States Do. Will FDA Change Its Mind? https://www.nutritionaloutlook.com/view/fda- doesn-t-allow-cbd-in-food-and-drinks-but-many-states-do-will-fda-change-its-mind

provided a path to market as dietary supplements/foods for natural products that contain an API by establishing a daily exposure level similar to what they did with monacolin K, the same ingredient that is in the prescription cholesterol-lowering drug lovastatin[3], which is found in Red Yeast Rice. We have seen several products in both the drug and supplement products, including caffeine, folate, niacin, lovastatin, and lithium. The critical differences in those cases are 1) the type of claims that can be made and (2) the dosage. While FDA has said that CBD is different, it most parallels lovastatin which was debated in court. To this day, lovastatin is available on the market, and it contains monacolin K. FDA at present only enforces when it finds a lovastatin product at approximately half the effective lowest dose of lovastatin. They do this based on a Health Hazard Evaluation (HHE), which the FDA has failed to produce for CBD. A more direct

solution is contained within the last part of the approved drug/investigational drug exclusion from the definition of a dietary supplement unless the Secretary, in the Secretary's discretion, has issued a regulation, after notice and comment, finding that the article would be lawful under this Act." In FDA's Draft Guidance for Industry: Dietary Supplements: New Dietary Ingredient Notifications and Related Issues IV.D. 8 (July 2011), FDA provides its interpretation of this language as follows:

The general rule is that an article that has been authorized for investigation as a new drug or as a biologic before being marketed as a food or as a dietary supplement cannot be marketed as a dietary supplement if substantial clinical investigations of the article have begun and the existence of such investigations has been made public. FDA can create an exception to this prohibition by regulation, but only if the agency finds that the use of the article in dietary supplements would be lawful. To date, no such regulations have been issued. The appropriate mechanism to request such a regulation is to file a citizen petition under 21 CFR 10.30.

While CBD was technically a federally "scheduled" substance before the passage of the 2018 Farm Bill in December, sales of CBD products continued to rise. At the present moment, there are well over 3,000 CBD products on the market. Since the passage of the 2018 Farm Act, which eliminated hemp from the definition of marijuana under the Controlled Substances Act- we've seen a significant increase in the production and sales of CBD products. FDA clearly states that "FDA has concluded that THC and CBD products are excluded from the dietary supplement definition under sections 201(ff)(3)(B)(i) and (ii) of the Federal Food, Drug, and Cosmetic Act."[3]

Despite this, the warning letters FDA has issued to companies marketing CBD as a dietary supplement largely focus on claims. The Food and Drug Administration has enforcement authority over labeling requirements. Two well-recognized types of claims are health claims and structure-function claims. Health claims describe the relationship between foods and dietary supplements and reduced risk of a disease or health-related condition. These claims are subject to premarket review and authorization by the FDA. Structure-Function claims describe the role of a nutrient or dietary ingredient intended to affect the normal structure or function of the human body for example, "calcium builds strong bones." Also, they may characterize how a nutrient or dietary ingredient acts to maintain the structure or function. The FDA requires manufacturers must have substantiations that such claims are truthful and not misleading. The FDA released a statement following the most recent string of warning letters. FDA not only cited how recipients of warning letters have violated the Federal Food, Drug, and Cosmetic Act, but they also cited the lack of scientific information supporting the safety of CBD in food and indicated that they cannot conclude that CBD is generally recognized as safe (GRAS) among qualified experts for its use in humans or animal food. As outlined in some of the warning letters issued by the FDA, violations included marketing CBD products as a dietary supplement since these products do not meet the definition of a dietary supplement. FDA Principle Deputy Commissioner Amy Abernethy, M.D., Ph.D. even went as far as to say, "We remain concerned that some people wrongly think that the myriad of CBD products on the market, many of which are illegal, have been evaluated by the FDA and determined to be safe.

[3] Red Yeast Rice, National Center for Complementary and Integrative Health https://www.nccih.nih.gov/health/red-yeast-rice FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD) https://www.fda.gov/news-events/public-health- focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd

Testing Products

Since the FDA has not determined that CBD is generally recognized as safe, we at NPA have long advocated for FDA to test CBD products for heavy metals, pesticides, and THC, all of which are proposed in this bill. Currently, through the United States Department of Agriculture, there are 37 hemp analytical testing laboratories. Any laboratory testing hemp for THC must be registered with the Drug Enforcement Agency through these facilities. Unfortunately, the combined volume of hemp produced and the lack of facilities has led to industry-wide concerns.

This is why we have proposed to establish a national testing center and corporate stewardship program for manufacturers

of CBD products at the National Center for Natural Products Research at the University of Mississippi. This program would provide an independent verification program for product analysis. The program would randomly select 1,000 products per year that would purport to contain hemp/CBD. These products would be tested using known standards for their content of impurities, THC, CBD, and other cannabinoids. The data generated from this program would be provided to the FDA and published in a public-facing database for anyone to access.

When looking across the globe, other agencies have begun establishing their standards and regulations for CBD products. In 2020, the United Kingdom (UK) established a deadline to clean up the CBD market and bring manufacturers into compliance with novel food rules, which require some food ingredients to be tested and approved by food safety authorities before they reach consumers. CBD manufacturers had until March 31, 2021, to submit a novel food application to stay on the shelf.

With over 3,000 products on the market, we believe that not testing products for impurities, such as lead or other heavy metals, is unacceptable for a federal agency whose mission is to protect public health. Product testing should be conducted by federal authorities. Though the overall market situation for CBD-containing products is fraught with problems in terms of quality and consistency, responsible companies would welcome an avenue to be recognized for compliance. Some of these companies even strongly desired guidance during the FDA's May 31, 2019 hearing on CBD.

Product Labeling

Despite the growth of the CBD market, much of the FDA and FTC's enforcement actions have centered around unsupported health claims. Earlier this year, the FTC reached settlements with six CBD operators whose products were making unsupported health claims. These firms were required to stop making unsupported health claims and pay monetary judgments to the agency. In July of 2020, in a report submitted to the U.S. House and Senate Appropriations Committees, the FDA reported that less than half of the 150 products evaluated were labeled correctly.[4]

In the United Kingdom, the Food Safety Authority (FSA) has provided manufacturers with guidelines for product regulation compliance for product labeling and measures. They have established a series of requirements, including a recommended daily dose ensuring that amounts consumed do not exceed 70mg of CBD as per the FSA guidance.[5]

States Rights

The tension between state and federal positions is quite clear. As mentioned, over two dozen currently allow the sale of hemp and CBD as a food or dietary supplement, and the list continues to grow. NPA supports the ability for states to make determinations based upon facts and findings presented before them. NPA also is urging Congress to mandate the FDA establish dosage recommendations along with an official method of analysis for CBD products. The implementation

[4] Sampling Study of the Current Cannabidiol Marketplace to Determine the Extent That Products are Mislabled or Adulterated.

[5] Guidelines for Product Regulation Compliance Product Labeling and Measures

of these regulations would serve as the uniform standard for testing foods and dietary supplements that purport to contain CBD. However, SB 23-271 is at odds with federal labeling laws for foods and dietary supplements while also undercutting federal case law in that it now defines consumption as inhalation.

Conclusion

It's been almost 30 years since this law became effective, and FDA has yet to use this central part of the law to allow for an ingredient with safety data like CBD to be used. The dosage submitted in our Citizen's petition was approximately 75 mg a day which is 10x lower than the 700 mg + that is used for the drug Epidiolex. FDA has wasted considerable time claiming confusion on CBD when the pathway is for them to write a proposed rule, or in the interim, exercise a policy of enforcement discretion via guidance or interim final rule, which they could establish a process of reviewing any CBD product via NDI notification and establishing a daily upper limit, which would ensure consumers that FDA is fulfilling their mandate as a science-based agency to review new items in the diet. While we understand the intent of the legislation, the fact remains that in its current form, the legislation in its current form is at odds with federal law. We strongly urge the legislature to oppose the bill in its current form.

Thank you,

Daniel Fabricant, Ph.D.

President and CEO

Natural Products Association