Joint Committee on Administrative Rulemaking

700 Stratton Building

Springfield, IL 62706

November 6, 2024

Re:	Filing	Second Notice of Proposed Rules
	Agency submitting rules:	Illinois Dept of Agriculture
	Rules Related to:	Hemp, 8 IL. Ad. Code 1200
	Hearing Date:	November 12, 2024

Dear Members and Staff of JCAR,

I am writing to you regarding the Second Notice submitted by the IDOA in relation to their proposed amendments to the hemp rules. I have very serious concerns about the impact that these amendments will have on small businesses and Illinois consumers.

The Illinois Department of Agriculture's ("IDOA") proposed rule changes regarding the Illinois Industrial Hemp Act [505 ILCS 89], authorized through

Public Act 102-0690, ignores relevant Federal laws & regulations (2018 Farm Bill, Administrative Rulemaking & Relevant Case Law) while attempting to pre-emptively legislate, through administrative rule-making, an issue currently being considered by the general assembly. Public Act 102-0690 gave IDOA the authority to issue updated Hemp Rules in accordance with all applicable State and federal laws and regulations. Despite admitting that it ***does not have the authority to expressly allow or ban hemp products,*** IDOA takes away the right to legally produce and sell a variety of federally legal hemp products from businesses operating under the Illinois Industrial Hemp Act and the 2018 Farm Bill and moves the right to legally produce and sell these products in Illinois to another group of businesses operating under the Cannabis Regulation and Tax Act [410 ILCS 705] by (1) redefining "Cannabis" from what it is currently defined by the Cannabis Regulation and Tax Act [410 ILCS 705/1-10] to encompass "any form of the plant in which the total delta-9 tetrahydrocannabinol [THC] concentration on a dry weight basis has not yet been determined," (2) requiring Interim Hemp Products to contain less than 0.3% Delta-9 THC by dry weight, (3) expanding "Delta-9 THC" in Final Hemp Products to include Delta-9 tetrahydrocannabinolic acid (THCa), considered hemp under current federal guidelines and (4) removing language allowing for the transportation of hemp following the retail sale of final hemp products to the general public.

These actions favor the interests of Illinois' legacy Cannabis Industry over BOTH newer Cannabis Social Equity licensees and Illinois' Existing Hemp industry. The proposed rules restrict Illinois' existing Hemp industry from manufacturing and producing a vast majority of federally legal hemp products within IL through a combination of the expansive definition modifications & sub-definition additions. In addition, certain types of Social Equity licensees are no longer eligible to become hemp licensees and Justice-involved individuals seeking careers in the hemp industries will be limited to low level job opportunities per Section 1200.30(b) for the proposed rules, which states

> *no person who has been convicted of any controlled substances related felony in the 10 years prior to the date of application shall be eligible to obtain a license or registration. For applicants that are entities, this prohibition shall apply to any person associated with the applicant who has executive managerial control of the entity. This does not include non-executive managers such as farm, field, or shift managers.*

Factual Timeline

1. On December 26, 2023, the IDOA published proposed amendments to the rules governing hemp production and sale in Illinois in the Illinois Register (Volume 47, Issue 51), which included changes to the definition of THC and regulations affecting the sale and transportation of hemp products.

2. In accordance with the public comment period for rule-making, multiple hemp industry stake-holders in Illinois submitted commentary at or around February 6, 2024 to IDOA regarding proposed changes to Section 1200.90 of the Illinois Hemp Rules. In particular, 5 out of the 8 commenters brought up a common concern

   The proposed rules eliminate Section 1200.90, which explicitly allows the sale of hemp to consumers. If enacted, this move would infringe upon individual rights and introduce regulatory uncertainty for Illinois-based businesses. We question whether the Department intends to overstep legislative authority by prohibiting legal products and businesses without explicitly authorization

3. At or around September 4, 2024, IDOA sent out multiple responses to the commenters acknowledging that

The Department does not have the authority to expressly allow or ban hemp products and does not have authority to regulate retail sales of hemp products.

Issue #1: Public Act 102-0690 gave IDOA the authority to set forth rules in accordance with the Illinois Hemp Act [505 ILCS 89] regulate the production of Hemp in Illinois in accordance with 2018 Farm Bill Guidelines, but it oversteps its authority by modifying the definition of Cannabis, defined in the Cannabis Regulation and Tax Act [750 ILCS 405].

The Proposed Second Notice Rules contains actions taken by IDOA that change definitions and legislative intent of the Illinois Hemp Act and criminalize the majority of existing operating Hemp Businesses, Retailers, Consumers and Licensees in Illinois.

The term “Cannabis” is defined in the Cannabis Regulation and Tax Act, and is defined as follows:

> *"Cannabis" means marijuana, hashish, and other substances that are identified as including any parts of the plant Cannabis sativa and including derivatives or subspecies, such as indica, of all strains of cannabis, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin, including tetrahydrocannabinol (THC) and all other naturally produced cannabinol derivatives, whether produced directly or indirectly by extraction; however, "cannabis" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted from it), fiber, oil or cake, or the sterilized seed of the plant that is incapable of germination. "Cannabis" does not include industrial hemp as defined and authorized under the Industrial Hemp Act.*

"Cannabis" also means cannabis flower, concentrate, and cannabis-infused products. [410 ILCS 705/1-10].

The proposed second read rules adds a more expansive definition of Cannabis into the Industrial Hemp Rules that is different from what has been defined in 410 ILCS 705/1-10:

"Cannabis" means a genus of flowering plants in the family Cannabaceae of which Cannabis sativa is a species, and Cannabis indica and Cannabis ruderalis are subspecies thereof. Cannabis refers to any form of the plant in which the total delta-9 tetrahydrocannabinol concentration on a dry weight basis has not yet been determined.

The proposed changes create a presumption that a hemp product is Cannabis unless proven otherwise and shifts the burden of proof from the state to the business or individual. In addition, given the realities of curing and the time & natural cannabinoid degradation of hemp products, it ensures that the majority of hemp products, including even CBD flower and broad-spectrum CBD, will “test hot” and become legally classified as Cannabis.

Issue #2: IDOA adds the 0.3% THC threshold to intermediate Hemp products (inputs used to make final products), criminalizing a business-to-business supply chain that extends across the country in conflict with the 2018 Farm Bill.

The IDOA's proposed rule change redefines "THC" by adding sub-definitions to Industrial Hemp such as "Acceptable Hemp THC Level," "Decarboxylation," "Post Decarboxylation Value," Total THC" and "Total Potential THC" and then applies these definitions to Intermediate Hemp Products. It is scientifically impossible to keep all forms of Intermediate hemp products, like crude and distillate, which are sold, imported and exported between in-state and out-of-state hemp processors and further processed and/or incorporated into Final Products by hemp manufacturers and infusers, under a 0.3% Total THC threshold level. By coupling this narrowed Interim Hemp Product definition with the above revised definition of cannabis and the corresponding cannabis possession, sale/delivery and trafficking provisions of the Illinois Criminal Code [720 ILCS 550], this imposes extreme penalties for the existing activities of a wide variety of

hemp processors, manufacturers, infusers and distributors. In addition, this action is contrary to Congressional Intent; a joint letter dated March 29, 2021 to the United States Department of Justice and Drug Enforcement Agency from Congressman David Scott, Chairman of the House Agriculture Committee and Congressman Sanford Bishop, Chairman of the House Appropriations Subcommittee on Agriculture states that:

> *Congress did not intend the 2018 Farm Bill to* ***criminalize any stage of legal hemp processing****, and we are concerned that hemp grown in compliance with a USDA-approved plan could receive undue scrutiny from the DEA as it is being processed into a legal consumer-facing product under this IFR.* [emphasis added]

Issue #3: IDOA changes the methodology in how the 0.3% Hemp vs Cannabis THC threshold level for final products is calculated by creating a definition of Hemp that is in conflict with the 2018 Farm Bill and places ~50% of the currently Illinois consumer hemp market illegal for anyone but dispensaries licensed under the Cannabis Regulation and Tax Act to sell.

The IDOA's also applies the above "expanded THC" rule change to Final Hemp products, which when combined with its revised definition of cannabis and the corresponding cannabis possession, sale/delivery and trafficking provisions of the Illinois Criminal Code [720 ILCS 550], effectively criminalizes the transportation and sales/delivery of federally legal Final Hemp products in Illinois. This is contrary to Congressional Intent; the same above joint letter dated March 29, 2021 to the United States Department of Justice and Drug Enforcement Agency states that

> *This is why the 2018 Farm Bill's definition of hemp was broadened from the 2014 Farm Bill's version to include derivatives, extracts and cannabinoids.* ***It was our intent that derivatives, extracts and cannabinoids would be legal if these products were in compliance [with] all other Federal regulations*** [emphasis added]

The Farm Bill's Conference Report, effective August 21, 2020, also makes it clear that Congress intended to preclude states from adopting more restrictive definitions of final hemp products in an attempt to criminalize the substance, stating that

> *State and Tribal governments are authorized to put more restrictive parameters on the* ***production*** *of hemp,* ***but are not authorized to alter the definition of hemp.*** *[emphasis added]*

The primary issue created by IDOA rulemaking revolves around an undefined non-intoxicating compound called tetrahydrocannabinolic acid (THCa), and how raw THCa converts into delta-9 THC with the application

of heat and time. In the 2018 Farm bill (7 USC §1639o. SEC. 297A.), Congress defined THCa as legal hemp by including it as an acid.

> *HEMP - The term 'hemp' means the plant Cannabis sativa L., and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers,* ***acids****, salts, and salts of isomers, whething growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." [emphasis added]*

The sole distinction federally between lawful cannabis (hemp) and unlawful cannabis (marijuana) is the concentration of delta-9 THC in the harvested material or final end-product. The concentration of delta-9 THC is ALSO the sole distinction in Illinois between hemp cannabis (under 505 ILCS 89, the Illinois Industrial Hemp Act), where thousands of businesses in Illinois and across the State participate in a federally legal market in need of further regulation and marijuana (under 410 ILCS 705, the Cannabis Regulation and Tax Act), where a chosen few number of business participate in a tightly controlled limited license state-regulated market.

The Fourth Circuit Court of Appeals joined the Ninth Circuit Court of Appeals in confirming that final hemp products are defined by delta-9 THC.

> *To sum it up, under state and federal law, then, certain hemp-derived products - those "with a delta-9 [THC] concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis," id 90-87(13a); accord 7 U.S.C. §1639o(1) - don't come within the definition of an illegal controlled substance, and instead fall under the umbrella of a legal hemp-derived product.* ***The critical distinction that separates illegal marijuana and THC from legal hemp under both state and federal law is a product's delta-9 THC concentration.*** *See AK Futures, 35 F.4th at 690 (observing that "the only statutory metric for distinguishing controlled marijuana from legal hemp [under the CSA] is the delta-9 THC concentration level*

The Fourth Circuit Court of Appeals continues its rationale for ignoring ambiguous administrative rulemaking, such as the incorporation of the

acidic form of THC (THCa) into the total calculation of d9 THC for final hemp products, by stating

> *Between the DEA's February 2023 letter and AK Futures, we think the Ninth Circuit's interpretation of the 2018 Farm Act is the better of the two. And we're free to make that determination ourselves, despite a contrary interpretation from the DEA, because we agree with the Ninth Circuit that §1639o is unambiguous, see AK Futures, 35 F, 4th at 692, and because, even if it were ambiguous, we needn't defer to the agency's interpretation, see Loper Bright Enters v Raimondo, 144 S Ct, 2244, 2262 (2024) ("The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.")*

What raises the stakes here is the enforcement mechanism used for the CRTA. According to the Illinois Criminal Code [720 ILCS 550/4], the penalties for Cannabis possession start becoming serious at 10 grams with a Class B misdemeanor, punishable by up to 6 months in jail and/or a fine up

to $1,500 up to a Class 1 felony, punishable with 4-15 years in prison and/or a fine up to $25,000. The penalties for Cannabis delivery or sale [720 ILCS 550/5] are even more severe, starting with the same Class B misdemeanor, punishable by up to 6 months in jail and/or a fine up to $1,500 and go up to a Class X felony, punishable by 6-30 years in prison with fines up to $200,000. Additionally, 720 ILCS 550/5.1 has a provision for Cannabis Trafficking, which is defined as bringing cannabis into the state for sale, by doubling the standard penalties associated with the amount involved. The issue at hand is that Industrial Hemp, being federally legal, benefits from Interstate Commerce, and Illinois-based Hemp Processing or Manufacturing Licensee who purchase and incorporate Federally-legal Hemp Interim Products from Florida, Wisconsin, Indiana, Oregon, Tennessee, Colorado, California, Texas, North Carolina or any other State or Tribal Territory in the US that operates a federally legal Hemp Program or Illinois-based Hemp Retailers who purchase Federally-legal Hemp Final Products for resale would become liable to the drug trafficking provisions of the Illinois Criminal Code.

Issue #4: IDOA adds business-to-business transportation prohibitions while removing language allowing for the transportation of hemp for retail customers which imposes extreme potential criminal liability for the retail possession of hemp products in Illinois.

The IDOA's proposed rule changes on transportation, when coupled with the IDOA's lack of delineation between industrial hemp being grown, interim hemp products and final hemp products ends up imposing extreme penalties for the retail purchase &/or transportation of industrial hemp by first changing Section 1200.110(a) from

> Former Section 1200.110(a) *Only a licensed or registered person, or an agent thereof,* ***may transport live or harvested industrial hemp***

to

> Updated Section 1200.110(a) *Only a licensed or registered person who is registered with the USDA or licensed or*

> *registered under a USDA approved State or Tribal hemp plan, or an agent thereof,* ***may transport industrial hemp****.*

and then, removing Section 1200.110(d) that states

> Section 1200.110(d) *There is no State restriction on the transportation of industrial hemp product following retail sale to a member of the public*

This rulemaking is especially problematic because State and federal agencies are not free to "bend" Hemp Law to satisfy political or other local interests. Regarding transportation, *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3dd 541 (7th Cir. 2020) states that.

> *A state cannot evade the* [2018] *Farm Laws express preemption of laws prohibiting the interstate transportation of industrial hemp by criminalizing its possession and delivery…* [and on] *remand, the district court should evaluate whether Indiana's law violates the express pre-emption clause of the Farm Bill while keeping in mind the extent to which the Law reserves to*

the states the authority to regulate the production of industrial hemp.

Conclusion

The IDOA's Second Notice rulemaking oversteps the administrative authority granted through Public Act 102-0690 while ignoring Federal laws & regulations. We are proposing language for consideration that solves the issues highlighted above while implementing the IDOA's intended rulemaking.

Sincerely,

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