ALAN WILSON
ATTORNEY GENERAL

September 16, 2024

The Honorable G. Murrell Smith, Jr.
Speaker of the House
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Mr. Speaker:

You seek our opinion as to "whether distribution, sale and marketing of non-alcoholic beverages containing hemp-derived Tetrahydrocannabinol ("THC") with concentrations of delta-9 THC [of] not more than 0.3% are legal in South Carolina." By way of background, you provide the following information, as stated in your letter:

> I am writing this letter to request an opinion as to whether the distribution, sale, and possession of non-alcoholic beverages containing hemp-derived Tetrahydrocannabinol ("THC") with concentrations of delta-9 THC not more than 0.3% are legal in South Carolina. If the answer to this question is yes, do any restrictions currently exist regarding the sale and marketing of these products to minors?
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> As you are aware, recent changes in federal and state law dramatically changed the treatment of industrial hemp through the United States, including South Carolina. Specifically, Congress removed "hemp" from the Controlled Substances Act based on the concentration level of delta-9 THC. See 21. U.S.C. 802(16).
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> Recently, South Carolina distributors have been requested to provide hemp-infused beverages to various retailers in South Carolina. There are a variety of companies in the United States that currently manufacture hemp-infused beverages. I understand these beverages do not contain alcohol.
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> No statute, regulation, agency guidance or prior Attorney General Opinion I provides a clear answer as to whether these hemp-infused beverages that are manufactured, distributed, or sold in South Carolina are legal. In fact, the Attorney General's July 10, 2019 Opinion confirmed possession or sale of material containing delta-9 THC concentration of more than 0.3 person using post-decarboxylation or similarly reliable methods would likely be deemed to constitute marijuana", but it did not

> explicitly state whether possession or sale of products containing hemp-derived THC with concentrations of delta-9 THC not more than 0. 3% are legal in South Carolina.
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> Manufacturers and distributors in South Carolina need clear guidance on whether hemp-infused products manufactured, distributed, possessed or sold are legal in South Carolina. Thus, I respectfully request an opinion from the Attorney General on whether the distribution, sale, and possession of non-alcoholic beverages containing hemp-derived THC with concentrations of delta- 9 THC of not more than 0.3% are legal in South Carolina. Further, if these products are legal in South Carolina, I respectfully request an answer to whether any restrictions currently exist regarding the sale and marketing of these products to minors.

In summary, we conclude that both federal and state law legalize hemp or hemp products (such as hemp-infused drinks) as long as the hemp or hemp product does not contain a delta-9 THC concentration of more than 0.3% on a dry weight basis. Any drink which meets this requirement is legal. This legalization of hemp is the result of passage by Congress in 2018 of the Farm Bill and the enactment by the General Assembly in 2019 of the Hemp Farming Act. In each of these pieces of legislation, hemp and hemp products were removed from the classification of a controlled substance and made legal if they meet the foregoing standard of concentration.

Thus, in the abstract, that is the answer to your question. However, for the reasons which follow, the legality of a particular THC-infused drink must be determined individually. In other words, we are unable to give a "blanket" assessment of the legality of a category of THC-infused beverages any more than we could, in a given instance, assess whether marijuana or some other substance is being possessed. See Lakes v. State, 224 N.E.2d 373, 374-75 (Ind. Ct. App. 2024) [the state must present evidence of the THC concentration to determine whether the alleged substance being possessed is marijuana]. As one court has noted, THC content cannot be determined by sight or smell or field testing, but only by lab analysis. See Gautier v. Los Angeles Police Dept., 2022 WL 19829441, at * 2 (C.D. Cal. 2022) [". . . lab testing is required to determine the percentage of delta-9 THC present in any submitted sample."]. Thus, lacing the ability to find facts, the limits of our legal analysis herein are simply to conclude that if a THC-infused beverage meets the delta-9 THC level of 0.3% or less on a dry weight basis, it is legal under federal and state law.

Accordingly, as discussed below, the General Assembly may wish to revisit – as other states are doing – the Hemp Farming Act of 2019 in order to address the various issues surrounding the regulation of hemp-infused drinks and food products.

Law/Analysis

We first provide a brief history of industrial hemp under federal and state law as set forth in our previous opinions. In Op. S.C. Att'y Gen., 2019 WL 3243864 (July 10, 2019), we summarized this history as follows:

> [d]espite its industrial uses and value as an agricultural crop, hemp was ultimately criminalized under federal and state law. The origins of its criminalization under federal law is found in the "Marihuana Tax Act of 1937," which "was to treat industrial-use and drug-use marijuana differently by taxing them at different rates, or not at all." United States v. White Plume, 447 F.3d 1067, 1071 (8th Cir. 2006). When the Controlled Substances Act was enacted by Congress in 1970, the Tax Act was repealed in favor of criminalizing the growing of marijuana. Id. at 1072. However, the Tax Act's definition of marijuana was adopted verbatim criminalizing "the growing of marijuana whether it was intended for industrial-use or drug-use." Id. That same definition is contained in the current version of the Controlled Substances Act.
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> Under the Controlled Substances Act, marijuana is defined as follows:
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> > The term [marijuana] means all parts of the plant Cannabis Sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.
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> 21 U.S.C. § 802(16).
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> Along the same lines, as the Court recognized in Lundy [v. Commonwealth, 511 S.W.3d 398, 404 (Ky. 2017)], in Op. S.C. Att'y Gen., 2014 WL 7505274 (June 6, 2014), we addressed the status of industrial hemp in South Carolina in an opinion rendered prior to the passage of the federal Farm Act of 2018, which we discuss below. In that 2014 opinion, we advised as to whether Act 216 (signed into law on June 2, 2014), which provides for industrial hemp cultivation in this State, was preempted by federal law. We concluded that it was. Our opinion explained: ...
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> > [w]e believe a court interpreting the validity of Act 216 would likely find state regulation of industrial hemp is largely preempted by federal law under the CSA, with the exception of the narrow circumstances permitted under Section 7606. Specifically, because Section 7606 does not authorize private individuals, their authorized entities, or organizations to cultivate industrial hemp, we believe a Court would likely find that despite the terms of Act 216, the Department cannot legally authorize private individuals or organizations to do so. The same is true with respect to permits as, "[f]ederal section 7606 limits those who may grow or cultivate industrial hemp to two kinds of entities: institutions of higher education, and state departments of agriculture." Op. Cal. Att'y Gen., 2014 WL 2573229 (June 6, 2014). As a result, unless the entities seeking permits meet Section 7606(a)'s definition of

> an "institute of higher education," or in the alternative, meet Section 7606(b)(3)'s definition of a "state department of agriculture," federal law continues to prohibit the cultivation of industrial hemp despite terms of Act 216.

However, enactment of the 2018 Farm Act by Congress dramatically revised the treatment of industrial hemp throughout the United States, including South Carolina. As described by the National Conference of State Legislatures,

> [t]he 2018 Farm Bill changed federal policy regarding industry hemp, including the removal of hemp from the Controlled Substances Act and the consideration of hemp as an agricultural product. The bill legalized hemp under certain restrictions and expanded the definition of industrial hemp from the last 2014 Farm Bill. The bill also allows states and tribes to submit a plan and apply for primary regulatory authority over the production of hemp in their state or in their tribal territory. A state plan must include certain requirements, such as keeping track of land, testing methods, and disposal of plants or products that exceed the allowed THC concentration.

Previously, the 2014 Farm Bill defined industrial hemp and allowed for state departments of agriculture or universities to grow and produce hemp as part of research or pilot programs. Specifically, the law allowed universities and state departments of agriculture to grow or cultivate industrial hemp if:

"(1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and

(2) the growing or cultivating of industrial hemp is allowed under the laws of the state in which such institution of higher education or state department of agriculture is located and such research occurs."

The U.S. Department of Agriculture, in consultation with the U.S. Drug Enforcement Agency (DEA) and the U.S. Food and Drug Administration, released a Statement of Principles on Industrial Hemp in the Federal Register on Aug 12, 2016, on the applicable activities related to hemp in the 2014 Farm Bill.

http:/www/ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx.

The passage of the 2018 Farm Act by Congress immediately led to enactment of South Carolina Act 14 of 2019, which you well outline in your letter and which addresses the status of industrial hemp in this State. The purpose of the Hemp Farming Act is succinctly summarized by the legislation's title: "An Act ... Relating To Industrial Hemp Cultivation, ... To Define Necessary Terms, [And] To Prohibit The Cultivation, Handling, or Processing of Hemp Without A Hemp License Issued By The South Carolina Department of Agriculture ... Thus, the centerpiece of the legislation is § 46-55-20(A)(l) which provides that "It is unlawful for a person to

> cultivate, handle, or process hemp in this State without a hemp license issued by the Department pursuant to the state plan." (emphasis added). Without a license, as explained below, the handling (including possession) or processing of hemp, as defined by the Act, is characterized as "unlawful." Your letter seeks clarity as to exactly what this means for law enforcement.
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> As you note in your letter, the term "hemp" or "industrial hemp" as defined by the Act, "means the plant Cannabis Sativa L, and any part of that plant, including the nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts by isomers whether growing or not, with the federally defined THC level for hemp." See § 46-55-10(8). Hemp or "industrial hemp" is "deemed an agricultural commodity." On the other hand, however, anything exceeding the 0.3% concentration of THC, as defined, transforms industrial hemp into a controlled substance (marijuana) under federal and state law. In this regard, the Act defines the "federally defined THC level for hemp" as "a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis, or the THC concentration for hemp defined in 7 U.S.C. Section 5940, whichever is greater." As one court has recently stated, "[b]y choosing to define industrial hemp based upon the concentration of THC in the plant Cannabis Sativa L, Congress did not amend the CSA so much as carve out a clear exception for industrial hemp ... [and] Congress clearly "swept away' the provision of the CSA, at least in so much as it restricts the growth, cultivation, and marketing of industrial hemp." U.S. v. Mallory, 372 F.Supp.3d 377, 386 (S.D.W.Va. 2019).
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> The Act also defines "hemp products." Hemp products are defined as follows:
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> All products with the federally defined THC level for hemp derived from, or made by processing hemp plants or hemp plant parts, that arc prepared in a form available for commercial sale, including, but not limited to, cosmetics, personal care products, food intended for animal or human consumption, cloth, cordage, fiber, fuel paint, paper, particleboard, plastics, and any product containing one or more hemp-derived cannabinoids, such as cannabinoil. Unprocessed or raw plant material, including nonsterilized hemp seeds is not considered a hemp product.
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> Section 46-55-30 makes clear, moreover, that the Act does not seek to regulate hemp products as defined: "The provisions contained in this chapter do not apply to the possession, handling, transport or sale of hemp products and extracts, including those containing hemp-derived cannabinoids, including CBD. Nothing in this chapter authorizes an person to violate any federal or state law or regulation." (emphasis added).

(emphasis added).

Thus, as we emphasized in Op. S.C. Att'y Gen., 2021 WL 4630497 (October 4, 2021), "the lawfulness of hemp and hemp products [as defined above] all hinge on the 'federally defined THC level for hemp,' which means 'a delta-9 THC concentration of not more than 0.3

percent on a dry weight basis.' § 46-55-10(6); see also 7 U.S. C. § 5940(a)(2)." While certainly this is the law, and if such standard is met, the hemp or THC-infused drink is lawful, the problem is determination of the THC content in a particular drink or category of drinks sold. Just as with respect to the legality of any other substance, this is a factual question, beyond the scope of an opinion of this Office, and is an issue for law enforcement and the courts to determine. See Hembrook v. Seiber, 2022 WL 3702091 at *9, report and recommendation approved, 2022 WL 4358771 (M.D. Tenn. 2022) ["It is impossible to visually distinguish whether a cannabis plant is either marijuana or hemp by looking at it – it has to be scientifically tested – and hemp and marijuana smell the same and are indistinguishable based on smell alone."].

One court has commented with respect to the complexities of determining whether food or beverages infused with THC meet the 0.3% THC or less "on a dry weight basis" threshold as follows:

> [t]he Farm Bill's THC levels primarily contemplated application to plants; according to respondents, the 0.3% THC weight limit in the Farm Bill equates to a miniscule amount of THC in dried plant matter. However, hemp infused edibles and beverages are more dense than dried plant matter, and as a result, contain significantly higher amounts of THC than does dried plant matter under the federal weight-based standard. In other words, the hemp infused products are potent intoxicants.

North Fork Distribution, Inc. v. New York State Cannabis Control Bd., 81 Misc. 952, 955 (2023). In short, the testing must conclude that the THC concentration is 0.3% or less "on a dry weight basis" to be legal "hemp"; if the concentration is greater than 0.3% on a "dry weight basis," it is illegal marijuana. State v. Dixon, 963 N.W.2d 724, 730 (Minn. 2021).

Another court has explained the difficulty in the application of the federal Farm Bill in a given situation involving THC-infused beverages and other foods thusly:

> [m]arijuana is a drug that is comprised from the cannabis sativa plant. . . . While there are currently legislative proposals to change marijuana's scheduled status as a controlled substance, it is still classified as a schedule 1 drug under the Controlled Substances Act ("CSA") and is strictly regulated. . . . Before 2018, the definition of marijuana in the CSA included hemp. . . . However, in 2018, congress passed the Farm Bill and defined hemp as any part of the cannabis sativa plant with a delta 9 THC that does not exceed 0.3% based on a dry weight. . . .
>
> Pursuant to the Farm Bill, hemp was removed as a controlled substance under CSA and its production was permitted under federal law. 21 U.S.C. § 802. While Congress's intent may have been to deregulate hemp to facilitate its use in agriculture and the production of commodities, one consequence of the Farm Bill was that THC could now be added to consumable products. . . . First, the Farm Bill only limits the potency of delta-9 THC. However, there are other types of THC, such as delta-8 and delta-10, which can be derived from hemp and used as an intoxicant. Id. Second, although a 0.3% limit on a dry weight basis for THC would preclude its intoxicating

> effects if it were consumed as an inhalant, when infused into beverages and other food, these products may be very intoxicating even under the statutory potency limit.

Climbing Kites LLC v. Iowa, ___ F. Supp.3d ___, 2024 WL 3437598 (S.D. Iowa 2024) at *1-2 (emphasis added) (citing Kline, Hemp-Derived Intoxicants Need Better Cannabis Law Guardrails, Bloomberg Law (Feb. 12, 2024), https//www.bloomberglaw.com/product/blaw/bloomberglawnews/cannabis/x261A2B(000000?bc.). In other words, the focus of the 2018 Farm Bill was agriculture, not canned drinks. With respect to those drinks, there is a general recognition that even within the authorized statutory limit requiring that the THC concentration be on a "dry weight basis," when this amount of THC is placed in beverages, the result may well become skewed. Thus, individual analysis is required.

Likewise, in Anderson v. Diamondback Investment Group, ___ F.4th ___, 2024 WL 4031401 (4th Cir. 2024), the 4th Circuit recently addressed a situation where an employee was taking CBD for anxiety. This decision is particularly instructive. The employee was terminated after having tested positive for marijuana. Among other claims, the employee relied upon North Carolina's "lawful products" statute, making it unlawful to discharge an employee who has engaged in "the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance. . . ." N.C. Gen. Stat. § 95-28.2(b). Thus, the question there was whether the CBD was lawful.

The employee argued that the THC level of the CBD met federal requirements for legality. Moreover, the employer did not "dispute that the statute applies equally to hemp-derived products." However, the Fourth Circuit concluded that the employee's claim failed; one reason this was the case was that Anderson "failed to show that the hemp-derived products she used were, in fact, legal." Id. at * 13.

The Court summarized federal and state law differentiating between illegal marijuana and lawful hemp as follows:

> [t]o sum 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. § 16390(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.").

Id. at * 15.

The Fourth Circuit concluded that Anderson "offered no evidence about the delta-9 THC concentration of the purportedly lawful products she used such that we could determine whether those products were legal under state or federal law." Such a factual showing was crucial. According to the Fourth Circuit,

> [t]hat the products were sold "over the counter" in gas stations and stores around North Carolina is not itself evidence of their legality. On the contrary, these products are notoriously difficult to regulate and often contain higher concentrations of THC than permitted by law (even if they advertise otherwise). Cf. Cleveland Clinic, https://health.clevelandclinic.org/cbd-oil-benefits [https://perma.cc/3G8X-6BSZ]. . . . ("If you're purchasing CBD oil and other products online or from a local vendor, Dr. Terpeluk says there's no real way of knowing the purity of the CBD you're using, as it could be mixed with other cannabinoids, such as . . . delta-8, or THC.").
>
> Nor does Nurse Hudson's note resolve this issue in Anderson's favor. In it, Hudson writes to "verify" that Anderson is taking "over the counter CBD products" or the "natural product of CBD" "for anxiety and muscle spasm[s]." J.A. 249. And Hudson states, without more, that "[i]t is common for THC to show up in a drug urine screen because of these products." J.A. 249. The note does not provide an accounting of the specific products Anderson was taking, much less their delta-9 THC concentrations. So this isn't enough to prove that the products were legal.

Id. Thus, according to the Fourth Circuit, ". . . without evidence of the delta-9 THC concentration of these products, no fact finder could reasonably find that they were indeed 'lawful' – a prerequisite to the applicability of the lawful products statute." Id. at * 19. It was simply not enough that the CBD products were being sold across the counter or were presumably lawful. Evidence was required that the CBD met the federal and state standard. In our view, this is what a South Carolina court would conclude.

In the criminal law context with respect to drug enforcement, the same issues arise. Violation of the drug laws must be determined on a case-by-case basis, not a categorical, basis. As was stated, for example, in Toledo Rojo v. State, 202 N.E.3d 1085, 1088-90 (Ind. Ct. App. 2022),

> the difference between a legal substance, such as hemp, and illegal marijuana is determined by the concentration of delta-9-THC in a particular substance: to be illegal, the concentration of delta-9-THC must be more than 0.3%.
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> Toledo Rojo correctly asserts that the state presented no chemical analysis evidence that the substance seized from his sock was actually marijuana, i.e., that it had a concentration of delta-9-THC that was more than 0.3%. . . .
>
> As the Fedij Court [Fedij v. State, 186 N.E.3d 696, 709 (Ind. Ct. App. 2022)] stated,
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> > [t]he statute proscribes possession of a specific substance, and if the State seeks to obtain a conviction under that statute, it is entirely the State's burden

> to prove that the proscribed substance was in fact in defendant's possession. Leaving the fact-finder to simply guess whether a substance is legal or illegal from equivocal evidence is not a sufficient basis to sustain a criminal conviction.
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> Id. at 709.

Again, individual case-by-case analysis is imperative; otherwise, it is pure "guesswork" as to the concentration of THC in a particular canned drink.

Moreover, by analogy, the legality of gaming machines in South Carolina is instructive. In Allendale Cty. Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 586-87, 606 S.E.2d 471, 474 (2004), our Supreme Court reversed the magistrate's conclusion that an entire category of video gaming machines was legal because they operated "in an identical manner." The Court held instead that the forfeiture process required that there must be a "machine-by-machine" analysis. Accordingly, the magistrate "lacked jurisdiction to determine the legality of machines not before the court." In short, the legality of machines could not be determined "en masse" or by a "blanket" categorization. Likewise, the legality of a hemp-infused drink must be ascertained on an individual basis.

It is clear from these authorities that the overarching purpose of the federal and state hemp legislation was the deregulation of hemp for its use in agricultural endeavors. Application of the legislation to THC-infused drinks was, as the Court explained in Climbing Kites a "consequence" of the legislation, but clearly not the principal focus of lawmakers. Determination of the legality of a THC-infused beverage is far more problematical than hemp in the field. The legal requirement for THC-infused beverages may be easily stated, as we do here: clearly, if the hemp product does not exceed a concentration of 0.3% THC on a dry weight basis, it is legal. However, application of this legal requirement to a particular product is much more difficult and must be determined on an individual basis. That is precisely why the General Assembly needs to renew its consideration of the Hemp Farming Act in light of these new public health and other issues. States elsewhere, such as Iowa, are now regulating THC-infused products. The pressing need for such regulation is well stated in an article in U.S. Law Week as follows:

> [h]emp-derived consumable products share an important trait with the state-regulated marijuana industry – both manufacture intoxicating substances that are derived from the cannabis plant.
>
> This is why it's perplexing to see that Smart Approaches to Marijuana, known as project SAM, has its sights set on the state-regulated marijuana industry, rather than focus more of its attention on the dangerous un regulated hemp-derived intoxicants that are readily available to children without restriction.

> It's apparent that members of Congress didn't fully appreciate that they were legalizing intoxicating hemp cannabinoid products without guardrails when they de-scheduled hemp and its derivatives in the 2018 Farm Bill.
>
> Because hemp and its derivatives that test below 0.3% THC on a dry-weight basis are now arguably legal, hemp cannabinoid manufacturers are exploiting a loophole. They're infusing high levels of THC in food products such a beverages, gummies, and brownies that are heavy – and thus test below 0.3% THC on a dry-weight basis.
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> Today, any child can buy intoxicating hemp-derived candy, and have it shipped to their house without age verification, lab testing for heavy metals and other dangerous biproducts, dosage limits, or packaging and labeling standards. Oftentimes these products replicate well-known children's candy brands.
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> Kids can order direct-to-consumer products online that are astonishingly more powerful than the THC products allowable for sale in the adult-only regulated marijuana marketplace. The Food and Drug Administration has issued warnings to the public and sent warning letters to manufacturers about these dangers.
>
> What is clear is that these products should be regulated just like marijuana products in the 38 states with medical marijuana programs and 24 states with legalized adult-use. This void in law and regulation should concern everyone.

Kline, "Hemp-Derived Intoxicants Need Better Cannabis Law Guardrails," U.S. Law Week, Feb. 12, 2024. We are confident that the General Assembly did not foresee these complex issues when enacting the 2019 Hemp Farming Act.

Conclusion

Beverages infused with concentrations of delta-9 THC of 0.3% or less on a dry weight basis are now "legal" under the literal language of the federal and state Farm Acts. That is what federal and state law expressly declare. We offer that conclusion herein.

However, the issue is complex. Compare Toledo Rojo, supra. As we noted in our opinion of July 10, 2019, the purpose of the Hemp Farming Act of 2019 "is succinctly summarized by the legislation's title: An Act . . . Relating To Industrial Hemp Cultivation, . . . To Define Necessary Terms, [And] To Prohibit The Cultivation, Handling, or Processing of Hemp Without A Hemp License Issued by The South Carolina Department of Agriculture. . . ." See Op. S.C. Att'y Gen., 2019 WL 3243864 (July 10, 2019). Thus, the Act was aimed primarily at legalizing industrial hemp and its cultivation. The Legislature simply left the hemp products issue for a later date by stating that products containing concentrations of delta-9-THC of 0.3% or less on a dry weight basis are legal. And as was concluded in Anderson, this same legal standard applies to hemp products as well as it does to hemp itself.

Further, courts have determined that the amount of THC in hemp in the field may not be always the same as that of hemp in a canned drink. Federal and state law legalizes the delta-9 0.3% THC content to be calculated on a "dry weight basis." In this regard, as courts have found, a delta-9 0.3% THC level on a dry weight basis may not always translate into that same level of THC when placed in a drink or beverage. As one court has put it, "although a 0.3% limit on a dry weight basis for THC would preclude its intoxicating effects if it were consumed as an inhalant, when infused into beverages and other foods, these products may be very intoxicating even under the statutory potency limit." Climbing Kites LLC v. Iowa, supra. The Court in Climbing Kites noted that Congress's intent in passing the 2018 Farm Bill "may have been to deregulate hemp to facilitate its use in agriculture and the production of commodities," but not necessarily to allow [or regulate] THC's placement in consumable products.

While Congress and the General Assembly have declared that a delta-9 concentration of THC below the 0.3% level is legal, a "blanket" conclusion of legality beyond stating the statutory limit of concentrations of 0.3% THC or less cannot be made in an opinion of this Office. Such determination must be made on an individual basis. See State v. Crumpton, ____ S.E.2d ____, 2024 WL 3588315 (Ct. App. 2024) at *5 ["As declared in SLED's notice and by Cowan's own admission, the testing method used here could not differentiate between legal industrial hemp and illegal marijuana."]. The Fourth Circuit in Anderson, recognized that merely because products are being sold over the counter in stores cannot be considered as evidence of individual concentration of THC. As we have emphasized in previous opinions regarding the Hemp Farming Act, such an assessment would require the investigation and determination on a case-by-case basis. Paraphrasing the Court in Allendale, rather than determining legality machine-by-machine, such must be done can-by-can. Only law enforcement or a court – assisted by lab testing – may determine whether or not a particular canned drink infused with THC meets the 0.3% or less requirements of the law. All we are able to do here is state what the law does: products with a THC concentration of 0.3% or less on a dry weight basis are legal. It may well be that certification of the 0.3% or less by the manufacturer satisfies the requirement of legality.

Accordingly, in light of the legality of hemp-infused drinks, as other states are now doing, the General Assembly may wish to consider what one authority has described as providing sufficient "guardrails." See Kline, supra. Currently, there are no such "guardrails" in the law beyond the statutory limit of 0.3% or less. In light of the need for clarity, legislatures in other states have begun to consider numerous issues – including public health – regarding THC-infused drinks. These include, among other considerations: whether children can purchase those drinks; whether there should be age limits thereupon; whether labelling requirements for such drinks are required; the safety of THC-infused drinks; whether there is some workable method for ensuring the content of a can meets the prescribed limits of the law without the need for testing can-by-can; as well as the threshold issue of legality in the first instance. See Climbing Kites, supra (Iowa). In addition, the Legislature may well wish to address which administrative agency is responsible for enforcement and regulation. We also note that Congress is seeking to legislate with respect to these same issues in the new Farm Bill, and it is our understanding that

certain restrictions have already passed the House. Such legislative clarification – which we have emphasized the need for in previous opinions, in other contexts – may be determined by the General Assembly to greatly serve the public interest, and public health and safety. Your questions regarding the sale of THC-infused drinks is one such area.

In summary, the Hemp Farming Act of 2019, as now written, makes non-alcoholic drinks containing concentrations of delta-9 THC of 0.3% or less on a dry weight basis legal. If such a drink meets this statutory requirement, it is legal under current law. Beyond that, this Office in an opinion, cannot go. The Legislature may wish to further address the many issues raised herein – including public health – arising from the sale of THC-infused drinks.

Sincerely,

Robert D. Cook
Solicitor General