

Comments Regarding Trade Agreements

Some commenters expressed the view that the proposed rule violates certain obligations of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) agreements. Many of these same commenters expressed these assertions to DEA before the proposed rule was published in October 2001. As a result, both before and after publication of the proposed rule, DEA sought the input of the Department of State and other components of the Executive Branch with the relevant expertise and responsibility for such matters and concluded that the proposed rule—which simply clarifies longstanding federal law with respect to schedule I hallucinogenic controlled substances—does not violate NAFTA or the WTO agreements.

One of the bases for these treaty claims asserted by commenters is the contention that the proposed rule provides more favorable treatment to United States and foreign, non-Canadian investors and their investments than to Canadian “hemp” investors and their investments in the United States. In reality, the rule applies to and treats all “hemp” industry investors and their investments the same—i.e., regardless of nationality of ownership. No company (whether Canadian-owned, foreign but non-Canadian-owned, or United States-owned) can manufacture, distribute or market products used, or intended for use, for human consumption that contain any amount of THC. DEA has made no exception to this rule for any United States company or any foreign company.

Comments Requesting an Extension of the Comment Period

Some commenters asked DEA to extend the comment period. DEA did not do so for the following reasons. In the notice of the proposed rule, DEA provided a 60-day comment period from the date of the publication in the **Federal Register**, which allowed ample time for any interested persons to express their opinions.

DEA considered all comments that were postmarked within the comment period, even where the agency did not receive the comments until several months after the comment period closed.¹⁵ It is evident from the number

and variety of comments that were submitted, and the detailed nature of such comments, that a wide range of viewpoints was expressed to the agency during the comment period. Nearly all of the types of comments that were submitted during the comment period were repeated many times over by a number of commenters, which further indicates that interested parties have had sufficient opportunity to express their comments.

DEA provided the public with advance notice of the rules. In the year preceding the October 9, 2001 publication of the rules, DEA announced twice in the **Federal Register** that the agency would be issuing the proposed rule, along with the interpretive rule and the interim rule, and described the nature of the rules. See Department of Justice Unified Agenda, 66 FR 25624 (May 14, 2001), 65 FR 74024 (November 30, 2000). It is evident from the comments submitted on the proposed rule that the advance notice gave interested persons ample time to assemble and articulate their thoughts and opinions. Some of those persons who requested an extension of the comment period themselves submitted lengthy comments, indicating that they have already fully expressed their views. In light of these considerations, extending the comment period was unnecessary.

Comments Regarding Economic Impact of the Proposed Rule

Many commenters expressed concern about how the proposed rule might impact economically various businesses that deal in “hemp” products. These economic considerations are addressed in the next section of this document (regulatory certifications).

Regulatory Certifications

Certain provisions of Federal law and executive orders (specified below) require agencies to assess how their rules might impact the economy, small businesses, and the states. (Hereafter in this document, these provisions will be referred to collectively as the “certification provisions.”) DEA has conducted these certifications. However, before discussing the economics, the nature of this rule should be reiterated. This rule revises the wording of the DEA regulations to clarify for the public the agency’s understanding of longstanding federal law. In other words, through this rule, DEA is implementing what it believes to be the mandate of Congress under the CSA. (This mandate is that every substance containing THC be listed in schedule I, unless the substance is

specifically exempted from control or listed in another schedule.) Regardless of how this rule might impact the economy, small businesses, or the states, DEA must carry out the mandate.

It is also critical to bear in mind that only a very narrow category of “hemp” products will be prohibited under the rules that DEA is publishing today. As a result of the exemptions issued by DEA under the interim rule, all “hemp” products that do not cause THC to enter the human body are entirely exempted from control, regardless of their THC content. Thus, items such as “hemp” clothing, industrial solvents, personal care products, and animal feed mixtures are considered noncontrolled substances (not subject to any of the CSA requirements) regardless of their THC content. This rule therefore causes no economic impact whatsoever on such exempted products.

It also must be considered that when Congress enacted the CSA, it created a system of controls that was comprehensive in scope to protect the general welfare of the American people within the context of the Act.¹⁶ Incidental restrictions on economic activity resulting from enforcement of the CSA have never been viewed as a proper basis to cease such enforcement. The certification provisions are no exception to this principle.

Moreover, one of the chief aims of the certification provisions is to ensure that agencies consider the potential economic ramifications of imposing new regulations. This rule, however, does not create any new category of regulation governing the handling of controlled substances. Rather, the rule merely helps to clarify what products are, or are not, subject to what DEA believes are preexisting CSA requirements.

DEA recognizes, however, that some members of the public disagree with DEA’s interpretation of the law with respect to THC. As a result, some companies may be continuing to market in the United States “hemp” food and beverage products that contain THC. Accordingly, for purposes of calculating the economic impact of these rules, DEA has assumed THC-containing “hemp” foods and beverages are lawful products until this rule becomes final.

In the regulatory certifications that accompanied the proposed rule, DEA explained in detail its analysis of the economic activity relating to “hemp” food and beverage products (referred to therein and hereafter in this document as “edible ‘hemp’ products”). 66 FR at 51536–51537. In that analysis, using

¹⁵ At the time the comment period closed, postal deliveries to DEA and other agencies were delayed after the widely-reported incidents of anthrax being sent through the mail. Because of this, although the proposed rule indicated that DEA would only consider comments received on or before December 10, 2001, the agency considered all comments postmarked by that date, even if they arrived late.

¹⁶ See 21 U.S.C. 801(2).