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Written by Nicole A. Aaronson, Ian A. Stewart – 8/28/18

Effective July 1, 2018, all cannabis and cannabis products will be subject to laboratory testing under the California cannabis regulations to ensure appropriate pesticide use. These standards, developed by the California Department of Pesticide Regulation (CDPR), impose heightened restrictions on cannabis crops compared with other agricultural products. If a cannabis product sample fails residual pesticide testing, the entire batch from which the sample was collected fails and cannot be sold by a retailer. See California Code of Regulations (CCR) § 5719. Impermissible pesticide violations may result in contamination of an entire crop and substantial lost profits to any cultivator lax on compliance.

Risks and Penalties

Failing to take steps to comply with the CDPR's standards puts a cannabis company at risk of litigation and jeopardizes business contracts with other downstream cannabis operators whose manufactured products are rendered unsalable due to crop contamination. Business practices that run afoul of pesticide standards may call for civil or criminal penalties under California's Food and Agricultural Code (FAC), or warrant a serious infraction charge from CalCannabis Cultivation Licensing authorities, a division of the California Department of Food and Agriculture (CDFA), subjecting operators to fines of \$1,001 to \$5,000 per violation. Civil penalties

may also impede state or local license renewal. Moreover, the CDPR standards provide fodder for prospective plaintiffs' attorneys to bring Unfair Competition lawsuits under California's Business and Professions Code, section 17200, *et seq.* for, among other things, unlawful business practices and deceptive or fraudulent advertising based on alleged contamination or adulteration of the product. These lawsuits give rise to costly litigation, damages awards, statutory penalties and possible injunctions that prevent business operations. See Wilson Elser's article "**Cannabis Consumer Class Actions Are Being Filed.**"

Labeling and Precautions

By law, pesticide users must follow the statements on pesticide product labels, which include precautionary statements for protecting human and environmental health, storage and disposal instructions, product warnings and directions for use. Improperly labeled pesticides should not be used. In addition, pesticide application must be at a rate no greater than the rate listed on the product label and done in a manner consistent with the provided agricultural use requirements. Directions may include use of personal protective equipment, varying methods of application and pre-harvest restricted entry intervals. Cultivation licensees also are charged with preventing offsite pesticide drift through application only when there is no pollinator presence and spraying when the wind is blowing away from surface water bodies. See CCR § 8307.

Pesticide use for cannabis will increase with expansion of cannabis cultivation to meet the demand of the regulated market. California's cannabis laws permit the use of pesticide products so long as (1) the product's active ingredients are exempt from residue tolerance

requirements and (2) the product is either registered for a use broad enough to include cannabis or completely exempt from registration requirements.

Regulation

The United States Environmental Protection Agency (EPA) is responsible for setting residue tolerance parameters that proscribe the amount of pesticide residue that may remain on a treated crop with “reasonable certainty of no harm.” If a pesticide is found to cause minimal risk, it may be exempt from the tolerance requirement. Not surprisingly, unlike traditional agricultural products, no pesticides are federally registered for use on cannabis. Also, most food-grade essential oils such as rosemary or peppermint oil are exempt from EPA registration requirements. At some point in the future, the EPA may regulate pesticide use on cannabis. Until then, this falls under state regulations.

The CDPR regulates pesticide products that are prohibited from use in California cannabis cultivation. These consist of pesticide products that are included on the groundwater protection list, that warrant the signal word “Danger,” that have no California registered food use, or that contain restricted materials that implicate federally restricted-use products. See CCR §§ 6800 and 6400. Pesticide use in violation of any of the aforementioned prohibitions will be strictly enforced by the CDPR and County Agricultural Commissioners (CACs) as a California FAC violation. See FAC §§ 12996 and 12999.5.

Cultivators also would be wise to consult CCR, sections 5700 – 5735, which contain the standards for testing laboratories mandated by the Bureau of Cannabis Control. When tested, cannabis and cannabis products must pass residual pesticides testing. This is achieved so long

as there are no traces of any Category I pesticide and the presence of any Category II residual pesticide does not exceed the provided action levels. See CCR § 5719.

Summary

The cannabis industry has its roots in agriculture. Unlike any other agricultural product, however, cannabis cultivators that use pesticides are faced with the dangerous nexus of inadequate federal research and oversight, rapidly evolving state regulations, onerous testing standards and high levels of potential legal liability. Fortunately, well-informed licensees who follow best practices consistent with California's regulations should mitigate most legal exposure associated with pesticide use.

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