



MINNESOTA BOARD OF PHARMACY

Report to the Legislature on Changes the Board Proposes to Make to the Controlled Substance Schedules Maintained by the Board in Minnesota Rules. (In compliance with Minnesota Statutes Section 152.02, Subd. 12)

*Cody Wiberg, Pharm.D.,
M.S., R.Ph.*

*Executive Director
Minnesota Board of
Pharmacy*

*2829 University Avenue
SE #530
Minneapolis, MN 55414*

(651)201-2825

cody.wiberg@state.mn.us

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COST OF REPORT

[Minnesota Statutes §3.197](#) states that a “report to the legislature must contain, at the beginning of the report, the cost of preparing the report, including any costs incurred by another agency or another level of government”. The estimated cost of preparing this report was **\$75.00**. That is the approximate value, in terms of salary and benefits, of the time that Board staff spent preparing the report.

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Introduction

The Board of Pharmacy (Board) is submitting this report to the Legislature in compliance with Minnesota Statutes §152.02, subdivision 12. That section states, in part:

“The state Board of Pharmacy shall annually submit a report to the legislature on or before December 1 that specifies what changes the board made to the controlled substance schedules maintained by the board in Minnesota Rules, parts 6800.4210 to 6800.4250, in the preceding 12 months. The report must also specify any orders issued by the board under this subdivision. The report must include specific recommendations for amending the controlled substance schedules contained in subdivisions 2 to 6, so that they conform with the controlled substance schedules maintained by the board in Minnesota Rules, parts 6800.4210 to 6800.4250, and with the federal schedules.”

The Board reviewed and approved this report at its December 8, 2021 meeting.

2021 Scheduling Changes

The Board did not engage in rule-making to make any changes to the controlled substance schedules found in Minnesota Rules Chapter 6800 during calendar year 2021. Nor did it issue any scheduling orders in 2021.

The Board continues to occasionally receive reports from law enforcement officials or the Bureau of Criminal Apprehension Laboratory about an unscheduled and potentially abused substances that appear to be available for purchase on the streets or from Internet suppliers. In addition, law enforcement officials and healthcare providers have expressed concern to the Board concerning the increasing abuse of gabapentin – a drug approved by the United States Food and Drug Administration that acts on the same receptor system that benzodiazepines (Valium-like drugs) act on. Consequently, the Board may propose controlled substance scheduling legislation during the 2022 Session.

There is also potential scheduling issue involving delta-8 tetrahydrocannabinol (Δ -8 THC), which is an isomer and analog of delta-9 tetrahydrocannabinol (Δ -9 THC). Δ -8 THC is an intoxicating substance, although it is slightly less potent than Δ -9 THC (meaning it takes a larger quantity to make some “high”). Δ -8 THC is being produced by some individuals and companies by extracting cannabidiol (CBD) from hemp and converting the CBD to Δ -8 THC.

The producers believe that Δ -8 THC products derived from hemp are not controlled substances as long as the product contains less than 0.3% of Δ -9 THC. That is because of the following definition of industrial hemp found Minn. Stats. §18K.02, subd. 2 is (emphasis added):

“Industrial hemp” means the plant *Cannabis sativa* L. and any part of the plant, whether growing or not, including the plant's seeds, and all the plant's *derivatives*, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, ***with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Industrial hemp is not marijuana*** as defined in section 152.01, subdivision 9.

In addition, the definition of “marijuana” in Minn. Stats. §151.01 includes this sentence “Marijuana does not include hemp as defined in section 152.22, subdivision 5a.”

However, Minn. Stats §152.02, subd. 2 h. (2) makes tetrahydrocannabinols Schedule I controlled substances, *separately* from marijuana. The definitions of industrial hemp and marijuana given above make no mention of

industrial hemp *not* being tetrahydrocannabinols. In addition, Δ-8 THC is not *directly* derived or extracted from industrial hemp, it is synthesized from CBD that is extracted from hemp. Therefore, an argument can be made that Δ-8 THC synthesized from CBD that is extracted from hemp, is a Schedule I controlled substance, even if the product that contains it has less than 0.3% of Δ-9 THC.

The Minnesota State Court of Appeals appears to have reached that same conclusion in the case of [*State v. Loveless*](#), pointing out (at least for liquid products containing any amount of any tetrahydrocannabinol):

“Unlike the definition of marijuana, the inclusion of tetrahydrocannabinols in Minnesota's Schedule I does not make any exception for hemp or for a substance or mixture that has a concentration of delta-9 tetrahydrocannabinol that is 0.3 percent or less on a dry-weight basis.”

The Court acknowledges that “the legislature enacted other laws that appear to recognize or assume the lawfulness of vaporizer cartridges containing low concentrations of delta-9 tetrahydrocannabinol.” However, the Court also opined that:

“the legislature did not amend the relevant provisions of chapter 152 to make it lawful to possess a liquid mixture with a low concentration of delta-9 tetrahydrocannabinol. If a statute's language is plain and its meaning is unambiguous, a court must interpret the statute according to its plain meaning, without resorting to canons of construction or legislative history. See, e.g., *State v. Serbus*, 957 N.W.2d 84, 87 (Minn. 2021); *State v. Struzyk*, 869 N.W.2d 280, 288 n.5 (Minn. 2015). Here, the relevant provision of Schedule I is unambiguous. It states simply, "tetrahydrocannabinols," without regard for the concentration of delta-9 tetrahydrocannabinol.”

Since even CBD products that meet the requirements of Minn. Stats. §151.72 contain at least trace amounts of tetrahydrocannabinols, they would appear to be Schedule I controlled substances under this ruling. Δ-8 THC products would definitely be Schedule I controlled substances under this ruling and for the other reasons mentioned above.

If the Legislature wishes to continue allowing the sale of non-intoxicating cannabinoids derived from hemp, it appears that Minn. Stats. §151.72 will need to be amended, as will Minn. Stats. §152.02, subd. 2 h (2). If the Legislature wished to legalize the sale and possession of products containing Δ-8 THC, which is intoxicating, those sections would also need to be modified.

The Board is working with the Minnesota Departments of Agriculture, Health, and Public Safety on issues involving substances extracted from hemp and sold for human or animal consumption. A separate report will most likely be developed by the agencies involved.