



December 13, 2024

The Hon. John J. Mulrooney II
Chief Administrative Law Judge
c/o DEA Office of Administrative Law Judges
8701 Morrisette Drive
Springfield, VA 22152
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Filed via email transmitted to DEA Judicial Mailbox

**RE: *In the Matter of Schedules of Controlled Substances:
Proposed Rescheduling of Marijuana***
DEA Docket No. 1362; Hearing Docket No. 24-44

Dear Chief Judge Mulrooney:

As you are aware, Fox Rothschild and Greenbridge Corporate Counsel represent the National Cannabis Industry Association (“NCIA”), a Designated Participant (“DP”) in the Hearing before Your Honor that is scheduled to commence on January 21, 2025 in connection with the Proposed Rule Rescheduling of Marijuana (the “Rule”). We write to Your Honor to kindly request clarification regarding: (1) the extent of NCIA’s right to cross-examine certain witnesses (testifying on behalf of the Government, as well as Designated Participants opposed to the Rule) and (2) NCIA’s reservation of its rights (made in our Prehearing Statement¹ and discussed at the Preliminary Hearing) to present a second witness (testifying in support of the Rule). In addition to the foregoing requests for clarification, NCIA also requests (3) the right to present witness testimony through video teleconference (VTC), and (4) leave to permit certain members of NCIA’s leadership to attend specific days of the Hearing.

I. REQUEST FOR CLARIFICATION REGARDING THE EXTENT OF NCIA’S RIGHT TO CROSS-EXAMINE WITNESSES

As Your Honor has acknowledged, NCIA occupies a unique position among DPs in this proceeding, as *both* an “interested person” *aggrieved by the Rule* as it pertains to the proposed redefinition of tetrahydrocannabinols (THC) *and* (as noted in Your Order Regarding Standing, Scope, and Prehearing Procedures dated November 19, 2024 (the “11/19 Order”)) an association with “a

¹ In an annotation to the “Documents” section of NCIA’s Prehearing Statement, we note that “NCIA respectfully reserves any right to submit a separate motion for leave to present additional documents and witnesses in favor of the Proposed Rule. To the extent necessary, it is NCIA’s intention to do so after the Prehearing Conference, at a date set by this Tribunal as the appropriate deadline for such motions.” NCIA’s Prehearing Statement at 8.



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large and diverse membership” of state-licensed marijuana businesses that *support* the Rule. *See* 11/19 Order at 40.

Consistent with this acknowledgement, and pursuant to the Prehearing Ruling dated December 4, 2024 (“**Prehearing Ruling**”), NCIA is scheduled to present its case on January 29, 2025—during the three-week period Your Honor has set aside for both the Government and other DPs in support of the Rule to present their cases. Accordingly, we recognize that Your Honor intends for us to cross-examine the witnesses of the DPs opposing the Rule. We agree that our membership’s experiences will allow us to elucidate important evidence through such cross-examinations.

Additionally, per the 11/19 Order, Your Honor notes that “Anti-Rescheduling DPs may cross-examine all Government witnesses and all Pro-Rescheduling witnesses,” and that “[w]itnesses presented by the Anti-Rescheduling DPs may be cross-examined by the Government and Pro-Rescheduling DPs.” However, as both an “interested person” aggrieved by a portion of the Rule, as well as a DP whose interests are otherwise largely aligned with the Pro-Rescheduling DPs, we are left speculating as to whether whether the Government and the Pro-Rescheduling DPs will be allowed to cross-examine NCIA’s witness in support of its limited objection to the Rule (Dr. Shane Johnson), and whether NCIA will in turn be allowed to cross-examine the Government’s witness as an “interested person”.

As an “interested person”, NCIA would ordinarily have a procedural right under 5 U.S.C. § 556(d) of the APA to cross-examine the Government’s witnesses:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

As such, we respectfully request clarification from Your Honor as to whether NCIA will be able to do so – notwithstanding our shared interest with Pro-Rescheduling DPs in advancing the Rule.

II. REQUEST FOR CLARIFICATION REGARDING THE EXTENT OF NCIA’S RIGHT TO PRESENT TESTIMONY

Presumably, if NCIA’s affiliation with other proponents of the Rule ultimately determines the extent of our right to cross-examine the Government’s witnesses, NCIA would be entitled to present a witness testifying in favor of the NPRM pursuant to 5 U.S.C. § 556(d). Arguably, this presumption would be consistent with the 11/19 Order, which asks NCIA to consider consolidating our presentations with other Pro-Rescheduling DPs: “Inasmuch as this requestor shares [] pecuniary and



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commercial concerns with other requestors, it may [be] prudent [to agree] to a consolidation of presentations with other commercially-motivated DPs who also support the NPRM” (11/19 Order at 40).

Put differently, while the 11/19 Order also states that all DPs are limited to one witness (and that NCIA has thus been granted the right to present a single witness to testify to matters upon which NCIA’s standing as an “interested person” rests) Your Honor’s suggestion to consolidate presentations with other DPs in support of the Rule also presumes that NCIA may present a witness in favor of removing marijuana from Schedule I. As acknowledged in the 11/19 Order, NCIA “would have the means at its disposal to provide qualified witnesses among its large and diverse membership, and that the commercial perspective available to it would be helpful to the adjudication of this NPRM.” 11/19 Order at 40; *see also* 11/19 Order at 43 (providing that DPs may present the testimony of a single witness, however can request leave to seek more witnesses).

While we value the ability to present a witness on our limited objection and for cross-examination by the Government, as the nation’s oldest and largest trade association for state-regulated cannabis, NCIA believes it would be able “to provide qualified witnesses” that would be particularly beneficial to this Court and provide unique insights drawing on the experiences of “its large and diverse membership” with a “commercial perspective available to it [that] would be helpful to the adjudication of this NPRM”. As noted above, NCIA has disclosed in its prior submissions, as well as statements made on the record at the Preliminary Hearing, of its position on presenting a second witness. As such, given NCIA’s overall position on this matter, coupled with its limited objection by which it has been granted standing, NCIA reiterates its request to present Dr. Jennifer Mitchell, Ph.D. for testimony in support of the Rule. At the hearing, it appeared this request would be considered. Accordingly, NCIA is seeking clarification from Your Honor as to whether it may present a second witness.

NCIA of course understands this Tribunal’s desire to keep the Hearings orderly and efficient by limiting superfluous live testimony. With this in mind, NCIA does not anticipate needing a full ninety (90) minutes per witness, as allocated in the Preliminary Hearing Order. Instead, we are requesting sixty (60) minutes for each witness and will endeavor to be as efficient as possible with both direct examinations.

A. THE ADDITIONAL TESTIMONY WOULD NOT BE UNDULY REPETITIVE OR INADMISSIBLE UNDER 21 CFR 1316.59(a)

Neither the affidavit nor any oral testimony of Dr. Jennifer Mitchell would be unduly cumulative under 21 CFR 1316.59(a), for three reasons. First, the DEA has already stated it will not



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present a witness from the HHS that can discuss the medical and scientific soundness of HHS' recommendation that marijuana be rescheduled to Schedule III (which would be the general subject of Dr. Mitchell's testimony, as described in her affidavit). Second, none of the other witnesses testifying in this Hearing have the decades of experience she possesses as (i) a Professor in the Departments of Neurology and Psychiatry and Behavioral Sciences at the Weill Institute for Neurosciences at the University of California San Francisco, (ii) Associate Chief of Staff for Research and Development at the San Francisco VA Medical Center, (iii) Chair of the Research Advisory Panel in the California Attorney General's office (which reviews and authorizes all marijuana research in California), and (iv) an experienced clinical researcher of Schedule I controlled substances. Third, and perhaps most critically, unlike the DPs opposing the Rule, none of the DPs in support of the Rule (other than NCIA) have standing as an "interested person," thus entitling NCIA's witness(es) to greater deference from this Tribunal and ensuring that at least some of the evidence submitted in support of the Rule is given equal weight to the evidence submitted in opposition to the Rule.

B. REQUEST TO FILE MOTION OUT OF TIME

We acknowledge Your Honor's admonition in the Prehearing Ruling that "as announced at the Preliminary Hearing, the time for seeking relief through motion practice has reasonably passed" (Prehearing Ruling at 8). As such, to the extent our lingering doubts can be resolved through your confirmation that NCIA's understanding conforms to Your Honor's spoken ruling at the Preliminary Hearing, we can spare this Tribunal yet another motion to review.

To the extent we must still affirmatively move for leave to present Dr. Mitchell's testimony supporting the Rule (in addition to Dr. Johnson's testimony) on January 29th, we respectfully request leave to file such motion herewith. Dr. Mitchell's affidavit (intended to be introduced into evidence as NCIA-Exh. No. 10) is attached hereto and provides a summary of the testimony Dr. Mitchell intends to submit. Dr. Mitchell's extensive *curriculum vitae* (intended to be introduced into evidence as NCIA-Exh. No. 11), substantiating her decades of relevant expertise, is also attached.

1. GOOD CAUSE EXISTS FOR THIS REQUEST TO FILE OUT OF TIME

Your Prehearing Ruling precludes DPs from filing additional motions without a demonstration of good cause supporting a request to file out of time: "Any further motions must be accompanied by a request to file out of time and supported by a demonstration of good cause that is likely to be narrowly construed" (Prehearing Ruling at p.8).

As such, and for good cause as discussed below, NCIA respectfully submits this request for leave to file this motion out of time. Your 11/19 Order instructed DPs that "[p]rehearing statements



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should not include motions, which should be filed separately.” This instruction was annotated with the following footnote: “⁴⁴ A prehearing ruling setting deadlines will be issued after the prehearing conference.” We understood the reference to “deadlines” to include deadlines for any separately-filed motions. Accordingly, we included the following reservation in our Prehearing Statement, memorializing our understanding of the 11/19 Order:

NCIA respectfully reserves any right to submit a separate motion for leave to present additional documents and witnesses in favor of the Proposed Rule. To the extent necessary, it is NCIA’s intention to do so after the Prehearing Conference, at a date set by this Tribunal as the appropriate deadline for such motions. (NCIA’s Prehearing Statement at 7, Fn. 1.)

Given the foregoing, we would have filed this motion before the Prehearing Ruling was issued, had we known we would be precluded from doing so after the Prehearing Ruling was issued.

III. REQUEST TO PROVIDE VTC TESTIMONY

As NCIA is a non-profit trade association, it must raise the funds to cover the transportation and lodging costs for its witnesses, staff and *pro bono* counsel to participate in the hearings. As such, we would like to afford our witness(es) the opportunity to provide VTC testimony in the event we cannot raise the funds needed to underwrite their travel from California to DC.

IV. REQUEST FOR LEAVE TO PERMIT NCIA LEADERSHIP TO ATTEND THE HEARINGS

We respectfully request leave to permit certain members of NCIA’s leadership to attend specific days of the proceedings, as follows:

January 21, 2025: Aaron Smith, NCIA CEO (“**Smith**”); Michelle Rutter Friberg, NCIA Director of Government Relations (“**Friberg**”); *and* Michael Cooper, NCIA Secretary and Policy Co-chair (“**Cooper**”)

January 29, 2025: Smith, Friberg, *and* Cooper.

We also ask for leave to permit *either* Smith, Friberg, *or* Cooper to attend every other day of the Hearing. Additionally, we ask that Smith (aaron@thecannabisindustry.org), Friberg (michelle@thecannabisindustry.org), and Cooper (mcooper@madisonjaysolutions.com) each be



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added to the service list, given that public has not yet been given online access to review submissions and orders in connection with the Hearing.

Finally, while we generally expect only two of NCIA's three *pro bono* Counsel of Record to attend the Hearings on any given day, we also ask for leave to permit each of NCIA's three (3) Counsel of Record to attend every day of the Hearing should they have the ability to do so.

We thank Your Honor for his time and consideration. If you have any questions related to our request, please do not hesitate to contact the undersigned.

Respectfully yours,

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