

2018 Farm Bill to Lift Federal Prohibition on Hemp Production, but State Laws May Restrict Certain Activities

December 13, 2018

Earlier this week, the U.S. House of Representatives and Senate both passed the Agriculture Improvement Act of 2018 (the “2018 Farm Bill”), legislation that includes provisions lifting the federal prohibition on hemp production. Enactment of this legislation would have significant implications for the legality of cannabidiol (“CBD”), a popular hemp derivative. President Trump is expected to sign the 2018 Farm Bill into law, perhaps as soon as this week. The full conference committee report is available [here](#).

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“Hemp” refers to varieties of the *Cannabis sativa* L. plant characterized by low levels of tetrahydrocannabinol (“THC”), the primary psychoactive chemical in marijuana. Hemp is capable of being used in a diverse array of products, including construction materials, clothing, paper, cosmetics, pharmaceuticals, food, and dietary supplements.

For decades, the United States has been the only industrialized nation where hemp was not a legally authorized crop. Schedule I of the federal Controlled Substances Act of 1970 (“CSA”), 21 U.S.C. § 801 *et seq.*, has long prohibited the growing, production, and sale of marijuana. Marijuana has been defined under the CSA as including all parts of the *Cannabis sativa* L. plant, with the exception of “the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound . . . 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.”¹ Hemp has been subject to the marijuana definition because it is also a variety of the *Cannabis sativa* L. plant.

Passage of the 2018 Farm Bill marks the first change in the federal classification of marijuana since Congress designated it a Schedule I controlled substance in 1970.

Specifically, the 2018 Farm Bill’s hemp-specific provisions amend the CSA so that hemp, as long as it contains 0.3 percent THC or less, no longer comes within the federal

¹ 21 U.S.C. 802(16).

definition of marijuana.² Certain cannabinoid derivatives of hemp would therefore also be removed from the purview of the CSA, including hemp-derived CBD.

Notwithstanding hemp’s removal from Schedule I of the CSA, the legality of certain FDA-regulated categories of hemp products—including products containing hemp-derived CBD—remains uncertain at the federal level. Specifically, the 2018 Farm Bill states that it does not “affect or modify the Federal Food, Drug, and Cosmetic Act [‘FFDCA’] . . . [or] the authority of the Commissioner of Food and Drugs and the Secretary of Health and Human Services.”³ The U.S. Food and Drug Administration (“FDA”) has taken the position that cannabinoids, including CBD, are impermissible for use in food and dietary supplements.⁴ Despite the existence of counterarguments, at the present time certain CBD products currently on the market, particularly those intended for ingestion, may therefore remain unlawful. In addition, the FDA has intermittently sent Warning Letters to entities that sell CBD products, including dietary supplements and topical cosmetic products, for making unproven drug claims about CBD’s health-related properties.⁵

The 2018 Farm Bill’s hemp provisions build on the framework set forth in the 2014 farm bill, which allowed for some legal cultivation of hemp by states. The previous iteration of the farm bill allowed cultivation of hemp for research purposes under state-approved pilot programs connected to universities or state agricultural departments.⁶ Some states declined to participate, however, and the DEA often took the position that the 2014 farm bill allowed only for the cultivation, not sale, of hemp and hemp-derived products.⁷

Section 10113 of the 2018 Farm Bill allows states to regulate hemp production if they so choose. Otherwise, federal requirements to be promulgated by the U.S. Department of Agriculture (“USDA”) will constitute the default regulatory regime in all 50 states. States must submit their plans to the USDA for approval prior to becoming effective. USDA review is meant to ensure that state laws comply with at least the minimum level of federal statutory requirements, and the USDA must act within 60 days of receipt.

² Agriculture Improvement Act of 2018, Section 12619.

³ Agriculture Improvement Act of 2018, Section 10113 (amending the Agricultural Marketing Act of 1946, Section 297D(c)(1)).

⁴ U.S. FOOD AND DRUG ADMIN., FDA AND MARIJUANA: QUESTIONS AND ANSWERS (June 25, 2018), available [here](#).

⁵ See, e.g., U.S. Food and Drug Admin., Warning Letter to Hemp Oil Care (Feb. 26, 2015); U.S. Food and Drug Admin., Warning Letter to Natural Organic Solutions (Feb. 26, 2015).

⁶ Agricultural Act of 2014, Section 7606.

⁷ Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53395 (Aug. 12, 2016), available [here](#).

Under Section 10113, state plans must include information concerning locations of hemp production, testing for THC concentration, disposal of non-compliant plants, compliance with the bill's enforcement provisions, participation in law enforcement information sharing, and a certification that the state has sufficient resources to carry out its plan. These requirements indicate Congress's desire to maintain a strict legal separation between marijuana and hemp.⁸

As an additional step to ensure that marijuana is not grown under the auspices of hemp legalization, the 2018 Farm Bill bars individuals with felonies related to a controlled substance from entering into hemp production for ten years following conviction.⁹

The 2018 Farm Bill does not preempt state law and states could choose to regulate hemp and hemp-derived CBD in a more restrictive manner. In fact, the Conference Committee Report expressly provides: "*While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Sec. 10112, agreed to not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory.*"¹⁰

States have their own controlled substances laws that often mimic the provisions of the CSA. Most states define marijuana consistent with the historical definition in the CSA, meaning that hemp and certain hemp products may still come within the marijuana definition under state law. In fact, many state attorneys general have publicly declared—prior to passage of the 2018 Farm Bill—that products containing CBD come within state marijuana prohibitions and are therefore subject to state enforcement.

Rather than preempt state law, the 2018 Farm Bill permits states to pursue primary regulatory authority over the production of hemp by submitting a detailed regulatory plan to the Secretary of Agriculture for approval. A state could choose to regulate the production of hemp even more stringently than under Federal law, as the 2018 Farm Bill provides: "No Preemption—Nothing in this subsection preempts or limits any law of a State or Indian tribe that (i) regulates the production of hemp; and (ii) is more stringent than this subtitle."¹¹

As of this writing, it is unclear how states will react to passage of the 2018 Farm Bill and whether passage will result in state initiatives to modify state controlled substances acts

⁸ See Agricultural Act of 2014, Section 7606(b)(2); Agriculture Improvement Act of 2018, Section 10113 (amending the Agricultural Marketing Act of 1946, Section 297A(1)).

⁹ Agriculture Improvement Act of 2018, Section 10113 (amending the Agricultural Marketing Act of 1946, Section 297B(e)(3)(B)).

¹⁰ H.R. Rep. No. 115-661, at 739 (2018) (Conf. Rep.) (emphasis added).

¹¹ Agriculture Improvement Act of 2018, Section 10113 (amending the Agricultural Marketing Act of 1946, Section 297B(a)(3)).

to exempt hemp (and hemp-derived CBD) from the marijuana definition. An early indication comes from the Alabama Attorney General, who recently announced that because of the 2018 Farm Bill the state is altering its prior position that the sale of CBD products violates state law.¹²

The 2018 Farm Bill does, however, contain language preempting states from prohibiting the transportation or shipment of hemp or hemp products “through the state.”¹³ In other words, states are not permitted to interfere with the flow of products from one lawful state to another lawful state.

Other hemp-related provisions in the 2018 Farm Bill. The 2018 Farm Bill contains other provisions that also address hemp.

- Section 7605 requires the Secretary of Agriculture to conduct a study and report on the economic viability of the domestic production and sale of industrial hemp by analyzing activities conducted pursuant to the 2014 farm bill.
- Section 7129 reauthorizes a research project for supplemental and alternative crops, including hemp, to develop new commercial products with industrial, medical, and agricultural applications.
- Section 7501 reauthorizes the Critical Agricultural Materials Act, and includes hemp as an eligible product “of strategic and industrial importance” for research and development to be sponsored by the USDA.
- Title XI amends various aspects of the Federal Crop Insurance Act to include hemp. These changes bring hemp back into the fold of federal farming programs and seek to hasten its large scale commercialization.

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Please do not hesitate to contact us with any questions.

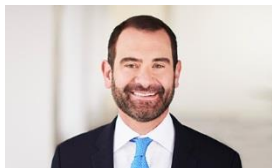
¹² Office of the Alabama Attorney General, Guidance on Alabama Law Regarding the Possession, Use, Sale, or Distribution of CBD (Dec. 12, 2018), available [here](#).

¹³ Agriculture Improvement Act of 2018, Section 10114(b).

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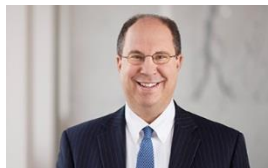


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