

Cannabis, hemp and CBD: Exploring the new frontier

By [Jeffrey O'Brien](#)

On December 20, 2018, President Trump signed into law the Agriculture Improvement Act of 2018, aka the 2018 Farm Bill, which reclassified hemp from a controlled substance to an agricultural product. This law change set off a surge in businesses involving hemp and hemp-derived cannabidiol (CBD) products ... and a wave of legislative proposals at both the federal and state levels to transition laws away from prohibition and instead into regulation of this new industry.



Legalization of hemp and CBD under the 2018 Farm Bill

The 2018 Farm Bill changed certain federal authorities relating to the production and marketing of hemp, defined as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all 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.” Most importantly, these changes include removing hemp from the Controlled Substances Act, which means that cannabis plants and derivatives that contain no more than 0.3 percent THC on a dry weight basis are no longer controlled substances under federal law.

The 2018 Farm Bill, however, explicitly preserved the authority of the Food & Drug Administration (“FDA”) to regulate products containing cannabis or cannabis-derived compounds under the Federal Food Drug & Cosmetic Act (“FD&C Act”) and Section 351 of the Public Health Service Act (PHS Act). FDA treats products containing cannabis or cannabis-derived compounds as it does any other FDA-regulated products — meaning they’re subject to the same authorities and requirements as FDA-regulated products containing any other substance. This is true regardless of whether the cannabis or cannabis-derived compounds are classified as hemp under the 2018 Farm Bill.

What can legally be produced using hemp and/or CBD?

In the wake of the legalization of hemp at the federal level, the FDA is currently evaluating CBD's safety with respect to a variety of products. For now, its stance is that products that add CBD to food or label CBD as a dietary supplement are not legal for interstate commerce.

With respect to drug products, to date the FDA has approved only one CBD product, a prescription drug product to treat two rare, severe forms of epilepsy.

As for other CBD-based products not falling under the purview of the FDA such as soaps, lotions, and the like, as well as CBD oil and tinctures, consumer demand for such products is on the rise. However, a significant challenge to those entering into this industry remains that many banks, insurance companies and merchant service companies are leery of providing services for national CBD companies and of the FDA stepping in to see whether the claimed CBD levels are present in the products and issuing warnings to companies making "egregious and unfounded claims that are aimed at vulnerable populations," such as saying they cure Alzheimer's, cervical cancer, fibromyalgia and more.

What about CBD-infused alcoholic beverages?

While some in the craft beverage industry pondered the idea of a CBD-infused beer or distilled spirit, the U.S. Alcohol and Tobacco and Trade Bureau ("TTB") – the Federal agency with authority to regulate the manufacture and sale of alcoholic beverages in the United States – foreclosed such speculation in May 2019. When dealing with the infusion of non-traditional ingredients into alcoholic beverages, the TTB defers to the FDA as to its interpretation of the FD&C Act and has thus issued guidance that use of CBD in alcoholic beverages is not legal.

What does this mean for legalization of cannabis?

At the same time as federal and state laws have changed to allow for legalization and exploitation of hemp and CBD-based products, several state legislatures have taken steps to legalize the use of cannabis (i.e., marijuana), either for medical or recreational use. At the federal level, however, the regulatory posture remains one of prohibition. During the Obama Administration, the U.S. Department of Justice issued guidance to all U.S. Attorney Offices known as the "Cole Memorandum" which stated that given its limited resources, the DOJ would not enforce federal marijuana prohibition in states that "legalized marijuana in some form and ... implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana," except where a lack of federal enforcement would undermine federal priorities.

The Cole Memorandum was rescinded by Attorney General Jeff Sessions in January 2018 and, while President Trump has at times indicated support for federal legalization of medical marijuana or allowing the states to decide how to regulate marijuana use, no

further progress has been made to date at the federal level. And so long as marijuana remains on Schedule I of the Controlled Substances Act, cannabis businesses will continue to encounter barriers to growth.

For example, marijuana companies aren't able to take any deductions on their federal income taxes, save for cost of goods sold. If profitable, this can mean paying an effective tax rate of 70% to 90%, which leaves little income left over for reinvestment and hiring. Further, and most importantly, U.S. cannabis companies have minimal access to basic banking services, including loans, lines of credit, and even checking accounts. Since financial institutions report to the Federal Deposit Insurance Corporation (FDIC), and the FDIC is a federally created agency, banks and credit unions fear possible financial and/or criminal repercussions for aiding cannabis companies. This has made marijuana an industry dominated by cash, which is both a security concern and an expansionary constraint.

Minnesota's legal landscape

Having legalized medical cannabis in 2014, the Minnesota Legislature is now poised to follow the lead of other states and act on recreational marijuana laws. With an upcoming legislative session occurring during an election year with divided government, look for recreational marijuana to be a hot topic of debate.

What does the future hold?

As noted herein, the developing legal patchwork which has replaced the prior system of prohibition when it comes to hemp, CBD (and on a state level, cannabis) requires thoughtful and comprehensive regulation from legislative bodies, as opposed to the current environment which leaves all authority for determination of what is permitted and what is not in the hands of the regulatory authorities. Much like the craft beverage boom that gave rise to increased jobs, tax revenue and economic growth, removing unnecessary restrictions on this new industry where appropriate will continue to present business opportunities in the years to come.

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