RETURNING TO OUR ROOTS: INDUSTRIAL HEMP'S COMEBACK IN THE DMV

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Industrial hemp is making a comeback thanks to recent changes in the Agricultural Improvement Act of 2018 (widely referred to as the 2018 Farm Bill), which exempted industrial hemp from the Controlled Substances Act, paving the way for a widespread resurgence.[1] Perhaps in part due to the success of the billion dollar cannabidiol ("CBD") industry, states are rapidly working to bring their own hemp programs into compliance with federal law to ensure that their local farmers do not miss out on this potentially lucrative opportunity for industrial hemp and hemp-derived products. As a result of these recent changes in the law, we expect to see increased activity among companies in this space. This alert focuses on the recent changes to the laws pertaining to hemp in the Maryland, Virginia, and District of Columbia markets.

I. 2018 FARM BILL PAVES THE WAY

Before the 2018 Farm Bill passed, industrial hemp was included in the definition of "marijuana" under the Controlled Substances Act since 1970. This was the case despite the fact that neither hemp nor hemp-derived CBD contain significant amounts of tetrahydrocannabinol ("THC")—the chemical compound that is widely recognized as producing psychoactive effects. CBD, when extracted properly from the flowers and buds of hemp plants, is a non-psychoactive compound that many advocate as having certain health benefits.

Before the 2018 Farm Bill, industrial hemp had held the same classification as other prohibited drugs—including narcotics such as heroin—and as such it was generally illegal to cultivate under federal law, except in very narrowly defined circumstances.[2] With the changes made to the 2018 Farm Bill, industrial hemp has been removed from the definition of marijuana under the Controlled Substance Act, thereby removing it as a Schedule I controlled substance.[3] The 2018 Farm Bill defines industrial hemp as any part of the cannabis sativa L plant with a THC "concentration of not more than 0.3 percent on a dry weight basis."[4] The Bill also provides that industrial hemp researchers can apply for federal grants and allows hemp farmers to access federal crop insurance that was not previously available to them. It also provides a pathway for states to become the primary regulators of industrial hemp cultivation by providing a plan to be submitted to the U.S. Department of Agriculture ("USDA,") which is the focus of this client alert.[5]

II. UPDATES FROM MARYLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA

A. Maryland

As noted previously, there were limited exceptions to cultivating industrial hemp before the 2018 Farm Bill passed. One of these exceptions was iterated in the 2014 Farm Bill, which allowed universities and state departments of agriculture to create certain pilot programs whereby industrial hemp could be cultivated for limited purposes.[6]

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Maryland was one of the 40 states that passed laws regarding hemp research and development after the 2014 Farm Bill.[7] During the 2018 legislative session in Maryland, the General Assembly passed House Bill 698, which created an "Industrial Hemp Pilot Program," to be administered by the Maryland Department of Agriculture.[8] The Maryland Department of Agriculture describes the purpose of the Program as being "to authorize and facilitate the research of industrial hemp and any aspect of growing, cultivating, harvesting, processing, manufacturing, transporting, marketing, or selling industrial hemp for agricultural, industrial or commercial purposes."

Then, after Congress passed the 2018 Farm Bill, the Maryland General Assembly passed House Bill 1123.[9] That Bill was signed into law by Governor Larry Hogan and became effective in Maryland on June 1, 2019. The Bill accomplished several items:

- Changed the name of the Industrial Hemp Pilot Program to the Hemp Research Pilot Program;
- Established a Hemp Farming Program to promote hemp as an agricultural commodity in Maryland, the commercial sale of hemp products within and outside the State, and to facilitate the research of hemp and hemp products; and
- Required the Maryland Department of Agriculture, in consultation with the Natalie M. LaPrade Medical Cannabis Commission, to adopt regulations to protect hemp growers and medical cannabis growers from the risk of cross-pollination; etc.

The biggest change House Bill 1123 provides is the Hemp Farming Program, which will allow hemp cultivators to grow hemp without participating in the research plan, provided that they meet the requirements of the program. However, for hemp growers not already participating in the Industrial Hemp Pilot Program, they will need to wait for Maryland to develop a hemp production plan to submit to the USDA for approval, consistent with the requirements of the 2018 Farm Bill. This can only take place once the USDA publishes its regulations on this topic, which is expected in the fall of 2019.[10]

Nevertheless, House Bill 1123 represents a big change for Maryland, and we should expect to see more regulations develop as more farmers prepare to take advantage of this new agricultural commodity in the coming months.

B. Virginia

Beginning in colonial times, hemp was an important agricultural product in Virginia—that is until its effective ban in the 1970s with the introduction of the Controlled Substances Act. After the 2014 Farm Bill was implemented, in 2015 the Virginia General Assembly passed Senate Bill 955, which allowed for the cultivation of industrial hemp by licensed growers, similar to Maryland.[11] Unlike Maryland, however, Virginia's bill only allowed the cultivation as part of a university-managed research program and required applicants to undergo a criminal background check to receive a license.[12] This allowed very limited hemp growth, but universities such as Virginia Tech, the University of Virginia, Virginia State University, and James Madison University all took advantage of the program.

This statute was amended in 2018 with the passage of Senate Bill 247, which authorized the Commission of Agriculture and Consumer Services to undertake research through the establishment of (i) a higher education industrial hemp research program, to be managed by institutions of higher education; and (ii) a Virginia industrial hemp research program.[13] The amendments also replaced the licensing program with a registration program[13] that eliminated the criminal background check requirement going forward.

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In 2019, following Congress' passage of the 2018 Farm Bill, the Virginia General Assembly passed Senate Bill 1692 on an emergency basis.[14] According to the Virginia Department of Agriculture and Consumer Services, these amendments to the Virginia Hemp Law, “eliminate the requirement that hemp be grown for research purposes and permit the commercial production of industrial hemp.” The Virginia Department of Agriculture and Consumer Services also says that to legally possess “hemp plants, viable hemp seed, hemp microgreens, hemp leaves, or hemp flowers in Virginia, you must be a registered Industrial Hemp Grower, Dealer, or Processor or an agent of one of these registrants for the purpose of growing, dealing or processing.” As of July, more than 800 growers have registered with the Virginia Department of Agriculture and Consumer Services to cultivate hemp.[15] It is likely that this number will only continue to grow in the coming months and years.

C. District of Columbia

Although often considered much more progressive than its surrounding counterparts of Maryland and Virginia, to date there has been no industrial hemp legislation introduced in the District of Columbia. The reasons for this may be twofold. First, recreational marijuana use is legal in the District as the result of Initiative 71, which was a Washington, D.C. voter-approved ballot initiative that went into effect in 2015. This initiative allowed persons over the age of 21 in the District to possess up to two ounces of marijuana, grow up to three mature and three immature marijuana plants in their homes, and transfer up to one ounce of marijuana to another individual.[16] Second, and more practically speaking, the District consists of only 68.34 square miles, and likely does not provide the space required to cultivate industrial hemp on a commercial basis.

III. CONCLUSION

The 2018 Farm Bill was a crucial first step in the resurgence of the industrial hemp industry. However, there remain many federal and state regulations that must be refined in the wake of these new developments, and potential industry participants must be aware of this changing regulatory landscape to avoid any potential liability. Our regional offices will continue to monitor and publish alerts as states align themselves with the federal legislation and as the federal regulations and policies take shape.

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[1] Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).

[2] The 2014 Farm Bill made some small exceptions for the cultivation of industrial hemp under the particular requirements of state pilot research programs. See Agricultural Act of 2014, Pub. L .No. 113-79, 128 Stat. 649 (2014).

[3] *Supra* note 1 at § 12619.

[4] *Id.* at § 10113.

[5] The use of CBD in various products including dietary supplements, lotions, etc. is currently considered one of the most lucrative opportunities for hemp growers following the changes made to the classification of industrial hemp in the 2018 Farm Bill. However, the Food and Drug Administration (“FDA”) recently issued a press release stating that products that claim to promote therapeutic benefits from CBD use must first undergo FDA review and approval. Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on new steps to advance agency's continued evaluation of potential regulatory pathways for cannabis-containing and

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cannabis-derived products (April 2, 2019), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-advance-agencys-continued-evaluation

[6] *Supra* note 2 at § 7606.

[7] National Conference of State Legislatures, State Industrial Hemp Statutes, http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx

[8] 2018 Md. Laws Chapter 475 (House Bill 698).

[9] 2019 Md. Laws. Chapter 228 (House Bill 1123).

[10] Press Release, U.S. Dep't of Agric., USDA Update on Farm Bill Implementation Progress (Apr. 12, 2019), https://www.usda.gov/media/press-releases/2019/04/12/usda-update-farm-bill-implementation-progress

[11] Va. Code. Ann. § 3.2-4112 (2015).

[12] *Id.*

[13] VA Code Ann. § 3.2-4114.1 (2018).

[14] VA Code Ann. § 3.2-4114 to 4120 (2019).

[15] Casey Fabris, *Virginia's Commercial Hemp Rush Launches After Changes in Laws*, THE ROANOKE TIMES, July 20, 2019, https://www.roanoke.com/news/local/virginia-s-commercial-hemp-rush-launches-after-changes-in-laws/article_8e34b861-8bf6-54d6-a82d-c0475d2774d2.html

[16] Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014, D.C. Law 4-29; D.C. Official Code §48-904.01.

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