

STATES RACE TO ALIGN ON INDUSTRIAL HEMP

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Industrial hemp, once grown throughout the United States and already the powerhouse behind the billion dollar cannabidiol ("CBD") industry,[1] is poised for a resurgence as an agricultural commodity. State legislatures are racing to bring their own hemp programs up to speed with the 2018 Farm Bill, which exempted industrial hemp from the Controlled Substances Act and accelerated the potential for wide-scale production.

As growers and producers launch the 2019 harvest cycle and beyond, seismic changes at the federal level are shaping states' approaches to cultivating this emerging industry. This alert focuses on the newly passed legislation in Washington State.

I. INDUSTRIAL HEMP IS NOT RECREATIONAL MARIJUANA

While both industrial hemp and recreational marijuana can be derived from the same plant family (cannabis sativa L.), they are genetically distinct and cultivated and used differently:

- **Industrial Hemp:** Contains 0.3% or less by dry weight tetrahydrocannabinol ("THC") content. Industrial hemp can grow up to 20-feet tall and is not cultivated to contain the THC-containing buds and flowers. Hemp seed can be used in foods and cosmetics, and the fibers and stalks are used for clothing, construction materials, paper, biofuel, plastic composites, and more.
- **Recreational Marijuana:** All parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3% on a dry weight basis. Generally, marijuana grown for recreational purposes has a THC content of 17-23%.[2] Recreational marijuana plants grow only up to five-feet tall and are cultivated to contain THC-heavy buds and flowers.

II. 2018 FARM BILL LEGALIZES INDUSTRIAL HEMP

a. Opportunities

Historically, industrial hemp had been regulated as a Schedule I controlled substance under the Controlled Substances Act—the same category as heroin—since 1970.[3] This changed with the 2018 Farm Bill. Backed by bipartisan efforts led by Mitch McConnell (R-KY), the 2018 Farm Bill removed industrial hemp (and products derived therefrom) that conforms to state and federal requirements from the list of Schedule I controlled substances.[4]

In addition to delisting industrial hemp as a controlled substance, the Farm Bill defined industrial hemp as an agricultural commodity. This change is anticipated to provide significant benefits to hemp farmers.

First, hemp farmers will likely have much more certainty in accessing crop insurance: i.e., for 2019 they will be eligible to participate in the Whole Farm Revenue Protection Plan if they derive part of their revenue from hemp (which itself will not be insured but will not by itself render any other crops uninsurable). By 2020, it is anticipated that hemp will be a fully covered commodity and therefore insurable. Second, farmers can expect more certainty and eligibility in applying for United States Department of Agriculture ("USDA") programs for certification and grants. Third, the U.S. Drug Enforcement Agency will no longer have enforcement jurisdiction, so federally regulated financial institutions (such as banks) may be more willing to do interstate business with most elements of the hemp and hemp product industry. The inability of recreational marijuana growers to access the banking system has been a major deterrent to growth of that industry.

b. Notes of Caution

Despite the long-term opportunities, all industry participants should be aware of short-term risk. Federal regulations to implement the 2018 Farm Bill are expected by the fall of 2019 to accommodate the 2020 planting season, and state regulation is underway across the country that may affect all aspects of the commodity market. Until then, the USDA has stated that the provisions of the 2014 Farm Bill remain in effect for 2019, so cultivating and processing hemp is only legal in states that implemented pilot programs. Although the 2018 Farm Bill prevents states from interfering with interstate shipment of hemp and its derivative products, there is still uncertainty regarding transporting hemp and hemp seeds from states in which it is legal under the 2014 Bill across or into states in which it is not.[5]

Additionally, for certain products that contain CBD, restrictions imposed by the Federal Drug Administration ("FDA") remain in place. FDA has taken the position that products containing CBD that promote therapeutic benefits must undergo FDA review and approval, and any CBD product sold with claims that it can treat disorders (such as anxiety and depression) or diseases (such as diabetes and cancer) must undergo review and approval by the FDA. FDA maintains that it also continues to be illegal to sell foods, drinks, and dietary supplements containing CBD, and while that it will consider issuing regulations allowing the use of CBD for these purposes assuming that all other FDA regulations are met, it will take enforcement action against those companies it believes are making "unsubstantiated therapeutic claims.[6]

III. STATES

The 2014 federal Farm Bill allowed universities and state departments of agriculture to administer programs to cultivate industrial hemp for limited purposes.[7] More than 40 states passed laws regarding industrial hemp research and cultivation.[8]

These programs were expanded by the 2018 Farm Bill, which delegated to states and Indian tribes the broad authority to regulate and/or limit the production and sale of hemp and hemp products within their borders, but not limit the transportation of hemp or hemp products through their jurisdictions.

As a result, a patchwork quilt of both expansion and prohibition is emerging. This alert focuses on new legislation in Washington State; we will provide updates and additional insights as new legislation and regulations take place across the country.

a. Washington State

The 2014 Farm Bill allowed industrial hemp cultivation under an agricultural pilot program administered by the Washington State Department of Agriculture (the "WSDA").^[9] However, due to lack of consistent funding, competition with the recreational cannabis industry, and growing and shipping restrictions it was difficult for growers and processors to invest significantly in the crop.

Those restrictions have now been removed and will pave the way for significant growth in Washington. On April 24, 2019, the state unanimously passed Senate Bill 5276, which accomplishes the following:

- **CBD is not a controlled substance:** CBD derived from hemp is exempted from the definition of controlled substances under Washington law, which incentivizes producers to use CBD derived from hemp rather than from marijuana because it is subject to less stringent regulations.
- **WSDA authority; can be regulated as a food ingredient:** WSDA, rather than the Cannabis and Liquor Control Board, now has the regulatory authority over hemp and with it the ability to regulate the processing of hemp, including its extracts, as a food ingredient commensurate with federal law. As noted earlier, while FDA has said that CBD in food is not yet legal, it has created gateways for that possibility. Washington will have the ability to align the FDA as those regulations evolve.
- **No buffer zones:** The pilot program had required a four-mile buffer zone between hemp and recreational marijuana fields. With some 1,100 licensed recreational marijuana growers in Washington and hemp's requirements for large tracts of land, location was a major challenge. The new bill removes this buffer but allows WSDA to consider evidence of cross-pollination and take action if needed. Already-established growers have a first-in-time right in the event of conflict.
- **Expedited Rulemaking:** In order to accommodate the 2019 harvest cycle the WSDA must implement new regulations under the expedited rule-making process.

Even with the federal legalization of industrial hemp and expansion of Washington's program, many questions remain about the co-existence of industrial hemp and recreational cannabis production. Examples include:

- **Cross-Pollination:** although the distance requirement was removed, we expect significant focus on cross-pollination concerns, with conflicts likely to arise. As a corollary issue, in certain areas, industrial hemp crops would be dependent on water from the U.S. Bureau of Reclamation. If cross-contamination occurred and the plants had higher concentrations of THC than federally allowed, the Bureau may exercise discretion to stop the supply of water to a federally-illegal crop.
- **CBD Oversight:** processing hemp into CBD products, the largest potential market, is caught in grey areas between the regulatory agencies. The Washington Liquor and Cannabis Board regulates recreational marijuana, the Washington Department of Health regulates medicinal marijuana, and the WSDA will regulate industrial hemp. CBD arguably has properties that belong under the jurisdiction of all three different agencies.
- **Taxing and tracking systems:** appropriate testing, labeling, taxing, and tracking systems need to be sorted out. While the new rules will be implemented and administered by the WSDA, there will be areas of

overlap with the recreational marijuana industry, which is regulated by the Washington State Liquor and Cannabis Board.

IV. CONCLUSION

The federal legalization of industrial hemp is the first step towards what is likely to become a multi-billion dollar industry throughout the United States. While long-term opportunities abound all participants in the industry should be aware of the current legal and policy considerations and track closely the changes taking place at the state level. 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.

[1] CBD is distinct and separate from THC, in which appears in recreational marijuana. Unlike THC, CBD is a non-psychoactive compound, which means CBD does not produce the "high" associated with THC.

[2] Jikomes, Nick and Zoorob, Michael, "The Cannabinoid Content of Legal Cannabis in Washington State Varies Systematically Across Testing Facilities and Popular Consumer Products," *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5852027/>.

[3] See 21 U.S.C. § 812.

[4] *Id.*

[5] There are still nine states in which cultivating industrial hemp is not legal: Connecticut, Georgia, Iowa, Idaho, Louisiana, Mississippi, Ohio, Texas, and South Dakota. In early 2019 a truckload of legally grown hemp from Oregon was seized in Idaho, and the driver was charged with felony drug trafficking because hemp is still classified as marijuana under Idaho state law. The District Court judge denied a request by the owner of the hemp to return the product. See *Big Sky Scientific LLC v. Idaho State Police et al*, No. 1:2019cv00040 (D. Idaho 2019). That decision was appealed to the 9th Circuit, which recently ordered release of the results of testing that showed that the cargo tested under the 0.3% THC limit. Order at 38, *Big Sky Scientific LLC v. Jan Bennetts*, No. 19-35138 (9th Cir. April 25, 2019). The product however, remains with the Idaho State Police at the time of this drafting.

[6] [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 cannabis-derived products, April 2, 2019.](#)

[7] Agricultural Act of 2014, Pub. L. 113-79, § 7606 (2014).

[8] National Conference of State Legislatures, *State Industrial Hemp Statutes*, <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> (updated February 1, 2019).

[9] See Industrial Hemp Growing—Pilot Program and Research, 2016 Wash. Sess. Laws Ch. 11, ESSB 6206.

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