

Cannabis Business Blog

## **Understanding the Patchwork of Regulatory Schemes of the Sale and Use of Hemp-Derived Products**

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On December 20, 2018, President Trump signed into law the Agricultural Improvement Act of 2018 (the “2018 Farm Bill”) to replace the expiring 2014 Farm Bill. The 2018 Bill, which passed with strong support in both the House and the Senate, removed hemp from the Controlled Substances Act—but does that mean that hemp is legal?

While hemp is no longer a controlled substance and subject to enforcement under DEA regulations, hemp and hemp-derived products (such as CBD) are still heavily regulated. So, who regulates these products? Though the landscape is evolving quickly, each of the following agencies and groups play a vital role in determining whether you may grow, process, sell or market hemp in your state.

### **United States Department of Agriculture (USDA)**

Under the 2018 Farm Bill, states may submit proposals for hemp production programs to the USDA for approval. These proposals must include sufficient testing, disposal, enforcement (among other) requirements. Once a proposal is submitted by a state, the USDA will have 60 days to approve or deny it. That being said, no proposals will be reviewed by the USDA until formal rules have been promulgated, tentatively anticipated for this Fall. Once a program is approved, each state will be subject to annual inspection and other reporting requirements by the USDA.

The 2018 Farm Bill also allows for the continued production of hemp under programs previously authorized by the 2014 Farm Bill, so long as those programs don't violate the 2018 Bill.

### **Food and Drug Administration (FDA)**

The FDA regulates the use of CBD, including hemp-derived CBD, in food products and dietary supplements. CBD has recently been approved for use as an active ingredient in the drug Epidiolex and, as such, is impermissible for introduction into interstate commerce as a part of a food product or dietary supplement under the Food, Drug & Cosmetic Act. Many states actually adopt and incorporate the federal regulation prohibiting use of new drugs in food into their

own laws, and some—such as California—have released explicit guidance warning against such use.

The FDA has also been active in enforcing against impermissible medical claims made by manufacturers and retailers for hemp and CBD products.

### State Specific Regulations

Finally, the states may regulate and enforce their own laws regarding the growth, processing, sale and import/export of hemp and hemp-derived products in accordance with the 2018 Farm Bill and other applicable federal law. Currently, the states that have allowed for (or at least do not prohibit) the growth, processing, sale and import/export of hemp and hemp-derived products vary significantly in both their legislation and enforcement of legislation.

All of that said, this is looking to be a year full of opportunities to shape the industry both at a federal and at a state level. Be on the lookout for opportunities to participate in the formal public comment period for the 2018 Farm Bill implementing regulations. You may also contact your local government for involvement opportunities in developing their hemp program proposals to the USDA.

If you have any questions about the above regulations, please feel free to contact any member of our [Cannabis](#) practice group.

**Warning Regarding Federal Law:** The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government's jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

**Tags:** 2018 Farm Bill, Cannabis, CBD, Epidiolex, FDA, hemp, hemp cannabis, hemp-derived CBD, hemp-derived products, industrial hemp, USDA