

# DEPARTMENT OF AGRICULTURE ISSUES OPINION CLARIFYING KEY HEMP ISSUES

*Hemp & Medical Cannabis Alert*  
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Significant developments in the hemp industry continue with the U.S. Department of Agriculture's issuance of an opinion on Tuesday, May 28, 2019. That opinion clarifies four key points regarding the hemp-related provisions of the Agriculture Improvement Act of 2018 (the "2018 Farm Bill").

The 2018 Farm Bill, signed into law by President Trump on December 20, 2018, legalized the commercial production of hemp. Production of Hemp pursuant to the 2018 Farm Bill remains highly regulated, and is only permitted with a USDA issued or approved license or State or Tribal plan. Tuesday's opinion by the USDA's Office of General Counsel ("OGC Opinion") clarifies four key components of the statute.

Noted below (in quotations) are the conclusions reached by the OGC:

1. *"As of the enactment of the 2018 Farm Bill on December 20, 2018, hemp has been removed from Schedule I of the Controlled Substances Act ("CSA") and is no longer a controlled substance."*

The OGC Opinion concluded that, because the 2018 Farm Bill amended the CSA's definition of marijuana to exclude hemp and "THC in hemp", hemp and "THC in hemp" are no longer classified as controlled substances. Further, removal from the CSA of hemp and "THC in hemp" is immediate and self-executing even though implementing regulations have yet to be updated to reflect the 2018 Farm Bill amendments.

2. *"After USDA publishes regulations implementing the new hemp production provisions of the 2018 Farm Bill contained in the Agricultural Marketing Act of 1946 ("AMA"), States and Indian Tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under a State or Tribal plan or under License issued under the USDA plan."*

The 2018 Farm Bill provides that nothing in Title X prohibits the interstate commerce of hemp and hemp products and, further, that no State or Tribe shall prohibit the transportation of hemp through that State or Tribal Territory. The OGC Opinion opined that these provisions preempt State law to the extent that State law prohibits the interstate transportation of hemp or hemp products. Accordingly, once the implementing regulations are published, which the Secretary of Agriculture is to complete "expeditiously," States and Tribes may not prohibit the transportation of

## Attorneys

Ariele Doolittle  
Christopher Doyle  
Patrick Fitzsimmons  
Joseph Goldberg  
Patrick Hines  
Kinsey O'Brien  
Gary Schober  
Daniel Spitzer  
Melissa Subjeck

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hemp or hemp products lawfully produced under an approved plan or license.

3. *“States and Indian Tribes also may not prohibit the interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill.”*

The 2018 Farm Bill does not immediately repeal the 2014 Farm Bill, and thus it was unclear whether States and Tribes could prohibit the interstate transportation of lawfully produced hemp and hemp products within their borders. After carefully analyzing the language of Section 297(B)(f) of the AMA, the OGC Opinion concluded that hemp and hemp products produced under the 2014 Farm Bill qualify for interstate transportation protection.

4. *“A person with a State or Federal Felony conviction relating to a controlled substance is subject to a 10-year ineligibility restriction on producing hemp under the AMA. An exception applies to a person who was lawfully growing hemp under the 2014 Farm Bill before December 20, 2018, and whose conviction also occurred before that date.”*

The 2018 Farm Bill includes a provision rendering any person convicted of a felony relating to a controlled substance ineligible to produce hemp under the AMA for a 10-year period following the date of the conviction. An exception exists for any person growing hemp lawfully prior to “the date of the enactment of this subtitle.” Questions arose as to the interpretation of the language of the restriction and accompanying exception, as they were not part of the 2014 Farm Bill. The OGC Opinion determined that the “date of enactment” is December 20, 2018, and thus, the exception applies to any person who was lawfully producing hemp under the 2014 Farm Bill before December 20, 2018.

Of note, the 2018 Farm Bill’s felony provision places a burden on States and Tribes to determine whether a person intending to produce hemp has any felony convictions that would render that person ineligible to produce hemp under the statute’s new restrictions.

In addition to the above, the USDA emphasized two points. First, while the OGC Opinion of May 28, 2019 addresses the interstate shipment of hemp, the 2018 Farm Bill preserves the authority of the States and Tribes to enact and enforce laws regulating the production of hemp. These laws are permitted to be more stringent than the Federal law. Second, the Secretary of Agriculture has the authority to issue Federal regulations and guidelines related to the production of hemp, but this authority remains subject to that of the Secretary of Health and Human Services or the Commissioner of Food and Drugs under the Federal Food, Drug, and Cosmetic Act.

In sum, the OGC’s Opinion represents another key development for the hemp industry, in that it provides much needed clarifications to, and thus protections for, those already engaged, or planning to engage in, the commercial production of hemp. Most significant, that interstate transportation of lawfully-produced hemp and hemp products may not be prohibited by a State or Tribe, even where those States or Tribes currently prohibit its production.

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