

NEW YORK ISSUES UPDATED CANNABINOID HEMP REGULATIONS

Hodgson Russ Hemp & Medical Cannabis Alert
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On May 19, 2021, the New York Department of Health (“DOH”) issued updated regulations and standards for the production, distribution, and sale of cannabinoid hemp products within its borders.

For historical context, as many are aware, the 2018 Farm Bill vested a majority of regulatory oversight for the cultivation and processing of hemp with the United States Department of Agriculture, but reserved authority for states to implement their own hemp regulatory programs. Since then, New York has implemented a robust cannabinoid hemp construct, which vests regulatory oversight of cannabinoid hemp with DOH, and soon, the Cannabis Control Board (“CCB”) — which was created under the recently-passed Marihuana Regulation and Taxation Act (“MRTA”). All cannabinoid hemp products offered for retail sale in New York must have a concentration of no more than 0.3% total delta9-tetrahydrocannabinol (THC).

The below provides a summary of the key points from the updated regulations:

Hemp and Food, Alcohol, and Tobacco

Under the updated regulations, all cannabinoid hemp products distributed or offered for retail sale in New York must be prepackaged, and cannot be added to food or any other consumable products at the point of sale. In addition, the regulations state that cannabinoid hemp products cannot contain liquor, wine, beer, cider, or meet the definition of an alcoholic beverage (as defined in section 3 of the Alcohol Beverage Control Law). Last, cannabinoid hemp products must not contain any tobacco or nicotine.

Smokable Hemp Products

The DOH regulations will not allow retailers to sell any cannabinoid hemp products “clearly labeled or advertised for the purpose of smoking.” This includes products in the form of a cigarette, cigar, or pre-roll, or packaged or combined with other products designed to facilitate smoking (such as rolling papers or pipes). But, while “smokable” products are prohibited under the cannabinoid hemp program, “inhalable” products are not. And the MRTA provides that smokable hemp products can be sold by adult-use cannabis retail licensees when that program gets started.

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All inhalable cannabinoid hemp products must be closed systems with pre-filled disposable cartridges, either attached to a rechargeable battery, or a single-use product that cannot be recharged. This is a fancy way of referring primarily to vapes and e-cigarettes. Distributors and retailers of inhalable products should take note of recent changes to federal law regarding the mailing and shipping of vape products, which we previously discussed [here](#). In addition, all non-hemp ingredients must be pharmaceutical grade, and cannot contain ingredients such as synthetic terpenes; polyethylene glycol (PEG); vitamin E acetate; medium chain triglycerides (MCT oil); or medicinal compounds and illegal or controlled substances.

Finally, inhalable cannabinoid hemp products cannot contain any flavors or flavoring agents—except for hemp-derived terpenes. Say goodbye to that tutti-frutti-flavored pen.

Hemp Extract

The regulations generally prohibit the sale of hemp extract directly to consumers. Hemp extract must be manufactured into a “cannabinoid hemp product” before being offered for retail sale. A cannabinoid hemp product is defined as “hemp or any product manufactured or derived from hemp including hemp derived terpenes, in its final form, used for human consumption.” Topical application is considered “use for human consumption” if applied because of the product’s cannabinoid content. But “cosmetics,” as defined by federal law, are not cannabinoid hemp products.

Good Manufacturing Practices (Federal Compliance)

To obtain a license to process cannabinoid hemp, an applicant must submit its application to the DOH. Among other things, the applicant must provide evidence that Good Manufacturing Practices (“GMP”) will be used in the extraction of hemp extract and manufacturing of cannabinoid hemp products. GMP regulations are promulgated by the federal Food and Drug Administration, and create a system for ensuring that products are consistently produced and controlled according to quality standards. Evidence of GMP can be provided in a number of ways, such as proof of a qualified third-party GMP audit of the applicant’s extraction or manufacturing process.

Retail sales

To sell cannabinoid hemp products in New York, a person must be licensed by DOH. The cost is a licensing fee of \$300 per retail location. Retailers must display cannabinoid hemp products in a way that distinguishes them from non-cannabinoid hemp products to “aid consumers in locating cannabinoid hemp and avoid accidental purchase or consumption.” And, retailers must have safeguards in place to verify that an individual purchasing an inhalable product or flower product is 21 years of age or older.

The regulations appear to contemplate cannabinoid hemp products being offered in convenience stores and other establishments, albeit in a separate section of the store. Contrast this with the recently passed MRTA legislation, which prohibits the sale of alcohol at any adult-use dispensary. It remains to be seen whether and how retailers will abandon their alcohol offerings in favor of selling adult-use cannabis instead.

Importation

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In order to distribute cannabinoid hemp products manufactured out of state to cannabinoid hemp retailers within New York State, a distributor must have a cannabinoid hemp distributor permit, even if the distributor is out of state. The permit must specifically authorize importation of non-New York hemp. This includes online retailers, who must be licensed to sell into New York, even if they conduct no separate and distinct business in the state.

Delta-8 THC

New York is also the latest market to expressly prohibit delta8-THC and delta10-THC, which are components of the cannabis plant less potent than delta9-THC, but still known to have psychoactive effects.

Cannabinoid hemp products sold within the State may not contain synthetic cannabinoids, or cannabinoids created through isomerization, including delta8-THC. Eleven states besides New York already have laws that address the minor cannabinoid, delta8-THC, while at least six other states have considered or are currently updating their laws regarding delta8-THC.

The MRTA

With these new cannabinoid hemp regulations comes the million-dollar question: What does this mean for the newly-passed MRTA? The MRTA is the first state law that proposes to centralize the regulation of all cannabis—which includes cannabinoid hemp. Under the MRTA, the Office of Cannabis Management (“OCM”) will administer rules and regulations for cannabinoid hemp and marijuana. The CCB will be tasked with implementing those rules and regulations.

Just last year, before passage of the MRTA, New York placed authority over cannabinoid hemp in the hands of DOH. As a result, DOH launched the Cannabinoid Hemp Program last fall. The Program was designed to regulate the processing, manufacturing, and sale of hemp extract and cannabinoid hemp products in the state. The MRTA provides that existing rules and regulations put in place by DOH that pertain to cannabinoid hemp will remain in place until the CCB and OCM take over the regulation of these products, and either adopts or repeals them.

Beyond general alignment with DOH quality control standards, the MRTA contains language that suggests the CCB may impose additional requirements on the cannabinoid hemp industry, such as an additional permit for wholesale activities. However, it can be expected that OCM and CCB will borrow heavily from the work DOH has already done with cannabinoid hemp regulations.

These are just a few of many changes that were introduced in the updated regulations. With these changes come very specific requirements, and noncompliance can lead to extreme penalties, including criminal penalties. The Hodgson Russ Hemp and Medical Cannabis practice group is here to help your business navigate through these new cannabinoid hemp regulations with ease.

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