



Effects of the 2018 Farm Bill Hemp Provisions
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The 2018 Farm Bill is an incremental step toward nationwide hemp legalization, but a major step forward for the hemp industry. The Farm Bill allows states to legalize and regulate hemp, opens banking and credit card services to the industry, and removes the significant tax burden of section 280(e) from hemp businesses. On the other hand, the bill does not legalize food or dietary supplement products with added cannabidiol (CBD) nationwide, nor legalizes hemp within a state until a very specific set of conditions are met. The hemp provisions included in the Farm Bill will likely take twelve to eighteen months from the beginning of 2019 to fully come into fruition.

Federal Controlled Substances Act (CSA) Hemp Exemption

Marijuana is classified as a schedule I substance under the federal Controlled Substances Act (CSA), making it illegal for all purposes. Marijuana is defined in the CSA as every part of the cannabis plant except its mature stalks and sterilized seeds. The Farm Bill exempts “hemp” defined as “*the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis*” from the CSA definition of marijuana. This broad definition makes clear that hemp and hemp products are not schedule I substances under federal law if they contain no more than 0.3% delta-9 tetrahydrocannabinol (THC).

The trace THC contained in hemp is also exempted from the CSA, meaning the Drug Enforcement Agency (DEA) cannot enforce against a hemp product for the sole reason that it contains trace THC; therefore, the Farm Bill hemp exemption entirely removes hemp from the jurisdiction of the DEA. This does not mean that hemp and all hemp products are legal federally and in the 50 states. In many circumstances, other state and federal statutes are implicated, including the Food, Drug, and Cosmetic Act (FD&C).

CBD: Federal Food, Drug & Cosmetic Act (FD&C)

CBD is classified as a drug by the FDA because the agency approved Epidiolex, a medication for epilepsy containing CBD. Once a substance is classified as a drug, it is illegal to introduce into interstate commerce as a food or dietary supplement product under the FD&C. Additionally, medical claims cannot be made about any non-drug product. Thus, any non-Epidiolex hemp product claiming CBD as an added ingredient, or claiming medical benefits, is in direct violation of the FD&C.

Importantly, states may regulate food and dietary supplements alongside the FDA and states are not required to enforce FDA regulations. In fact, states can expressly allow CBD in food and dietary supplement products within the state. For example, Colorado allows CBD food and dietary supplement products if they are compliant with state regulations, while California does not, following federal guidance. This makes CBD food and dietary supplement legality, as well as risk of enforcement, very much a state by state determination.

Internal Revenue Code Section 280(e)

Perhaps the most immediate and tangible effect of the Farm Bill is the removal of Internal Revenue Code Section 280(e) from hemp business. Prior to the bill, those dealing commercially in both marijuana and industrial hemp were subject to section 280(e), meaning they could take no tax deduction beyond cost of goods sold. After enactment of the Farm Bill, hemp is no longer a controlled substance and hemp businesses will no longer be subject to this tax code. This benefits the industry immensely because compliant hemp businesses will now have effective tax rates similar to that of other legal businesses.

State Hemp Regulation

The Farm Bill passed the responsibility to legalize and regulate hemp to the states. Most states must undertake multiple regulatory actions for hemp to be legal under state law. First, a state must add an exemption to the its definition of marijuana in the state's CSA, if it has not done so already. Currently, hemp and hemp products fall under the definition of marijuana in the majority of states.

Following a hemp exemption, the Farm Bill presents a choice of three regulatory options: (1) legalize and regulate at the state level; (2) legalize and allow farmers to apply for federal licenses and follow USDA regulations; or (3) keep hemp illegal and only allow transportation through the state.

Under the first option, states must submit a state plan to USDA including mandatory procedures for (1) maintaining and submitting the location of Hemp cultivators and businesses to the USDA; (2) testing for cannabis above 0.3% THC; (3) disposing of non-conforming cannabis plants and products; (4) enforcement of negligence and intentional violations; (5) annual random inspections; and (6) ensuring the state has enough resources to carry out the plan. The secretary of the USDA then has 60 days to approve or disapprove the plan. Until hemp is exempted from a state's definition of marijuana in its CSA, and the state has a USDA approved plan in place, hemp production is not legal within the state.

Instead of drafting a state plan, a state may also wait for the USDA to create a licensing and regulatory system for hemp. Growers and producers would then have apply for and be granted federal licenses prior to cultivating hemp. The mandatory requirements for the USDA plan are identical to the requirements for the state plan. Finally, a state may choose to keep hemp illegal within the state but allow transportation of hemp through its borders.

Penalties for Growing Hemp Above 0.3% THC

Penalties for negligently growing "hot" hemp are minimal in the Farm Bill. This is important because criminalizing farmers for an honest mistake was of concern to potential hemp farmers, and would have prevented many from entering the industry. Repeat negligent violations, meaning three in a five-year period, subjects the offender to license suspension of five years. In contrast, penalties for intentionally growing higher THC cannabis are taken more seriously and may be prosecuted as marijuana violations.

Other Effects of the Farm Bill: Intellectual Property, Insurance, and Banking

Federal intellectual property protection including patents and trademarks have been mostly unavailable to hemp businesses due to hemp's schedule I designation. Now that hemp is a legal agricultural commodity, businesses legally dealing in hemp will now be granted patents and trademarks protecting hemp intellectual property. Additionally, the Farm Bill expressly makes hemp eligible for the federal crop insurance program. This provides security to investment in hemp cultivation, increasing the growth potential for the industry.

Finally, the hemp industry has been largely unable to use banking or credit card services due to federal illegality of hemp. The services can finally open to hemp entities complying with state and federal hemp laws; however, as this is a bank management risk decision, it will take time for banks and other financial institutions to begin servicing the industry.

Although the 2018 Farm Bill did not legalize hemp nationwide, nor overrule the FDA's determination that CBD is a drug, it will increase investment in hemp, kick-start consumer interest, expand hemp biomass across the nation, and allow for further product diversification. Look for CBD prices to drop in the upcoming years as supply catches up with demand, allowing the fiber and grain sectors of hemp to mature.