

Hemp, Hemp, Hooray?

A major policy shift in the federal regulation of hemp occurred at the end of 2018. The Agriculture Improvement Act of 2018 (2018 Farm Bill) legalized hemp by removing it from the definition of marijuana under the Controlled Substances Act.¹ The 2018 Farm Bill defines hemp 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 (‘THC’) concentration of not more than 0.3 percent on a dry weight basis.”² This means that any *Cannabis sativa* L. plant or product that contains less than 0.3 percent THC is legal hemp.

However, it is important to be aware that hemp and marijuana come from the same plant, and any plant or product that has a THC concentration in excess of 0.3 percent is considered marijuana and is illegal under both federal and Virginia law. Additionally, the 2018 Farm Bill maintained the Food and Drug Administration’s (FDA) regulatory authority over products containing cannabis or cannabis-derived compounds, including cannabidiol (CBD) and THC.³ A CBD product that contains a concentration of 0.3 percent THC or less is a permitted hemp derivative under the 2018 Farm Bill, but still must comply with FDA requirements and other applicable laws. Currently, the FDA maintains that it is unlawful to introduce food containing added CBD or THC into interstate commerce, or to market CBD or THC products as, or in, dietary supplements.⁴ It is unclear how the FDA plans to treat non-ingestible CBD products.

In addition to decriminalizing hemp and hemp derivatives, the 2018 Farm Bill establishes a framework for hemp cultivation and regulation. A state or Indian tribe that desires to have primary regulatory authority over the production of hemp can devise a plan for monitoring and regulating hemp production and submit such plan to the Secretary of Agriculture (Secretary) for approval. Each plan must include a practice for maintaining relevant information regarding the land on which hemp is grown, a procedure for testing plant THC levels, a procedure for disposing of plants and products that are produced in violation of the law, a procedure for enforcement of violations, and a procedure for annual random inspections of hemp producers. In states and Indian tribe territories where there is no Secretary-approved plan in place, the Secretary will be the primary regulator of hemp production under its own regulatory plan.

The Secretary has announced that all state and Indian tribe plan submissions for primary regulatory authority of hemp will be held until it has promulgated final regulations on hemp production. Once the federal rules are in place, the Secretary will review and approve plans within 60 days of their submission. Thus, it is unlikely that any state or Indian tribe who submits a plan will receive approval until later this year or early 2020. Until a state or Indian tribe’s plan is approved by the Secretary, hemp production in that state or territory may only occur under the limited agricultural pilot programs permitted under the Agriculture Improvement Act of 2014.⁵

¹ Pub. L. 115-334.

² Section 10111 of the 2018 Farm Bill.

³ Federal Food, Drug, and Cosmetic Act and section 351 of the Public Health Service Act.

⁴ Statement from FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency’s regulation of products containing cannabis and cannabis-derived compounds, December 20, 2018.

⁵ 7 U.S.C. 5940.

Virginia is well poised to be a primary regulator of hemp production. In addition to having a hemp registration program in place, Virginia enacted legislation on March 21, 2019, to align its hemp laws with the 2018 Farm Bill. HB 1839 removed industrial hemp as a controlled substance, eliminated the requirement that hemp be grown for research purposes, and allowed the commercial production of industrial hemp.⁶ To legally grow, process or deal in hemp in Virginia, a person must register with the Virginia Department of Agriculture and Consumer Services as an Industrial Hemp Grower, Dealer, or Processor or an agent of a registrant.⁷

Because hemp is now legal, proceeds connected to properly licensed or registered hemp-related businesses are also legal and do not trigger anti-money laundering statutes. Banks who want to provide services to hemp producers should ensure that producers are operating pursuant to an approved state or tribal plan, or have a license issued by the Secretary. Additionally, customers that produce hemp derivatives must also be in compliance with FDA regulations. Banks will benefit from educating themselves about the requirements for hemp companies and inquiring with their regulators regarding expectations for compliance.

⁶ <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=hb1839&submit=GO>

⁷ Section 3.2-4115 of the Code of Virginia.