

Cannabis Law 300:400



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Interstate Transactions for Industrial Hemp

Until recently, federal law did not differentiate hemp from marijuana meaning both were considered “marihuana” (the law dates back decades and uses an older spelling of the word marijuana) and outlawed as a Schedule I Controlled Substance. *See* [21 U.S.C.A. § 812\(c\)\(10\) \(2018\)](#). In late 2018, Congress passed the Agriculture Improvement Act of 2018, otherwise known as the “2018 Farm Bill”. The 2018 Farm Bill removed hemp and hemp-derived products from the definition of “marihuana,” effectively removing it as a Schedule 1 controlled substance and paving the way for legalized hemp cultivation, processing, and sale.

Importantly, the 2018 Farm Bill also authorized interstate sales of hemp and hemp-derived products such as cannabidiol (CBD), a popular cannabinoid found in the cannabis plant. With the hemp and hemp-derived CBD industry now formally legal, experts predict the size of the hemp and hemp-derived CBD market will skyrocket to between \$9.3 and \$11.3 billion in annual retail sales by 2024. *See* [Hemp & CBD Industry Factbook, Marijuana Business Daily, https://mjbizdaily.com/bizbooks/2019-hemp-factbook/14/](#) (last visited September 1, 2020).

With so much activity in this space, legal practitioners must understand the nuances in how the 2018 Farm Bill works in order to adequately assist clients seeking to establish hemp and CBD sales around the country. This note will provide an overview of what the 2018 Farm Bill did and didn’t do. From there, this article will dive into detail on the legal requirements for hemp set forth in the 2018 Farm Bill and then outline practical considerations for lawyers to consider when advising companies on interstate sales of hemp and hemp-derived CBD products.

BACKGROUND

A. What the 2018 Farm Bill Does Do

While the 2018 Farm Bill generally paved the way for legal hemp and certain hemp-derived CBD products there are several major qualifiers. First, to be considered legal, hemp must not contain more than 0.3% tetrahydrocannabinol (THC) by dry weight. *See* [7 U.S.C.A. § 1639o \(2018\)](#). THC is an intoxicating cannabinoid found in the cannabis plant that is responsible for producing a “high.”

Second, hemp must be produced in a manner consistent with the Farm Bill as well as with associated state and federal regulations. The Farm Bill created a joint federal-state regulatory regime requiring States to take certain steps before hemp can be considered legal. Section 10113 of the 2018 Farm Bill provides that state departments of agriculture, in consultation with the state’s governor and attorney general, must devise and submit to the United States Department of Agriculture (USDA) a plan regulating hemp. The USDA must approve the state’s plan before hemp can be legally produced and sold. Notably, if a state chooses not to establish such a system, the USDA will create and enforce a plan for that state. In addition, the pilot programs established by states under the Agricultural Improvement Act of 2014 (the “2014 Farm Bill”), remain lawful until September 30, 2021 as discussed in more detail below.

Third, the 2018 Farm Bill provides that certain activities such as cultivating hemp without a license under an approved plan or producing hemp with more than 0.3% THC are unlawful. The legislation outlines various penalties, including felonies, for failure to comply with these restrictions.

B. What the 2018 Farm Bill Does Not Do

A common misconception is that the 2018 Farm Bill legalized hemp and CBD everywhere in the United States. In fact, the 2018 Farm Bill only narrowly legalized certain types of CBD derived from hemp. With a few exceptions that are beyond the scope of this article, most CBD derived from something other than hemp remains a Schedule I Controlled Substance that is illegal under federal law.

The Farm Bill also did nothing to legalize state-level cannabis programs, meaning that marijuana remains illegal as a Schedule I Controlled Substance under federal law even in states that have legalized marijuana in some manner. [21 U.S.C.A. § 812\(c\)\(10\) \(2018\)](#).

DETERMINING WHETHER THE HEMP OR HEMP DERIVED PRODUCT IS LAWFUL

The 2018 Farm Bill tasked the USDA with devising rules and regulations to implement the Act's provisions. The USDA published its interim final rule on October 31, 2019, which provided details regarding how hemp industry participants should understand compliance obligations with activity authorized by the 2018 Farm Bill. *See* [7 C.F.R. § 990 \(2019\)](#). The most important of those considerations are: (1) what does it mean for hemp to contain less than 0.3% THC by dry weight; (2) under what regulatory authority must hemp and hemp derived products be authorized to be lawful; and (3) to what extent can hemp and CBD industry participants engage in interstate sales of hemp and hemp products.

A. The product must not contain more than 0.3% tetrahydrocannabinol (THC) by dry weight.

Any cannabis product that contains more than 0.3% THC is considered marijuana, which is illegal at the federal level. Thus, it is very important that cannabis lawyers understand the 0.3% THC standard and advise clients accordingly. *See* [7 U.S.C.A. § 1639o \(2018\)](#). Unfortunately, the 0.3% THC standard is itself a hotly contested and complex issue.

Under the USDA's final interim rule, the testing standard for assessing THC by dry weight requires using a "total THC" standard. *See* [7 C.F.R. § 990.25 \(2019\)](#). Total THC means the sum of both the total delta-9 THC level and the possible conversion of THCA (the acidic form of THC) which can be decarboxylated into Delta-9 THC. [7 C.F.R. § 990.25 \(2019\)](#). This standard was heavily criticized in the USDA's public comment period and is seen by many in the hemp industry as overly burdensome and not in line with the requirements set forth in the 2018 Farm Bill. *See, e.g.*, Public Comments, Hemp Farm Bill, *available at* <https://www.regulations.gov/docket?D=AMS-SC-19-0042> (last visited Mar. 2, 2020). Despite the criticism, the total THC standard remains the USDA rule as of this writing.

The total THC standard is also complicated by the fact that states operating pilot programs authorized under the 2014 Farm Bill (discussed more below) may assess the THC level based solely on the delta-9 THC level. Under the delta-9 THC approach, the test for THC level need not consider or add the THCA level to produce a total THC reading below 0.3%. Accordingly, the delta-9 approach is more lenient than the total THC standard. The presence of a competing standard between the USDA's total THC standard and various pilot program's delta-9 only THC standard means the level of THC authorized for hemp to be considered lawful depends on what state you are transacting business in (until the pilot programs sunset on September 30, 2021).

For example, in Ohio, where the USDA has approved Ohio's plan to regulate hemp, the total THC must be below 0.3%. This means that a certificate of analysis must show that the sum of delta-9 THC level plus 0.877 multiplied by the THCA level is below 0.3%. *See* [Ohio Admin. Code 901:14-2-01 \(2020\)](#). By contrast, Kentucky enjoys the more lenient delta-9 THC testing standard, which requires only that the delta-9 THC be below 0.3% since Kentucky operates under the authority conferred by the 2014 Farm Bill. *See* [Ky. Rev. Stat. Ann. § 260.858\(3\)](#).

B. The product must be produced in a manner consistent with the Farm Bill as well as with associated state and federal regulations.

Section 10114 of the 2018 Farm Bill protects activity in connection with transporting hemp in interstate commerce provided such hemp is lawfully cultivated under the Act. *See* 7 C.F.R. § 990.63 (2019). Hemp is lawful under the 2018 Farm Bill—and thus protected in interstate commerce—in three scenarios: (1) with a valid USDA-issued license, (2) under a USDA-approved state plan, or (3) under the 2014 Farm Bill industrial hemp pilot authority. Initially, under the 2018 Farm Bill, the pilot programs established under the 2014 Farm Bill were supposed to remain lawful for a period of one year from the date the final administrative regulations implementing the 2018 Farm Bill were introduced, which would have been October 31, 2020. 7 C.F.R. § 990.63 (2019). However, on October 1, 2020, President Trump signed into law a continuing resolution that extended the time that programs established under the 2014 Farm Bill remain lawful until September 30, 2021. Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, § 122 (2020). 7 C.F.R. § 990.63 (2019); Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, § 122 (2020).

i. USDA and State Regulatory Plans

Hemp is considered lawful under a state plan regulating hemp provided the provisions of Section 10113 of the 2018 Farm Bill are met. 7 C.F.R. § 990 (2019). That provision provides that state departments of agriculture, in consultation with the state’s governor and attorney general, must devise and submit to the USDA a plan regulating hemp. 7 C.F.R. § 990 (2019). The USDA must approve the state’s plan before hemp can be legally produced and sold.

If a State declines to set up a regulatory program governing hemp, then that state’s residents shall be subject to a regulatory program set up and run by the USDA. 7 C.F.R. § 990 (2019). In that case, a producer may apply to the USDA for a license to cultivate hemp. The USDA’s administrative regulations set forth its licensing program requirements, which are similar to provisions for state and tribal hemp production plans.

To date, 20 states have had their plans approved by the USDA. Status of State and Tribal Hemp Production Plans for USDA Approval, [USDA Agricultural Marketing Service, https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review](https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review) (last visited Sept. 1, 2020).

ii. 2014 Farm Bill’s Pilot Authority Extension

The 2018 Farm Bill also provided that the provisions of the 2014 Farm Bill’s hemp pilot program would stay in place for one year from the date that the USDA promulgated regulations implementing the 2018 Farm Bill. *See* The Agricultural Improvement Act of 2018, Pub. L. No. 115-334 § 7605(b) (2018); 7 C.F.R. § 990 (2019). As mentioned above, this was recently extended to September 30, 2021. Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, § 122 (2020).

The extension to September 30, 2021 means that states operating under the 2014 Farm Bill can legally continue to do so for nearly a year longer than originally anticipated. This puts states that complied with the 2018 Farm Bill at a competitive disadvantage since, as discussed above, they are locked into stricter rules for testing and permissible THC levels enumerated in the USDA’s stricter 2018 Farm Bill regulations.

C. Express Legal Authority to Engage in Interstate Sales of Hemp

The USDA’s interim final rule states in pertinent part that “Congress expressly pre-empted state law with regard to the interstate transportation of hemp.” 7 C.F.R. § 990 (2019). Thus, “states and Indian tribes may not prevent the movement of hemp through their states or territories even if they prohibit its production.” 7 C.F.R. § 990 (2019). Prior to publishing the final interim rule, the USDA had issued a Memorandum on May 28, 2019, to clarify that States “may not prohibit the interstate shipment of hemp lawfully produced” *See* Memorandum from Stephen Alexander Vaden, General Counsel, United States Department of Agriculture Office (May 28, 2019), *available at*

<https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf>.

Prior to passage of the interim final rule, there had been several high-profile seizures of lawful hemp by states that initially refused to recognize the protections afforded by the 2018 Farm Bill. *See, e.g.*, Hemp Industry Daily Staff, Marijuana or hemp? Manufacturers snagged by Farm Bill confusion, Marijuana Business Daily (Feb 6, 2019) <https://mjbizdaily.com/marijuana-or-hemp-manufacturers-snagged-by-farm-bill-confusion/> (lawful hemp shipments were seized in Idaho and Oklahoma and the drivers of the shipments were charged with crimes under state law). Since the USDA issued its memorandum and the final interim rule, the risk of such seizures has dissipated to some extent. However, there remains a risk that state police authorities will at least temporarily seize hemp or hemp-derived products in transit. Hemp looks exactly like marijuana in its unprocessed form; thus, state police agencies have had trouble differentiating between lawful hemp and illegal marijuana. We discuss this risk in more detail below.

TRANSACTIONS OF HEMP AND HEMP-DERIVED PRODUCTS IN INTERSTATE COMMERCE

Practitioners advising clients on interstate sales of hemp must engage in a thorough analysis of whether the component pieces of the deal are lawful prior to finalizing the paperwork needed to consummate the transactions. Here, the authors provide a road map for conducting such an analysis with a detailed discussion of what each step in the analysis entails.

A. Advise Client Of All Risks, Including Potential Penalties Of Illegal Transactions.

Lawyers should have a detailed engagement letter from the outset of the client relationship that outlines the potential consequences of participating in the hemp industry, including that any hemp not cultivated or processed under the parameters set forth in the 2018 Farm Bill may be considered marijuana which remains illegal under federal law.

Lawyers should also advise clients of the risk that even lawful hemp may be seized by law enforcement and either held for a significant period of time or confiscated due to the uncertainty surrounding hemp testing and differences in state testing standards. The bottom line is, clients operating in the hemp industry cannot enjoy 100% assurances that their conduct will be considered lawful due to the complex regulatory environment plaguing the cannabis industry.

B. Confirm That The Product Meets The Requirements Of Lawful Hemp.

Confirm the hemp at issue is legal. In other words, the hemp at issue must have been cultivated under one of the following programs:

- A pilot program set up under the 2014 Farm Bill (note this authorization sunsets on September 30, 2021);
- A USDA-approved state plan regulating industrial hemp (*see* United States Department of Agriculture, Status of State and Tribal Hemp Production Plans for USDA Approval, *available at* <https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review> (last visited Mar. 2, 2020); or
- A USDA-issued license.

Any hemp or hemp-derived products cultivated or processed outside the parameters of one of the above regulatory programs is unlawful and could potentially be federally illegal in a manner carrying significant legal and financial consequences.

C. Provide All Necessary Notices And Harvest Reports (if any) To The Applicable Authorities.

The USDA's interim final rule set forth a process that States should follow when devising their hemp harvesting regulatory requirements. Under both the USDA regulatory program and the guidelines for state plans, the USDA has developed an approach that requires the applicable licensed hemp cultivator to provide 15 days' notice prior to the intended cultivation date. [7 C.F.R. § 990.24 \(2019\)](#); [7 C.F.R. § 990.3 \(2019\)](#). The appropriate state or USDA authority shall then come collect samples during that 15-day period to ensure that the hemp to be cultivated remains below the 0.3% THC threshold. [7 C.F.R. § 990.24 \(2019\)](#). If the hemp tests within the appropriate THC threshold, then the hemp cultivator is authorized to harvest the product, but in many cases it must do so within a 15-day harvest window (states can have varying requirements with regard to harvest windows but several approved state plans have followed the USDA's regulatory program rule that the harvest

window is 15 days long). *See, e.g.* 7 C.F.R. § 990.26 (2019).

If the product sampled tests over the 0.3% THC threshold, then the harvest must be destroyed. 7 C.F.R. § 990.27 (2019); 7 C.F.R. § 990.3 (2019). Further, if the cultivator fails to harvest the product within the applicable harvest period set forth under state law, then the cultivator must notify the appropriate regulator who may require additional sampling, at the cultivator's expense prior to authorizing a harvest. *See, e.g.*, 7 C.F.R. § 990.26 (2019); Ohio Admin. Code 901:14-1-08(C) (2020).

Attorneys working with hemp cultivators or entities doing business with such cultivators should ensure that they review applicable harvest reports and certificates of analysis to confirm that the hemp at issue in a given transaction has been lawfully harvested and meets the applicable regulatory requirements. Copies of these documents should accompany the product in transport.

D. Verify That Both The Seller And The Buyer As Well As The Transportation Company Have All Required Licenses To Consummate The Transaction.

Because States have the option of devising their own regulatory programs governing hemp under the 2018 Farm Bill, the required licenses for hemp and CBD industry participants can differ state by state. Attorneys should request a copy of all licenses held by the counterparty and any third-party transportation or security companies to verify that such individuals or entities can lawfully participate in the hemp-based transaction.

This analysis can be complicated by the presence of the 2014 Farm Bill pilot programs. Some States have chosen to operate under such programs for the 2020 harvest season prior to submitting a state regulatory plan to the USDA for the 2021 harvesting season. The 2014 Farm Bill gave states establishing pilot programs more latitude to devise their hemp regulatory programs than the 2018 Farm Bill did, so the licenses and requirements can vary wildly from state to state.

As an example, Colorado requires any entity that intends to engage in buying any "farm products" or "commodities" from the "owner" for processing or resale to be licensed under Colorado's Farm Products and Commodity Handler regulatory programs. *See* Colo. Rev. Stat. § 35-36-101, *et seq.* (2017); Colo. Rev. Stat. §§ 35-37-101, *et seq.* (2017). This includes persons or entities buying, selling, and transporting industrial hemp and can impact entities transporting hemp products from outside of Colorado to processors or resellers in Colorado. Accordingly, those transacting business with entities in Colorado need to ensure that the counterparty has the appropriate licenses not only to cultivate or process hemp as necessary, but also to buy, sell, and transport hemp.

E. Analyze Applicable State And Federal Statutes To Make Sure The Transaction Is Not Otherwise Prohibited.

Some state regulatory programs governing hemp prohibit certain types of hemp or hemp-derived products. And these prohibitions can be different from state to state such that a lawful form of hemp in one state may have a dubious legal status in another state. Attorneys advising clients in the hemp space should ensure that the client's intended transaction doesn't violate local law or the destination jurisdiction's law as deviation from the applicable state law could cause the underlying hemp and transaction to be unlawful.

For example, Kentucky's hemp program prohibits certain types of smokeable hemp while most other states do not have prohibitions on smokeable hemp. *See* 302 Ky. Admin. Reg. 50:070 (2018) (prohibiting hemp cigarettes, hemp cigars, chew, dip, or other smokeless material consisting of hemp leaf material or hemp floral material). Accordingly, if a producer or processor in Colorado wanted to source certain types of smokeable hemp, they should not source the *processed* product in Kentucky if it is one of the forms of smokeable hemp prohibited under Kentucky law.

While the Kentucky example above may seem like splitting hairs or a technicality, it is important to remember that any hemp cultivated that is not in compliance with the applicable jurisdiction's hemp regulatory program remains federally illegal.

F. Confirm Hemp Product Quality; Method Of Shipment; Risk Of Loss In Transit; And Insurance Options For The

Product In Transit.

For hemp transactions involving the interstate commerce, the parties might consider executing a minor agreement to send samples of the product to allow the receiving party to confirm the quality before executing a purchase agreement for a large quantity of hemp. Generally, parties should refrain from shipping large amounts of hemp without performing basic due diligence on the quality of the product beforehand.

Attorneys should also advise clients about options for methods of shipment. The safest method of shipment for an entity selling hemp or hemp derived products is to identify a carrier with experience in the hemp industry and then negotiate to have the counterparty assume title and/or risk of loss upon delivery of the product to the carrier. However, if your client assumes the risk of loss while in transit, then consider insuring the product. Notably, the authors are unaware of any insurance company that will insure over the risk that product is seized and held by police on suspicion that the hemp is unlawful. But cannabis companies can guard against most other risks of loss while the product is in transit.

G. Drafting Considerations For Hemp And Hemp Derived Transactions.

A critical aspect of advising clients on hemp related transactions in the interstate commerce is the agreement itself. When negotiating an agreement involving such transactions, a lawyer should consider the following:

- Requiring both parties to make representations and warranties with corresponding indemnification provisions wherein both parties affirm their status as a licensed entity authorized to consummate the contemplated transaction. Before entering into the agreement, lawyers should perform due diligence to look into these issues and confirm (to the extent possible) that the licenses are valid and the licensee is in good standing with the applicable regulatory authority.
- Draft representations and warranties with corresponding indemnification provisions affirming that the certificates of analysis accompanying a particular shipment of hemp or hemp-based product is below the 0.3% THC threshold (i.e., require the party who cultivated or sourced the hemp to represent and warrant that the certificate of analysis showing such hemp is below 0.3% THC is true and accurate and that the product meets the legal definition of hemp). In this situation, it is important for the lawyers to analyze which tests the shipping state and the receiving state use for the definition of hemp. If the destination state in question uses a total THC standard, while the state of cultivation allows only for Delta-9 THC, then there is a risk that the product will qualify as marijuana in the destination state if it is seized by police. The contract should confirm what level of THC is required and account for differences between the state of cultivation and ultimate transport. Notably, the different THC testing standards will only be an issue until October of 2021 when the pilot programs under the 2014 Farm Bill sunset. At that time, total THC will become the national standard.
- Pay careful attention to how the product is being transported, who bears the risk of loss during transit, and who takes title to the goods and at what point in time. If the product is transported by a third party, the party assuming the risk of loss during transit should make sure the transportation company has basic insurance and any licenses that may be necessary to transport the product. Because certificates of analysis, harvest reports, and licenses are so important for confirming legal status of the hemp product, practitioners should add provisions to the contract that require the transporting party to carry a copy of the licenses, harvest reports, and certificates of analysis with the product in transit.

H. Work With Regulators

If the reader has one takeaway after reading this article, it should be that the hemp industry regulations are far from clear and settled. The hemp industry is highly regulated and complex, and not all questions can be easily answered. In the authors' experience, working with the applicable regulators has been critically important, particularly when uncertainty exists. State regulators are learning alongside the hemp industry participants. The regulators can be extremely helpful when trying to figure out whether a specific transaction is lawful so when in doubt, work with the regulatory authorities.

I. Stay Informed About Industry Developments

Lastly, practitioners in the hemp space must spend the time to stay up to date on regulatory changes. The cannabis industry remains among the most rapidly developing and complex legal environments in the United States. Failure to stay informed of

industry changes could have significant and devastating consequences to clients and legal practitioners alike.

There are many resources available that can aid practitioners in their educational endeavors. Sign up for alerts and updates from the USDA's hemp program and applicable State Departments of Agriculture. Use popular websites like Hemp Industry Daily and its sister site Marijuana Business Daily to get daily cannabis industry news updates. There are also numerous podcasts and audio based news sources that are specific to the cannabis industry and available for free and easy access.

About the Authors



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