



## Government Affairs Extra



# Cannabis & Hemp Update

BY  
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**T**he legal status of cannabis (often called “marijuana” in federal and state laws) has evolved at an astonishing pace. The first states began legalizing cannabis for medical use in the late 1990s and early 2000s. Today, nearly all states have legalized cannabis, or its derivative cannabidiol (CBD), for medicinal use. An additional 10 states have legalized recreational or adult-use cannabis.

Cannabis legalization receives widespread popular support. According to opinion polls, more than two-thirds of Americans support full legalization—a steep rise in support considering that as recently as 2005, almost two-thirds of Americans opposed legalization. The country appears on the path to full cannabis legalization, but until that time, citizens and companies should be aware of the legal risks involved in entering the cannabis space.

### STATUS OF FEDERAL LAW

In contrast to the repeal of Prohibition in the 1930s—where the legalization of alcohol was carried out at the federal level and states followed by setting up complementary regulatory regimes—movement toward cannabis legalization began

at the state level. Fulfilling their roles as “laboratories of democracy,” states are experimenting with different laws and regulations regarding cannabis production, marketing, and consumption. At the same time, the federal government continues to criminalize most actions involving cannabis. While the Constitution’s Supremacy Clause makes federal law superior to state law, many businesses and consumers are engaging in cannabis-related activities, relying solely upon state law regimes.

But the federal criminal liability risk is real, and the potential consequences are extreme. The Controlled Substances Act (CSA), which criminalizes the manufacture, possession, use, and distribution of certain drugs, lists marijuana, tetrahydrocannabinol (THC), and marijuana extracts as Schedule I drugs with a high potential for abuse and with no known medicinal benefits. Under federal law then, cannabis and its derivatives are treated the same way as heroin, LSD, and ecstasy. Possible federal penalties for cannabis trafficking include lifetime incarceration and forfeiture of assets. Even people or entities not directly involved in the possession or sale of the plant itself face potential criminal liability under “aiding and abetting” and “criminal enterprise” legal theories. Since the severity of criminal penalties is tied to the quantity of cannabis possessed, businesses involved in the

production or distribution of cannabis—even in states in which it is legalized—face potential severe criminal penalties.

Fortunately for the emerging cannabis industry, federal prosecutors have taken a relatively light approach when it comes to enforcing the CSA against businesses operating in accordance with state-legal cannabis laws. Issued under the Obama administration, a series of memos, including the so-called Cole Memorandum, directed Department of Justice (DOJ) prosecutors to refrain from prosecuting marijuana activity in compliance with state law, unless there were certain aggravating factors involved, such as connection to organized crime or harm to minors. Former attorney general Jeff Sessions rescinded the Cole Memorandum, but newly confirmed attorney general William Barr indicated in his confirmation hearings that he would not target cannabis businesses operating within the bounds of state law. While such exercises of “prosecutorial discretion” can be ignored at any time, for now at least, the risk of federal prosecution of businesses operating within the bounds of state cannabis laws appears quite low.

Moreover, although “marijuana” (the label of cannabis under the CSA) remains a Schedule I substance, the definition of what constitutes “marijuana” recently changed. The Agriculture

Improvement Act of 2018 (Farm Bill) explicitly excluded hemp from the definition of marijuana in the Controlled Substance Act. The bill defined 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 concentration of not more than 0.3 percent on a dry weight basis.*

While the 2014 Farm Bill authorized the growing of industrial hemp for research purposes only, the 2018 Farm Bill contains no such restrictions on the growing of hemp.

But until the U.S. Department of Agriculture (USDA) issues new regulations (expected fall of 2019), all hemp production is still governed by the 2014 law. The law provides for shared federal and state regulation of legalized hemp production. States that desire to have primary authority over the production of hemp must submit regulatory plans for federal approval. In states without an approved plan, production of hemp is subject to plans established by the Secretary of Agriculture, including a procedure to issue licenses. In a state without a federally approved plan, it is unlawful to produce hemp without a federal license.

The 2018 Farm Bill's de-scheduling of hemp had no effect on federal food and drug laws, notably the Federal Food, Drug and Cosmetic Act (FD&C Act). On the same day the Farm Bill became effective, the Food and Drug Administration (FDA) released a statement reminding the public that it possesses regulatory authority over products containing cannabis or cannabis-derived compounds under the FD&C Act. The FDA has recognized hemp and several hemp-derived products as "generally recognized as safe" (GRAS) under the FDA's food ingredient standards. But the same cannot be said for THC or CBD, including CBD derived from hemp produced in compliance with the 2018 Farm Bill.

And although CBD might seem to fall squarely within the FDA's alternative category between "foods" and "drugs"—a category known as "dietary supplements"—recognition of CBD as a dietary supplement faces a somewhat ironic roadblock. Over the past decade, the FDA has approved CBD and THC as active ingredients in several drugs—actions cheered by most cannabis advocates at the time. But these approvals create a major roadblock to the recognition of CBD as a dietary supplement, since active drug ingredients are generally not recognized as dietary supplements unless they were clearly used as such before they underwent clinical drug trials. As cannabis has been illegal for decades, demonstrating use of CBD as a dietary supplement will prove difficult.

## NEWLY INTRODUCED LEGISLATION

- **Small Business Tax Equity Act (H.R.1118/S.422):** Would allow state-legal cannabis businesses to claim small business tax deductions.
- **Responsibly Addressing the Marijuana Policy Gap Act (RAMP Act) (H.R.1119 / S. 422):** Removes federal criminal penalties for businesses complying with state cannabis laws, and ensures access to banking, bankruptcy protections, cannabis research, and advertising. It would also include protections for individual consumers of state legal cannabis related to housing, higher education, immigration, and veterans' benefits.
- **The Marijuana Revenue and Regulation Act, (H.R.1120/S.420):** Would amend the Internal Revenue Code to provide for the taxation and regulation of cannabis products.
- **Veterans Medical Marijuana Safe Harbor Act (H.R.1151/S.445):** Would create a safe harbor for veterans who use medical cannabis in accordance with state law and allow VA physicians to recommend participation in state medical cannabis programs.
- **REFER Act (H.R.1455):** Would restrict the use of Department of Justice funds against states and individuals in states that permit the use of cannabis.
- **The Marijuana Justice Act (H.R. 1456/S. 597):** Would remove cannabis entirely from the list of controlled substances, expunge federal cannabis use and possession crimes, and provide incentive for states to legalize.
- **The Ending Federal Marijuana Prohibition Act (H.R.1588):** Would limit the application of federal laws to the distribution or consumption of cannabis.
- **SAFE Banking Act (H.R. 1595):** Would create a safe harbor for banks that provide financial services to state-legal cannabis and cannabis-related businesses.
- **Fairness in Federal Drug Testing Under State Laws Act (H.R. 1687):** Would prohibit the federal government from denying employment or subjecting federal employees to adverse personnel actions for testing positive for cannabis in states where cannabis is legal. It contains limited exceptions for jobs that require a top-secret clearance, and when there is probable cause that an individual is under the influence of cannabis while at work.

Nevertheless, despite the ambiguities under federal law, many CBD-infused edible products are available across the country. Given the exploding popularity of such products, a major crackdown would likely provoke an angry backlash from consumers and their elected representatives. Moreover, government enforcers lack the resources to go after thousands of alleged violators. Seeking to maximize the impact of limited enforcement resources, the FDA's main efforts to date have focused on CBD products making exaggerated claims about their purported health benefits.

The addition of cannabis-derived products to beer (or any other alcohol beverage) poses unique regulatory challenges. Formula approval from the Alcohol and Tobacco Tax and Trade Bureau (TTB) is required for any beer containing a non-standard ingredient like cannabis, hemp, or CBD. The TTB's authority to require formula approval arises from the Internal Revenue Code and does not require a showing of "interstate commerce." Thus, even beers sold entirely within one state, such as products sold exclusively at a brewery, need formula approval if they contain cannabis or a cannabis-derived ingredient like CBD. The TTB has indicated that it will not approve a formula containing a Schedule I drug, or ingredients not recognized as GRAS by the FDA. For this reason, most brewers seeking to enter the cannabis beverage space have focused on non-alcohol products.

## POSSIBLE CONGRESSIONAL ACTION

Thus far, the most effective congressional activity in the area of cannabis has focused on appropriations. Rather than undertaking the arduous process of passing a standalone bill, Congress has attached riders on appropriations bills prohibiting government agencies from using federal funds to enforce federal law against medical cannabis activities compliant with state law. Efforts are underway to pass similar riders regarding state-regulated recreational marijuana activities. While it has been effective to date, drawbacks to this appropriations strategy include the temporary nature of the law's effect, as appropriations amendments must be passed annually to remain law.

Other pending legislation related to cannabis legalization includes the SAFE Banking Act, which would provide protection from federal prosecution to banks doing business with state-legal cannabis enterprises. The Veterans Medical Marijuana Safe Harbor Act would allow doctors at the Veterans Administration to prescribe medical cannabis to veterans and do away with rules that put veterans' benefits at risks for using medical cannabis. Additionally, presidential candidate Cory Booker has sponsored a bill that would de-schedule cannabis ("marijuana") altogether from the CSA and create incentives for states to legalize. Incremental changes to federal

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policy, including those that rely on the appropriations process, are much more likely to succeed in Congress than full legalization.

**STATE LAW CONSIDERATIONS**

State laws on cannabis cover many different topics, and—like the laws governing the production, distribution, and sale of alcohol—the cannabis laws in one state may be very different from those in a neighboring state. As brewers would expect, states generally impose a licensing scheme covering producers, distributors, retailers, and testing laboratories. It should also come as no surprise that states have created excise tax regimes to ensure that the state gets its share of this newly legalized activity.

States to date have not embraced a three-tier model for cannabis distribution, but cross-ownership restrictions do exist. Notably, most states have ownership restrictions that prevent someone from holding a financial interest in a testing facility and any other cannabis business. For example, in California, an individual cannot be a board member of a licensed cannabis facility if the person holds even a small financial interest in a testing facility.

Brewers looking to get involved in the cannabis space must pay careful attention to state laws. Just because a state's laws allow adult-use cannabis sales does not mean those laws also allow cannabis-infused alcohol beverages. Indeed, most states (as well as the new Canadian national cannabis laws) prohibit the production of cannabis-infused alcohol beverages. Going one step further, many jurisdictions require a separation between marijuana/cannabis products and alcohol, prohibiting the storage of alcoholic beverages on premises licensed to produce, store, and sell cannabis. These rules often make it prohibitive for a licensed alcohol business to produce any cannabis-infused products, even those not falling under the TTB's regulatory authority.

Rapid legal shifts in the cannabis space present opportunities for businesses to be at the forefront of the cannabis market. But despite significant legal developments, cannabis activity remains risky under federal law. Businesses seeking to get involved in cannabis must be aware of the federal risks and the diversity of state laws.

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