

INDUSTRIAL HEMP GOLD RUSH MOVES EAST: UPDATES FROM SOUTH CAROLINA

Date: 6 June 2019

U.S. Environment, Land & Natural Resources and Agribusiness, Food and Beverage Alert

By: Christopher A. Jaros, Laura A. Musselman, W. F. Graham

Industrial hemp [1], once grown throughout the United States, is poised for a resurgence as an agricultural commodity due to recent changes in the 2018 Farm Bill [2] that exempt industrial hemp from regulation under the Controlled Substances Act. Now, state legislatures are racing to bring their own hemp programs in line with federal law in order to ensure that local farmers are not left behind in the rush for industrial hemp and hemp-derived products. This alert addresses recent changes in federal law and examines legislation recently passed in South Carolina.

I. 2018 FARM BILL LEGALIZES INDUSTRIAL HEMP

Since 1970, industrial hemp had been regulated as a Schedule I controlled substance under the Controlled Substances Act, and thus, it has been illegal to cultivate under federal law, except under narrow circumstances. [3] That long history came to an abrupt end with passage of the 2018 Farm Bill, which removed industrial hemp (and products derived therefrom) from the list of Schedule I controlled substances, thereby permitting its cultivation and processing under federal law and eliminating the U.S. Drug Enforcement Agency's enforcement jurisdiction with respect to the crop. [4] Due to the status under federal law of industrial hemp prior to passage of the 2018 Farm Bill, many federally regulated financial institutions (such as banks) refused to lend or otherwise invest in industrial hemp, thus severely limiting its potential for growth as a cash crop. Passage of the Farm Bill has had a dramatic and immediate effect on investment in the industry and is expected to continue to fuel growth of the industry across the country.

With the dramatic shift in investment, federal regulators are expected to issue new rules regarding the processing and cultivation of industrial hemp by the fall of 2019 in order to accommodate the 2020 planting season. Until then, the U.S. Department of Agriculture has stated that the provisions of the 2014 Farm Bill remain in effect for 2019; [5] therefore, cultivating and processing hemp is only legal in states that previously implemented pilot programs (including South Carolina). Notably, although the 2018 Farm Bill prevents states from interfering with interstate shipment of hemp and its derivative products, there is still uncertainty regarding the legality of transporting hemp and hemp seeds across or into states where cultivation of industrial hemp is still illegal. [6]

While hemp can be used for a wide variety of products, ranging from fibers for clothing to fuel for biogas, currently the most lucrative opportunity for hemp growers and processors is the production of cannabidiol, or "CBD" oil. When extracted from the flowers and buds of hemp plants, CBD is a non-psychoactive compound that is considered by some to have health benefits, including the ability to treat health issues ranging from anxiety and insomnia to chronic pain and epilepsy. As a result of these alleged benefits, the presence of CBD has exploded in

the consumer marketplace, and it now appears in various products such as lotions, dietary supplements, pet food, craft beer, and food. Following passage of the 2018 Farm Bill, the Food and Drug Administration (“FDA”) has taken the position that, although industrial hemp-derived products may no longer be considered Schedule I controlled substances, if those products containing CBD promote therapeutic benefits, they must first undergo FDA review and approval. [7] FDA asserts that it will take enforcement action against those companies it believes are making “unsubstantiated therapeutic claims” and has already issued warnings to several companies selling products that make such claims. [8] Finally, FDA maintains that it also continues to be illegal — unless or until FDA issues such regulations — to sell foods, drinks, and dietary supplements containing CBD.

II. UPDATES FROM SOUTH CAROLINA

The 2014 Farm Bill allowed universities and state departments of agriculture to administer programs to cultivate industrial hemp for limited purposes. [9] More than 40 states passed laws regarding industrial hemp research and cultivation. [10]

These programs were expanded by the 2018 Farm Bill, which delegated to states and Indian tribes the broad authority to regulate and/or limit the production and sale of hemp and hemp products within their borders, but not limit the transportation of hemp or hemp products through their jurisdictions. As a result, a patchwork quilt of both expansion and prohibition is emerging. Previously, we examined the emerging framework in Washington State. [11]

South Carolina has responded to the increasing legalization of industrial hemp by enacting its own pilot program and updating its law enforcement approach to industrial hemp plant material. Following the 2014 Farm Bill, the state declared the cultivation of industrial hemp lawful and excluded industrial hemp from the definition of marijuana in its list of narcotics and controlled substances. [12] Beginning in 2018, the state implemented the South Carolina Industrial Hemp Pilot Program, allowing up to 20 farmers to grow up to 20 acres of industrial hemp. [13] South Carolina expanded the pilot program in 2019, allowing up to 40 farmers to grow up to 40 acres of industrial hemp. [14]

On March 28, 2019, South Carolina Governor Henry D. McMaster signed the Hemp Farming Act into law. [15] Under the new law, anyone who previously applied for a grower permit under the 2019 pilot program will now be eligible to grow hemp in South Carolina, provided they successfully pass a background check and accurately provide their contact information, GPS coordinates of where the crop is grown, and a signed letter of intent with a purchaser. [16] The Hemp Farming Act also removes the cap on cultivated acreage and allows approved growers to grow hemp on an unlimited number of acres. [17] The new law further reduces obstacles to growing hemp by removing the pilot program's requirement that growers obtain a letter of intent from an approved college or university. [18]

The South Carolina hemp industry has responded favorably to the expansion, with one company announcing the opening of a new 15,000 sq. ft. hemp processing facility in Beaufort County, South Carolina. [19]

State regulators and law enforcement are adjusting to the changes implemented by the Hemp Farming Act. In response to the prevalence of CBD-infused food items like honey being sold in the state, the South Carolina Department of Agriculture released a statement in February 2019 reminding South Carolinians that the FDA prohibits the introduction into interstate commerce of any food or feeds to which CBD has been added. [20]

Additionally, in response to the now-legal presence of industrial hemp in South Carolina, state law enforcement has announced it plans to discontinue the testing of plant material by police officers, who previously could detect the presence — but not the amount — of THC. [21] Going forward, plant material will be submitted for testing to the South Carolina Law Enforcement Division Drug Analysis laboratory for analysis by trained scientists instead of law enforcement officers. [22] This change in policy is expected to result in confusion at the local level, and may result in improper enforcement and other legal complications.

III. CONCLUSION

The federal legalization of industrial hemp is the first step toward a loosening of regulations governing industrial hemp and its byproducts. However, the industry remains subject to myriad federal and state laws and regulations posing a potential minefield to unsuspecting hemp farmers, distributors, and purchasers. Industry participants should be sure to obtain a strong understanding of the opportunities and limitations before engaging in hemp cultivation. Our regional offices will continue to monitor and publish alerts as states align themselves with the federal legislation and as the federal regulations and policies take shape.

NOTES:

[1] Industrial hemp is classified as having 0.3% or less by dry weight tetrahydrocannabinol (“THC”) content. Hemp seed can be used in foods and cosmetics, and the fibers and stalks are used for clothing, construction materials, paper, biofuel, plastic composites, and more.

[2] Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (Dec. 20, 2018).

[3] See U.S. Statutes at Large, Pub. L. No. 91-513, 84 Stat. 1249 (Oct. 27, 1970). Although generally not permitted, the 2014 Farm Bill allowed some small scale cultivation of industrial hemp under the requirements of state pilot programs. See Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (Feb. 7, 2014).

[4] 21 U.S.C. § 812.

[5] Press Release, U.S. Dep’t of Agric., USDA Update on Farm Bill Implementation Progress (Apr. 12, 2019), <https://www.usda.gov/media/press-releases/2019/04/12/usda-update-farm-bill-implementation-progress>.

[6] There are still six states in which cultivating industrial hemp is not legal: Idaho, Louisiana, Mississippi, Ohio, Texas, and South Dakota. Several of these states are considering legislation to legalize the cultivation of industrial hemp. In early 2019, a truckload of legally grown hemp from Oregon was seized in Idaho, and the driver was charged with felony drug trafficking because hemp is still classified as marijuana under Idaho state law. The district court judge denied a request by the owner of the hemp to return the product. See *Big Sky Sci. LLC v. Idaho State Police*, No. 1:19-cv-00040-REB (D. Idaho 2019). That decision was appealed to the Ninth Circuit, which ordered release of the results of testing that showed that the cargo tested under the 0.3% THC limit. Order, Dkt. No. 38, *Big Sky Sci. LLC v. Jan Bennetts*, No. 19-35138 (9th Cir. Apr. 25, 2019). The appeal is still pending. The U.S. Department of Agriculture released a memorandum stating that states cannot block any interstate shipment of hemp lawfully produced under the 2014 Farm Bill, specifically referencing the *Big Sky Scientific LLC* case; however, the memorandum is not legally binding. See General Counsel, U.S. Dep’t of Agric., Memorandum re Legal Opinion on Certain Provisions of the Agriculture Improvement Act of 2018 Relating to Hemp (May 28, 2019), <https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf>.

- [7] Press Release ,U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on new steps to advance agency's continued evaluation of potential regulatory pathways for cannabis-containing and cannabis-derived products (April 2, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-advance-agencys-continued-evaluation>.
- [8] *Id.*
- [9] Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649 (Feb. 7, 2014).
- [10] National Conference of State Legislatures, *State Industrial Hemp Statutes*, <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> (updated Feb. 1, 2019).
- [11] <http://www.klgates.com/states-race-to-align-on-industrial-hemp-05-06-2019/>.
- [12] 2014 S.C. Acts 216.
- [13] Press Release, S.C. Dep't of Agric., SCDA Receives More than 160 Industrial Hemp Applications (July 6, 2018), <https://agriculture.sc.gov/wp-content/uploads/2018/07/HempAppTotal2019.pdf>.
- [14] *Id.*
- [15] 2019 S.C. Acts 14.
- [16] *Id.*; see also Clemson Cooperative Extension, *South Carolina Industrial Hemp Program*, <https://www.clemson.edu/extension/industrial-hemp.html> (last accessed June 5, 2019).
- [17] *Id.*
- [18] *Id.*
- [19] Katie Filling, *New hemp processing facility opening in Beaufort County to produce CBD oil*, FOX 28 MEDIA (May 15, 2019), <https://fox28media.com/news/local/new-hemp-processing-facility-opening-in-beaufort-county-produces-cbd-oil>.
- [20] Press Release, S.C. Dep't of Agric., SCDA Regulators to Notify Industry Regarding CBD and Hemp in Food and Feed Products in The Market Place (Feb. 20, 2019), <https://agriculture.sc.gov/wp-content/uploads/2019/02/CBD-Hemp-News-Release-2019.pdf>.
- [21] Press Release, S.C. L. Enf't Div., Termination of Marijuana Analyst Certification/Testing Program (Dec. 14, 2018), <http://www.sled.sc.gov/documents/Forensics/2018-04%20Termination%20of%20Marijuana%20Analyst%20Certification%20Program.pdf>.
- [22] *Id.*

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.