Hope for Hemp: Overcoming Regulatory Obstacles to Revive An American Industry

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Hemp cultivation was once a proud American tradition. George Washington and Thomas Jefferson grew hemp, and thousands of farmers participated in Uncle Sam’s “Hemp for Victory” campaign during World War II.

In the post-war period, hemp became confused with marijuana, and this led to a complete prohibition of domestic hemp cultivation. Over a half century later, marijuana legalization is now, ironically, creating new opportunities for its cannabis cousin. But the growth of the legal marijuana industry has also created some unexpected challenges for hemp.

This article outlines the relationship between federal and state laws regarding hemp production and hemp-derived products. It highlights legal issues and business opportunities surrounding the use of hemp-derived ingredients such as cannabidiol (CBD) in health and wellness products. It also summarizes emerging challenges in the implementation of state hemp programs.

The Federal Landscape

The various fiefdoms within the federal government have created great uncertainty regarding the legal status of hemp and hemp products. This section highlights key hemp decisions by the Drug Enforcement Administration (DEA), Congress, the Food and Drug Administration (FDA), and the U.S. Department of Justice (DOJ).

1. DEA interpretation of federal criminal law

The DEA has long interpreted the definition of “marihuana” in the Controlled Substances Act (CSA) to encompass hemp. Based on this interpretation, DEA has taken the position that no hemp may be grown within the United States without a license from the DEA, and DEA has generally refused to issue these licenses. Federal courts have upheld DEA’s position on domestic hemp farming.¹

In 2003, DEA issued rules interpreting the CSA to also ban all hemp products containing even trace amounts of tetrahydrocannabinol (THC), the main psychoactive ingredient in cannabis. The Ninth Circuit Court of Appeals, however, invalidated these rules based on the CSA’s exclusion

¹ See Monson v. DEA, 589 F.3d 952 (8th Cir. 2009); N.H. Hemp Council v. Marshall, 203 F.3d 1 (1st Cir. 1999)
of “stalk,” “fiber” and “oil or cake made from the seeds” of the cannabis plant from the
definition of marijuana. See Hemp Industries Ass’n v. DEA, 357 F.3d 1012 (2004).

As a result of the Hemp Industries Association decision, some food products with hemp
ingredients may be sold in the U.S. However, because of DEA’s position on hemp farming,
hemp food producers have been forced to rely on imported hemp seeds and hemp seed oil.

2. The Farm Bill and other recent congressional action

In the 2014 Farm Bill, Congress permitted some state universities and agricultural agencies,
including those in Oregon and Washington, to license hemp production for research purposes.\(^2\)
In a separate appropriations bill, Congress also prohibited the DEA and the Department of
Justice (DOJ) from interfering with these state pilot programs.\(^3\)

Although these actions may create regulatory momentum for hemp at the federal level, they
provide only a limited federal authorization of hemp production. And the scope of this
authorization is unclear given the research purpose of the Farm Bill program.

[Update: In the 2016 Consolidated Appropriations Act, Congress temporarily expanded
protections for hemp by prohibiting the use of federal funds to impede interstate sales of hemp
produced under the Farm Bill program.\(^4\) Despite this congressional decision, the DEA continues
to assert that interstate transportation of Farm Bill hemp violates federal law.\(^5\)]

3. FDA actions

Under the FDA’s complex regulatory scheme, many hemp products fall somewhere between
food and drugs as either “food additives” or “dietary supplements.” Food additives generally
require pre-market FDA approval unless they qualify under the “Generally Recognized As Safe”
(GRAS) exemption. In 2000, FDA refused to deem hemp seed oil GRAS.\(^6\) Some contend that
the Hemp Industries Association case invalidates this FDA decision, but this is unclear given that
the Hemp Industries Association case concerned the CSA rather than FDA’s authority under the

Although dietary supplements do not require pre-market approval, they are subject to FDA safety
and labeling standards. In 2015, FDA sent a series of letters to companies selling hemp-derived
CBD products, warning them about marketing these products for their health benefits. FDA then
issued guidance stating that CBD is not a “dietary supplement” under federal law.\(^7\)

These FDA decisions therefore add another layer of uncertainty to the legal status of hemp
products for human and animal consumption.

\(^3\) See H.R. 83, 113th Cong. (2014) (enacted).
\(^4\) [See H.R. 2029, 114th Cong. (2015) (enacted)]
\(^5\) [See 81 Fed Reg 53395 (Aug 12, 2016)]
\(^6\) See Agency Response Letter GRAS Notice No. GRN 000035 (August 24, 2000).
\(^7\) See FDA and Marijuana: Questions and Answers 12-13, available at
http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm#dietsuppsexclude.
4. The DOJ’s Cole Memo

The final landmark on the federal landscape is DOJ’s well publicized 2013 “Cole Memo” regarding enforcement of the CSA in states that have legalized cannabis. Because the Cole Memo generally allows the development of well-regulated intrastate marijuana markets in the states that have legalized marijuana, the Cole Memo is generally understood to also allow hemp production and the sale of hemp products in these states. The policies embodied in the Cole Memo therefore appear to diminish the power of the DEA and the FDA to impede the development of the hemp industry.

That said, one of the key points in the Cole Memo is a prohibition on interstate commerce in cannabis. Assuming this applies to domestically-produced hemp, it likely restricts multistate production and distribution of domestic hemp products.

[Update: Given the results of the 2016 Presidential election, it is unclear whether DOJ will continue to adhere to the policies articulated in the Cole Memo.]

The State of State Law

Over twenty states have enacted laws allowing some form of hemp production and the manufacture of hemp-derived products. Some states like Kentucky generally adhere to the research limitations in the Farm Bill pilot program, although even Kentucky allows some commercial marketing of hemp products.

Virginia and Wyoming have recently enacted legislation allowing the use of hemp-derived CBD to treat epilepsy. Because both of these states have strict cannabis production laws, however, it will be difficult to develop a legal supply of CBD in these states.

Other states that have more broadly legalized cannabis are apparently disregarding the Farm Bill’s limitations on hemp production. Both Oregon and Colorado have interpreted the Cole Memo to encompass hemp, and have developed licensing schemes for commercial hemp production.

The remainder of this section addresses current issues for hemp industry participants in the implementation of these state programs

1. Developing local supplies of viable seed and plant stock.

The long prohibition on domestic cannabis production and DEA policy on the importation of viable hemp seed has made it difficult to farmers to obtain the plant material necessary to begin hemp production. To overcome this obstacle, Kentucky formed a state seed bank to supply hemp

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10 In Washington, despite marijuana legalization and federal authorization to participate in the Farm Bill program, state law does not allow for hemp production. Two legislative proposals to change this failed in 2015. [Update: Washington joined the Farm Bill program in 2016 through legislative action.]
seeds to farmers. DEA initially responded by seizing seeds that the state imported from Italy, but DEA eventually released the seeds and allowed them to be planted. The congressional ban on DEA interference with Farm Bill pilot programs was in part a response to this incident.\textsuperscript{11}

Oregon and Colorado, by contrast, have taken a “don’t ask, don’t tell” approach to sourcing hemp seed and plant stock. Although this has allowed for greater initial diversity in hemp varieties and farming methods, some hemp crops in these states have registered THC levels too high to be marketed as hemp under state law. Consistent with the CSA and the Farm Bill, both Oregon and Colorado\textsuperscript{12} limit THC in hemp to under .3% by dry weight, although at least one state (West Virginia) allows up to 1% THC.\textsuperscript{13}

Successful hemp production under these state programs should improve availability of seed and plant stock over time, but additional regulatory changes may be needed to ensure reasonable access to hemp source material.

2. Cross pollination of hemp and marijuana

In Oregon, hemp production has been stymied by concerns over potential damage to legal marijuana crops from cross pollination by hemp plantings. In 2015, the Oregon Department of Agriculture (ODA) issued 13 licenses for commercial hemp production. In response, some cannabis interests and their allies in the state legislature advocated for rescission of these licenses and a moratorium on new hemp licenses until ODA developed appropriate geographic buffers between hemp and marijuana farms. House Bill 2668 became the vehicle for these proposals.

In the waning days of the 2015 legislative session, however, the Oregon Senate rejected HB 2668, leaving ODA discretion as to handle hemp licensing. Shortly thereafter, in August 2015, ODA declared a moratorium on new hemp licenses. Further legislation and/or ODA rulemaking is therefore needed to resolve the cross pollination issue in a way that allows coexistence of legal marijuana and hemp farms in Oregon.

[Update: ODA adopted a temporary moratorium on new hemp licenses following the legislative session in 2015, but resumed issuing new licenses in 2016 following passage of bill House Bill 4060. Cross-pollination concerns remain, however.]

Conclusion

Given the history of American hemp farming, hemp’s many traditional uses, and the emergence of new hemp products like CBD, the domestic hemp industry has great potential. Although American hemp still faces many regulatory obstacles, businesses are beginning to successfully navigate these obstacles. Additional practical experience, regulatory clarity, and cooperation

\textsuperscript{11} See Hemp As An Agricultural Commodity, Congressional Research Service (Feb 22, 2015) at 18-19.
\textsuperscript{12} Or. Admin. R.603-048-0010(8)(a); Colorado Constitution Amendment 64, Sec. 16(d)
between hemp and marijuana farmers are all critical to the resurgence of the American hemp industry.

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