

CBD Use in Consumer Products Under the Farm Bill and NJ Law

By Nicole A. Maguire

Industrial hemp has a long and rich history throughout the world. This is largely because hemp is dynamic and can evolve into products such as clothing, animal feed, building materials, bio plastics, biofuels, paper, fiber and food. Hemp seeds, or grains, are smooth and about one-eighth to one-fourth of an inch long. Hemp seeds can also be used to make a variety of products for industrial and cosmetic use. Of particular interest in New Jersey are the agricultural benefits associated with the hemp plant. Hemp has been known to kill weeds, thereby negating the need for herbicides on crops. Hemp also can absorb metals in the soil thereby acting as a natural filter, mitigating sediment runoff, through which eroded soils carry nutrient pollution into water resources.

Given its multipurpose capabilities, it is no surprise that Congress passed the Agriculture Improvement Act of 2018 (“Farm Bill”). Section 297A of the 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.” The Farm Bill effectively decriminalizes hemp by removing it from the Controlled Substances Act. The Farm Bill also expands the commercial cultivation of hemp beyond the limited state-



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approved pilot programs, legalizes hemp production in US territories and on Indian tribal land, and authorizes the coverage of hemp as a commodity under crop insurance.

Because hemp is no longer viewed as a controlled substance, the Drug Enforcement Agency has been removed from oversight and replaced with United States Department of Agriculture (USDA). As such, the USDA exercises primary regulatory authority over hemp production. According to the New Jersey Department of Agriculture (NJDOA), the USDA intends to issue regulations in the fall of 2019 for states that wish to submit hemp production plans. These regulations will address requirements for testing the THC levels of hemp and address disposal of hemp plants and products produced that contain more than .3% THC.

The Farm Bill also allows transfer of hemp derived products across state lines for commercial or other purposes. It does not place any restrictions on the sale, transport or possession of hemp-derived products, so long as those items are produced in a manner consistent with the law. In passing the Farm Bill, Congress legalized hemp production for all purposes within the parameters of the statute, but granted States and Indian Tribes the authority to enact and enforce more stringent laws regulating the production of hemp. Because the Farm Bill provides states with the authority of enforcing hemp production, it is important we consider New Jersey law as it relates to the Farm Bill.

In November of 2018 Governor Phil Murphy signed a bill to begin a pilot program for New Jersey farmers to produce industrial hemp. The pilot

program calls for rules to ensure that growers are not subject to criminal penalties and meet federal guidelines and legal growing limits, and allows for collaboration with higher education institutions. The NJDOA is required to adopt rules and regulations to administer the pilot program. These include creating requirements for the licensing or contracting of growers participating in the program, prescribing hemp testing procedures to ensure compliance with federal law, creating a fee structure for the administration of the program, and certifying germinating seeds and hemp cultivars if necessary.

The NJDOA is currently in the process of developing regulations for New Jersey's Industrial Hemp Pilot Program. As of May 2019, New Jersey lawmakers *proposed* the New Jersey Hemp Farming Act (NJHFA), [A5322] which would repeal New Jersey's Industrial Hemp Pilot Program and replace it with a more permanent program, administered by the Department of Agriculture. The legislation would make it lawful for hemp producers to cultivate, handle or process hemp in the state, and for any person to possess, transport, sell and purchase legally produced hemp products. Under the proposed legislation, any person or entity that is *not* a hemp producer or an agent of a hemp producer, but who cultivates, handles or processes living hemp plants or viable seeds, leaf materials or floral materials derived from hemp, shall be subject to the same penalties as those related to marijuana.

Under proposed Assembly Bill 5322, the term "hemp" includes hemp-derived cannabinoids, including cannabidiol, shall be considered an agricultural commodity and not a controlled substance. Derivatives of hemp, including hemp-derived cannabidiol, may be added to cosmetics, personal

care products, and products intended for human or animal consumption to the maximum extent permitted by federal law. All of these products, so long as they are legally sourced, shall not be considered controlled substances and may be legally transported across state lines and exported to foreign countries in a manner that is consistent with federal law and the laws of respective foreign countries.

However, when it comes to edible items containing CBD the Farm Bill expressly preserved the Food and Drug Administration's (FDA) authority to regulate products containing cannabis or cannabis-derived compounds under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and the Public Health Service Act. As such, if a hemp product is intended for use as a drug, food (including dietary supplement), device or cosmetic by humans or animals and is introduced into interstate commerce, the product is subject to FDA regulation regardless of its source. This is because the FDA is responsible for ensuring public health and safety through regulation of food, drugs, supplements and cosmetics, among other consumable products, through its enforcement authority pursuant to the FD&C Act.

Under the FD&C Act the FDA has concluded that it is a prohibited act to introduce or deliver for introduction into interstate commerce any food (including any animal food or feed) to which THC or CBD has been added. The FDA has made clear that products containing hulled hemp seed, hemp seed protein, and hemp seed oil can be legally marketed in human or pet foods without food additive approval—provided they comply with all other regulations and do not make any disease treatment claims.

Federal law aside, many state health agencies have adopted policies and

regulations prohibiting CBD and other non-FDA-approved cannabinoids in food products. For example, Colorado and Alaska permit industrial hemp in food, while states like New York and Maine have expressly prohibited the same. In New Jersey, the Department of Health has *not yet* adopted any policies and/or regulations prohibiting the incorporation of hemp derived CBD and other non-FDA-approved cannabinoids in food products. Therefore, it appears that New Jersey will not take action with respect to incorporating hemp derived CBD in food, at least until the Department of Health issues regulations stating otherwise, or the FDA instructs the state to act otherwise. It is important to note that the commodity must contain lawfully sourced hemp products.

In sum, products such as lotions, cosmetics and clothing containing CBD derived from lawfully sourced hemp can be transported across state lines and exported to foreign countries in a manner that is consistent with federal law and the laws of respective foreign countries. Some retailers and manufacturers are waiting for the DOA and FDA to provide more guidance before they go forward with marketing CBD products, while others are moving full steam ahead with commercializing hemp derived CBD products absent clear guidelines. The lack of guidance at a federal level represents a situation whereby businesses in the cannabis industry should proceed with caution. While enforcement by the FDA has been sporadic, it does not mean that it is unlikely.

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