

## USDA Issues Legal Opinion on Hemp



On May 28, 2019, the U.S. Department of Agriculture (USDA) released a legal opinion resolving significant ambiguities about the legality of hemp following the passage of the Agricultural Improvement Act of 2018 (more commonly known as the 2018 Farm Bill). The 2018 Farm Bill removed hemp from Schedule I of the Controlled Substances Act (specifically, the bill removed industrial hemp, meaning cannabis plants and derivatives that contain no more than 0.3 percent tetrahydrocannabinol, or THC, on a dry weight basis). However, it left open many questions regarding hemp production and transport. The memorandum from USDA's Office of General Counsel (OGC) summarizes USDA's opinions on several important issues, as highlighted below.

### Hemp Removed from Schedule I of the Controlled Substance Act

As of the enactment of the 2018 Farm Bill on December 20, 2018, hemp has been removed from Schedule I of the Controlled Substances Act and is no longer a controlled substance. Following the 2018 Farm Bill's passage, some have argued that the Controlled Substances Act's implementing regulations must be amended before the decontrolling could take effect. USDA clarified that the Farm Bill is self-executing. Although USDA's regulations will eventually be conformed to the Farm Bill, regulatory action is not necessary to make the Farm Bill's removal of hemp from Schedule I of the Controlled Substances Act effective.

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## States and Indian Tribes May Not Prohibit Interstate Transportation or Shipment of Hemp

After USDA publishes regulations implementing the new hemp production provisions of the 2018 Farm Bill, States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under a State or Tribal plan or under a license issued under the USDA plan. Section 10113 of the 2018 Farm Bill amends the Agricultural Marketing Act of 1946 (AMA) by adding a new subtitle G (7 U.S.C. §§ 1639o-1639s), which allows States or Indian tribes to submit a plan for approval to USDA to have primary regulatory authority over the production of hemp. For States or Indian tribes that do not have approved plans, the 2018 Farm Bill directed USDA to establish Federal requirements.

USDA's opinion clarifies that although States or Indian tribes may have primary regulatory authority over production of hemp, Section 10114 of the 2018 Farm Bill, which addresses transportation of hemp, preempts State law to the extent such State law prohibits the interstate transportation or shipment of hemp that has been produced in accordance with AMA subtitle G.

## 2014 Farm Bill Provisions Still Apply

States and Indian tribes also may not prohibit the interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill. The 2018 Farm Bill does not immediately repeal the hemp pilot program authorized under the 2014 Farm Bill, and the publication of regulations implementing the hemp production provisions of the 2018 Farm Bill will likely not occur until later in 2019. This has raised questions as to whether States and Indian Tribes can block interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill. Only hemp produced in accordance with AMA subtitle G is covered by the preemption provision in Section 10114 discussed above.

USDA is relying on AMA Section 297B(f), which provides that "Nothing in this section prohibits the production of hemp . . . if the production of hemp is in accordance with . . . other Federal laws."

USDA emphasized that this "other Federal laws" language includes hemp produced under the 2014 Farm Bill, which has not yet been repealed. According to USDA, under Section 10114 (discussed above), a State or Indian tribe may not prohibit the transportation or shipment of hemp produced under the 2014 Farm Bill.

USDA's interpretation is consistent with a recent decision issued in the Southern District of West Virginia, *United States v. Mallory*, Case No. 18-CV-1289 (S.D. W. Va. Mar. 6, 2019), which permitted the transport of hemp grown under a 2014 Farm Bill pilot program across state lines.

At the same time, USDA's opinion is in tension with a recent decision in the District of Idaho, *Big Sky Scientific LLC v. Idaho State Police*, Case No. 19-CV-00040 (D. Idaho Feb. 2, 2019). In that case, a Magistrate Judge found that a shipment of Oregon hemp bound for Colorado and interdicted by Idaho State Police could not have been produced "in accordance with subtitle G" (in which AMA Section 297B(f) is located). The Court found that because the regulations implementing the 2018 Farm Bill do not yet exist, the hemp was not produced under subtitle G of the 2018 Farm Bill, and the interstate hemp shipment was, therefore, subject to Idaho law prohibiting its transportation. USDA, while noting it is not

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comments on this issue  
until July 2, 2019.**

involved in this case, stated that the Court erred by not reading the statute as a whole and by failing to consider the “other federal laws” clause discussed above, which USDA found conclusive on this issue.

## Ineligibility Restrictions

A person with a State or Federal felony conviction relating to a controlled substance is subject to a 10-year ineligibility restriction on producing hemp under the AMA. USDA found the only exception to this restriction applies to a person who was lawfully growing hemp under the 2014 Farm Bill before December 20, 2018, and whose conviction also occurred before that date.

## Key Takeaways

Importantly, the 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the production (but not interstate transportation or shipment) of hemp that are more stringent than Federal law. Thus, States may continue to prohibit the growth and cultivation of hemp.

Second, the 2018 Farm Bill did not affect the authority of the Secretary of Health and Human Services or Commissioner of Food and Drugs under applicable U.S. Food and Drug Administration (FDA) laws. The FDA held a hearing on May 31, 2019, about the safety, manufacturing, product quality, marketing, labeling, and sale of products containing cannabis or cannabis-derived compounds, including cannabidiol (CBD). The FDA is accepting comments on this issue until July 2, 2019.

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