



BANKING ON HEMP



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In 2014, Congress enacted an omnibus farm bill which permitted certain research institutions and state departments of agriculture to grow hemp as part of an agricultural pilot program, including through the licensing of private growers. Our General Assembly enacted legislation in 2015 creating the Industrial Hemp Commission and authorizing it to develop the rules and licensing structure necessary to regulate a pilot program, and to enable private crop production (Article 50E of the General Statutes). Both of these laws were quite restrictive, and those restrictions along with the interplay of federal drug, secrecy and money laundering, among other laws, made bank financing of hemp production and processing impractical and a high-risk endeavor. Recent legislation has since altered the landscape.

The 2018 Farm Bill was signed into law by President Trump on December 20, 2018. One of the provisions amends the federal Controlled Substances Act to exclude “hemp” from the definition of “marijuana,” to provide that the tetrahydrocannabinols (THC) in hemp (if the delta-9 THC concentration is 0.3 percent or less on a dry weight basis) are no longer a controlled substance, and to enable federal crop insurance of a legally grown crop. For those of us unlearned in botany, marijuana and hemp are the same plant, separated only by the concentration of THC in each particular strain grown.

The Farm Bill establishes multiple conditions and limitations to the legal commercial production and processing of hemp, i.e. the 2014 federal agricultural pilot program no longer controls. If a state does not have a regulatory regime covering commercial production or processing, a hopeful hemp business must obtain a license from the U.S. Department of Agriculture. That state may take the role of the primary regulator of hemp production and processing in its jurisdiction by adopting a “plan” (i.e. enabling statutes and regulations), along with submitting it to the federal Agriculture Department for approval. The plan must include a licensing requirement, a mechanism for identifying all real property being used for hemp growth, a procedure to test hemp crops for delta-9 THC concentration, a process for

disposing of crops and products that exceed the concentration standard, a system for annual inspections of random crop samples, and an enforcement regime (civil and criminal) for violations with a culpable mental state greater than negligence. The Agriculture Department has not yet adopted relevant regulations under the Farm Bill, and North Carolina has not yet made necessary changes, if any, to Article 50E, nor has it submitted a plan to the Agriculture Department. The Industrial Hemp Commission has indicated it will file an application in May or June of this year.

Why does all this matter to North Carolina banks? The production and processing of hemp is a rapidly growing industry across the nation. North Carolina farmland once used for tobacco and the climate of many areas of our state are conducive to growing hemp. Our farmers need replacement cash crops. And, of course, hydroponic and other greenhouse growth methods can be utilized throughout the state. Even with the limited authorization and exacting nature of Chapter 50E, there were 399 licensed growers utilizing 6,148 acres and 1,664,000 square feet of greenhouse production in North Carolina as of November 2018. Quite simply, industrial hemp is likely to provide significant opportunities for economic activity, expanded employment and profit generation in North Carolina. Bankers bank opportunities.

Before the 2018 Farm Bill became law, a financial institution seeking to bank hemp producers licensed by the Industrial Hemp Commission (loans, deposit accounts, etc.) was led into a morass of uncertainty. Crops could be produced and sold under North Carolina law only for an identified research purpose or to an intended purchaser for an intended legal purpose identified to the Industrial Hemp Commission. Hemp was, however, a “controlled” substance under federal law, with all the related BSA and AML complexities. Although FinCEN issued guidance in 2014 about marijuana-related businesses, it set extremely high standards and did not address related parties, such as suppliers, employees and landlords. Whether, and when, to file a “suspicious activity report” was difficult to ascertain. The U.S. Department of Justice provided guidance on controlled substance criminal exposure intended to give a degree of comfort under the 2014 federal law, and then rescinded that guidance. The conflicts between federal and state laws were unsettled and unsettling for banks. Moreover, because hemp was deemed to be marijuana, federal crop insurance was not available.

Are we now at the point where banking North Carolina producers and processors of industrial hemp makes sense? For cautious bankers, not quite yet. The Farm Bill creates a regulatory structure to ensure that a hemp business (production and/or processing) is operating within the exemption from the Controlled Substances Act. When the federal Agriculture Department has issued implementing regulations and our Industrial Hemp Commission has an approved “plan,” the controlling conditions and limitations and the necessary documentation to safely serve hemp producers and processors will have more clarity. Other areas, however, may remain uncertain. For example, although the hemp plant is now a legal crop, the Food and Drug Administration retains jurisdiction over the use of cannabidiol (which is present in marijuana and hemp) in food, drugs and cosmetics. CBDs are banned from most such uses. More guidance from the FDA is needed on the use of hemp-derived CBD.

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When the regulatory landscape becomes more clear, will North Carolina banks be able to bank hemp producers and processors with comfort? So long as the loan agreements, security agreements, account agreements and other customer documentation ensure the customer is operating within the confines of the exemption under the Controlled Substances Act, the Industrial Hemp Commission’s “plan” and other relevant laws, the lawfulness of the relationship should be in place. Current form agreements are not likely to meet this standard. Banks desiring to enter this market should expect some upfront expense to create hemp specific documentation. There is, also, a caveat which credit underwriters should consider. A hemp crop and the products into which that crop is processed must satisfy the 0.3% delta-9 THC concentration standard at all times. A farmer who grows a crop with too high a concentration of THC will have a field of marijuana that will need to be disposed of in accordance with federal and North Carolina law. The producer of a product derived from high THC hemp may well confront the same reality. In those events, the cure to bank compliance issues effected by the 2018 Farm Bill would no longer be applicable, and evaluations of whether and when to file suspicious activity reports could again become relevant. Moreover, with apologies in advance, collateral securing a loan could, well, simply disappear in smoke or be flushed.