
ABA Staff Analysis©: Hemp: What the 2018 Farm Bill Means for Banks January 2019

The 2018 Farm Bill, which was signed into law by President Trump on December 20th, included several provisions relating to “hemp.” One of the provisions amends the Controlled Substances Act (CSA) to exclude “hemp” from the definition of “marihuana,” thereby removing it from the CSA provided certain conditions are satisfied (see below). The bill also includes hemp in various research and pilot projects run by the Department of Agriculture, establishes regulatory and licensing requirements for hemp producers, and amends the Federal Crop Insurance Act to enable insurance coverage for hemp farmers. Here is a look at the key hemp provisions of the bill, and what they may mean for banks.

Text of the 2018 Farm Bill is available [here](#).

Defining Hemp and Amending the Controlled Substances Act **(Sec. 10111 & Sec. 12608)**

The bill defined “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 concentration of not more than 0.3 percent on a dry weight basis.”

Importantly, the bill also amended the definition of marihuana in the CSA to exclude hemp, and the list of controlled substances under Schedule I to reflect that “tetrahydrocannabinols” in hemp are no longer a controlled substance. For banks, that means that proceeds connected to a hemp-related business will no longer trigger anti-money laundering statutes.

It is important to note, however, that “hemp” and “marihuana” are the same plant, separated only by the concentration of tetrahydrocannabinol (THC) in the particular strain grown. A hemp farmer who inadvertently grows a crop with too high a concentration of THC will have a field full of marihuana that will need to be disposed of in accordance with state or federal law. Banks that choose to do business with hemp companies should be aware of the unique risks that accompany this crop, and should speak to their regulators regarding expectations for compliance.

The Department of Agriculture will issue regulations to identify which particular strains are no longer covered by the CSA (see below).

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Establishing Regulation & Enforcement Mechanisms **(Sec. 10111)**

The Farm Bill allows a state or Indian tribe to serve as the primary regulator over the production of hemp in its territory, if it so desires, by submitting a plan to monitor and regulate that production to the Secretary of Agriculture.

If a state does not have a plan approved by the Secretary of Agriculture, the Secretary will serve as the primary regulator for hemp in that territory. The Secretary will issue licenses to hemp producers in accordance with its own regulatory plan, the minimum requirements of which mirror those established for the states (described below). **It is unlawful to produce hemp in a state for which a state plan is not approved without a license issued by the Secretary of Agriculture.** Until state plans are approved and/or USDA licenses issued, hemp production may only occur under an agricultural pilot program authorized under the Agricultural Act of 2014 (7 U.S.C. 5940).

For states that wish to regulate their own hemp producers, their regulatory plan should be submitted to the Secretary of Agriculture through the state department of agriculture, in consultation with the Governor and chief law enforcement officer of the state. The plan must include:

- i. a practice to maintain relevant information regarding land on which hemp is produced in the State or territory of the Indian tribe, including a legal description of the land, for a period of not less than 3 calendar years;
- ii. a procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State or territory of the Indian tribe;
- iii. a procedure for the effective disposal of products that are produced in violation of this subtitle;
- iv. a procedure to comply with the enforcement procedures under subsection (d);
- v. a procedure for conducting annual inspections of a random sample of hemp producers—to verify that hemp is not produced in violation of this subtitle; and in a manner that ensures that a hemp producer is subject to not more than 1 inspection each year;
- vi. a certification that the State or Indian tribe has the resources and personnel to carry out the practices and procedures described in clauses (i) through (v).

The Secretary must approve the plan within 60 days, unless it fails to comply with the standards listed above. State laws may include any other practice or procedure for regulating the production of hemp as long as they are consistent with the federal standards.

The bill also mandates an enforcement regime for violations of hemp regulation that states must adopt. The prescribed regime classifies violations as “negligent” or “with a culpable mental state greater than negligence,” and explicitly protects negligent violations from any

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criminal or civil enforcement action by the federal or any state government. That's important – since without it, a hemp producer who inadvertently finds himself out of compliance with hemp regulations could otherwise be subject to the full spectrum of penalties reserved for CSA violations.

Forty-one states have hemp legislation on the books, and 19 states have active farming operations. There will likely be a flurry of activity at the state level in coming months to align existing state laws with the regulatory standards and enforcement procedures outlined in the Farm Bill. Once compliant state laws are in place, the state department of agriculture can apply to the Secretary of Agriculture for approval to serve as the industry's primary regulator.

From a bank's perspective, the regulatory structure that is outlined in the Farm Bill is designed to ensure that the hemp business is operating within the confines of the exemption from the CSA, and is therefore helpful from a compliance standpoint. Hemp producers must be operating under an approved state plan or under a license from the USDA in order to be considered a lawful business.

Therefore, in order to safely bank one of these hemp producers, a bank must ensure that the customer is operating within these confines and has the necessary licenses in place. Similar conditions apply to whether a bank can safely offer products and services to any company that produces any hemp derivatives.

FDA Regulation and CBD Products

Although the hemp plant is now a legal crop, there are still restrictions on how it can be processed and sold to the public. The Farm Bill retained the Food and Drug Administration's authority over how CBD and hemp-derived THC can be used in food, drugs and cosmetics. The FDA has banned the use of CBD in food and dietary supplements because CBD is an active ingredient in an FDA approved epilepsy drug, and selling ingestible products that contain a medical ingredient is illegal. It is unclear how the FDA plans to treat non-ingestible CBD products, but the agency has indicated that it plans to review its CBD policy.

Banks will want to consider whether CBD-related customers can demonstrate that their products are sourced from legal hemp producers, with THC concentrations of less than 0.3%, and that they are in compliance with FDA guidelines.

The statement from FDA Commissioner Scott Gottlieb on signing of the Agricultural Improvement Act and the agency's regulation of products containing cannabis and cannabis-derived compounds is available [here](#).

Questions? Contact ABA's [Sabrina Bergen](#) for more information.

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