



So the federal government legalized hemp: Now what?

By Christopher P. Parrington

On December 20, 2018, President Trump signed the Agriculture Improvement Act of 2018, also known as the “2018 Farm Bill.” One of the more significant aspects of the 2018 Farm Bill was the legalization of industrial hemp throughout the United States. Although industrial hemp had been partially legalized following enactment of the 2014 Farm Bill, the 2018 Farm Bill finally took the steps necessary to fully legalize industrial hemp at a federal level by removing it from the Controlled Substance Act (“CSA”). Although agricultural industries from coast-to-coast agree that the 2018 Farm Bill is a huge accomplishment by the federal government, there is a lot of confusion about what it really means now that industrial hemp is legal in the United States.

History of Hemp in the United States

For centuries, hemp has been a crop utilized greatly throughout the world. Archeologists have found traces of hemp in modern day China and Taiwan, which they believe demonstrates that hemp was used in food and pottery in those countries as far back as 8,000 BCE.¹ Hemp rope from 600 and 200 BCE has been discovered in Russia and Greece, and historians have recently discovered that in the 6th and 9th centuries, hemp was used by the French monarchy and Icelandic Vikings.² In the 16th century, King Henry VIII, King of England, fined English farmers if they did not include hemp as one of their crops.³

The history of hemp in the United States can be traced back to the 17th century, when early English settlements grew hemp to make rope, sails and clothing.⁴ In 1776, the Declaration of Independence was drafted on paper produced from hemp.⁵ Historians claim that President Abraham Lincoln even used hemp seed oil to fuel the lamps in his home.⁶ In 1916, the United States Department of Agriculture (“USDA”) produced a report that showed hemp can produce 4 times more paper than trees.⁷ In 1937, however, Congress passed the Marijuana Tax Act, which placed a tax on all cannabis sales, including hemp, and strongly discouraged the growing of hemp and manufacturing of hemp-based products.⁸ Although steps were taken by the federal government to increase hemp production after the Marijuana Tax Act, in 1970, Congress passed the CSA, which classified marijuana as an illegal, Schedule 1 drug, and included hemp in the definition of marijuana.⁹ The CSA resulted in several decades of prohibition on the cultivation of hemp and processing of hemp-based products in the United States. It is believed that today hemp could be used to manufacture more than 25,000

¹ <https://ministryofhemp.com/hemp/history/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 21 U.S.C.A. § 802(16).

different products spanning numerous markets including textiles, recycling, automotive, furniture, food and beverages, paper, construction materials and personal care.¹⁰

In 2007, two North Dakota farmers were issued the first hemp licenses in over fifty (50) years.¹¹ The issuance of these licenses ultimately led to President Obama signing the Agricultural Act of 2014 (the “2014 Farm Bill”), pursuant to which the federal government allowed state-sponsored universities and state departments to grow and cultivate industrial hemp under limited circumstances.¹² Specifically, the 2014 Farm Bill provided that notwithstanding the CSA, an “institution of higher education” or a “State department of agriculture” may grow or cultivate industrial hemp if (1) it is grown or cultivated for research conducted under an agricultural pilot program or other academic research; and (2) the growing and cultivation is allowed under the laws of the state in which the educational institution or state department of agriculture is located.¹³ The 2014 Farm Bill also provided a definition of an “agricultural pilot program” to include a program that studies the growing, cultivation or marketing of industrial hemp in a manner that (1) ensures that only higher-educational institutions and State agricultural departments are used to grow or cultivate industrial hemp; (2) requires the growing and cultivation sites to be certified by and registered with the State department of agriculture; and (3) authorizes the State agricultural departments to carry out the pilot program in accordance with the purposes of the 2014 Farm Bill.¹⁴ Finally, the 2014 Farm Bill defined industrial hemp as “the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration [“THC”] of not more than 0.3 percent¹⁵ on a dry weight basis.”¹⁶ The 2014 Farm Bill expired in September 2018.

The 2018 Farm Bill

On December 20, 2018, President Trump signed the 2018 Farm Bill. Although certain provisions of the 2018 Farm Bill were hotly debated, one aspect had overwhelming bi-partisan support – the provision that legalized industrial hemp under federal law. Unlike the 2014 Farm Bill, which partially legalized industrial hemp under very limited circumstances, the 2018 Farm Bill was a revolutionary piece of legislation that opens the doors for an entirely new hemp industry throughout the United States. Although most people know the 2018 Farm Bill as the legalization of industrial hemp, very few people are aware of the logistics for operating within the legal hemp industry under the 2018 Farm Bill. Despite the 2018 Farm Bill being signed by President Trump, there is still a lot of work to be done before the United States experiences life with a federally legal industrial hemp industry.

One of the most significant provisions in the 2018 Farm Bill is found in Section 6, which provides that Section 102(16) of the Controlled Substance Act¹⁷ is amended by stating that the term “marihuana” “does not include . . . hemp, as defined in Section 297A of the [2018 Farm Bill].”¹⁸ The 2018 Farm Bill goes on to define “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,

¹⁰ <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

¹¹ <https://ministryofhemp.com/hemp/history/>.

¹² 7 U.S.C.A. § 5940.

¹³ 7 U.S.C.A. § 5940(a).

¹⁴ 7 U.S.C.A. § 5940(b).

¹⁵ Today, every state statute defines industrial hemp as cannabis with a THC concentration of no more than 0.3 percent, with the exception of West Virginia, which defines hemp as cannabis with a THC concentration of less than 1.0 percent. See West Virg. Code § 19-12E-3(2).

¹⁶ 7 U.S.C.A. § 5940(b)(2) (footnote added).

¹⁷ 28 U.S.C.A. § 802(16).

¹⁸ Agricultural Improvement Act of 2018 § 6(a)(2)(B)(ii).

whether growing or not, with a delta-9 tetrahydrocannabinol concentration¹⁹ of not more than 0.3 percent on a dry weight basis.”²⁰ As a result, any part of the cannabis plant, or derivatives and extracts from the cannabis plant, which contain 0.3% THC or less, are no longer deemed marijuana and no longer a controlled substance (Schedule I, like marijuana, or otherwise) under the CSA. This amendment to the CSA is often looked at as the most significant provision in the 2018 Farm Bill.

Not only does the 2018 Farm Bill remove hemp from the CSA, but it also sets out certain parameters for any state or Native American tribe desiring to establish a regulatory system over the production of hemp.²¹ For example, the 2018 Farm Bill provides that any state or tribe “desiring to have primary regulatory authority over the production of hemp in the State or territory of the Indian tribe” must submit to the U.S. Secretary of Agriculture, a plan that describes how the state or tribe will monitor and regulate the production of hemp in compliance with the 2018 Farm Bill.²² At a minimum, those plans (the “State Hemp Plans”) are required to contain the following: (1) methods of maintaining “relevant information” regarding the land upon which hemp is produced; (2) procedures for testing for THC concentrations in the hemp produced; (3) procedures for disposing of hemp and hemp-based products that contain more than 0.3% THC; (4) procedures for complying with the enforcement requirements of the 2018 Farm Bill; and (5) procedures for conducting random annual inspections of hemp producers.²³ A State Hemp Plan may also include “any other practice or procedure established by a State or Indian tribe, as applicable, to the extent that the practice or procedure is consistent with [Section 297B of the 2018 Farm Bill],” thereby allowing each state or tribe to have the authority necessary to tailor its State Hemp Plan as it deems appropriate.²⁴ Any person who is convicted of a felony “relating to a controlled substance under State or Federal law” is ineligible to produce hemp or otherwise participate under a State Hemp Plan.²⁵ The Secretary of Agriculture is required to review and approve or disapprove each State Hemp Plan within sixty (60) days of receipt from the respective state or tribe.²⁶ Although each state or tribe desiring to regulate its hemp industry is required to have a plan that satisfies the aforementioned criteria, the 2018 Farm Bill makes clear that federal law does not preempt or limit “any law of a State or Indian tribe regulating the production of hemp, *to the extent that law is consistent with this subtitle.*”²⁷ Finally, the 2018 Farm Bill also allows the Secretary of Agriculture to “provide technical assistance” to states and tribes in the development of their State Hemp Plans, thus allowing for synergy between the states, tribes and the federal government, with regard to the regulation of hemp throughout the United States.²⁸

The 2018 Farm Bill also contemplates the situation in which hemp is produced in a state or on tribal lands in which a State Hemp Plan has not been approved by the Secretary of Agriculture.²⁹ According to Section 297C, in such a case, “the production of hemp in that State or the territory of that Indian tribe shall be subject to a plan [the “USDA Hemp Plan”] established by the Secretary [of Agriculture] to monitor and regulate that production.”³⁰ The requirements of the USDA Hemp Plan are identical with the requirements of a State Hemp Plan, including granting the Secretary of Agriculture the

¹⁹ Tetrahydrocannabinol concentration is more commonly referred to as “THC.”

²⁰ Agricultural Improvement Act of 2018 § 297A(1).

²¹ See generally *id.* § 297B.

²² *Id.* § 297B(a)(1).

²³ *Id.* § 297B(a)(2).

²⁴ *Id.* § 297B(a)(2)(B).

²⁵ *Id.* § 297B(b)(3)(B).

²⁶ *Id.* § 297B(b)(1).

²⁷ *Id.* § 297B(b)(3)(A) (emphasis added).

²⁸ *Id.* § 297B(c).

²⁹ See generally *id.* § 297C.

³⁰ *Id.* § 297C(1).

authority to impose additional practices and procedures as deemed necessary so long as they are consistent with Section 297C of the 2018 Farm Bill.³¹ Section 297C also requires that the Secretary of Agriculture establish a procedure for issuance of licenses to hemp producers in states that have not implemented an approved State Hemp Plan.³² The Secretary of Agriculture is also given authority to consult with the U.S. Attorney General on creation of the USDA Hemp Plan, and issue federal regulations and guidelines related to the production of hemp, including regulations and guidelines that apply to the establishment of State Hemp Plans and the USDA Hemp Plan.³³ It is anticipated that these regulations and guidelines will provide additional guidance to those desiring to operate in the cannabis industry under the 2018 Farm Bill.

The other key component of the 2018 Farm Bill pertains to enforcement of State Hemp Plans and the USDA Hemp Plan, and the establishment of parameters for enforcing violations. According to the 2018 Farm Bill, there are three (3) types of violations of concern by the federal government: negligent violations; culpable state of mind violations; and repeat violations.³⁴ A negligent violation may consist of one of the following: negligently³⁵ failing to provide a legal description of the land on which hemp is produced; negligently producing hemp without a state or tribal-issued license; or negligently producing hemp-based product that exceeds 0.3% THC. In the event of a negligent violation, the 2018 Farm Bill allows the violator to cure the violation through the implementation of a corrective action plan as approved by the respective state or tribal government.³⁶ Furthermore, a negligent violation of the 2018 Farm Bill or any applicable state or tribal laws shall not be subject to criminal or civil enforcement action by the federal, state, tribal or local government.³⁷ In the event a hemp producer negligently violates a State Hemp Plan or the USDA Hemp Plan three (3) times in a 5-year period, then that producer becomes ineligible to produce hemp for a period of 5 years from the date of the third violation.³⁸ The 2018 Farm Bill also provides that if a person violates a State Hemp Plan or the USDA Hemp Plan “with a culpable mental state greater than negligence,” then the state or tribal government must immediately report the violator to the U.S. Attorney General and the chief law enforcement officer for the state in which the violation occurred, in which case enforcement action may be taken against the violator.³⁹

In light of the language in the 2018 Farm Bill, although hemp is no longer illegal under federal law, production of hemp could be deemed illegal under federal law until the Secretary of Agriculture develops and implements the USDA Hemp Plan, and applicable regulations and guidelines related thereto, or until the Secretary of Agriculture approves of a State Hemp Plan submitted by the state in which hemp is to be produced. After a State Hemp Plan or the USDA Hemp Plan is approved, anyone desiring to produce hemp under the 2018 Farm Bill will be required to apply for and receive a license from either the state where the hemp production will occur, or the U.S. Department of Agriculture (“USDA”), where applicable. Therefore, hemp may be legal in the United States, but until the requirements of Sections 297B and 297C of the 2018 Farm Bill are implemented, the production of hemp could be deemed illegal under federal law and could subject those producers to liability given

³¹ *Id.* § 297C(a)(2)(F).

³² *Id.* § 297C(b).

³³ *Id.* § 297D.

³⁴ *Id.* § 297B(d).

³⁵ “Negligent” is not defined in the 2018 Farm Bill, but Merriam-Webster defines “negligent” as “failing to exercise the care expected of a reasonably prudent person in like circumstances.” See <https://www.merriam-webster.com/dictionary/negligent>.

³⁶ Agricultural Improvement Act of 2018 § 297B(d)(2)(B).

³⁷ *Id.* § 297B(d)(2)(C).

³⁸ *Id.* § 297B(d)(2)(D).

³⁹ *Id.* § 297B(d)(3).

that said production would likely be deemed more than a negligent violation under the 2018 Farm Bill.

State Regulation of Hemp

After the 2014 Farm Bill was enacted, several states enacted their own industrial hemp legislation. By the time the 2014 Farm Bill expired in September 2018, 41 states had passed some sort of legislation related to industrial hemp, such as defining hemp and removing barriers for cultivation and growing.⁴⁰ By September 2018, at least 39 states had enacted legislation that allowed for the establishment of hemp cultivation and production programs.⁴¹ In 2018, at least 38 states considered legislation related to industrial hemp, with bills ranging from clarifying existing laws to establishing new licensing requirements and programs.⁴² Five (5) states – Alaska, Arizona, Kansas, Missouri and Oklahoma – actually enacted legislation in 2018, which established hemp research and industrial hemp pilot programs.⁴³

As described above, although hemp has been removed from the definition of marijuana in the CSA, most states still have a lot of work to do before hemp production can take place. Most of the work will involve the creation, submission and approval of State Hemp Plans as required under the 2018 Farm Bill. For those states that had already developed and implemented hemp research and pilot programs under the 2014 Farm Bill, this work will consist of adjusting their programs to be compliant with the 2018 Farm Bill. For those states that have not yet allowed for hemp research and production, this work will consist of developing new State Hemp Plans and may be an easier process. In order to get a good sense of what State Hemp Plans may look like, it is worth looking at some of the more prominent hemp programs developed and implemented under the 2014 Farm Bill, pursuant to which many hemp business operate under today.

Although Colorado has developed a reputation for being one of the first states to legalize adult-use marijuana, it is has also been home to one of the more reputable hemp programs under the 2014 Farm Bill. Under Colorado’s Industrial Hemp Regulatory Program (the “Colorado Hemp Program”), any person who is registered with the Colorado Department of Agriculture (“CDA”), may engage in industrial hemp cultivation for commercial purposes, or grow industrial hemp for research and development purposes.⁴⁴ Registration requires submission of an application to the CDA that includes the name of the address, legal description of the property upon which hemp will be cultivated or grown, and payment of an application fee.⁴⁵ Everyone registered to cultivate industrial hemp for commercial purposes is required, on an annual basis, to provide the CDA with a report that contains the following: verification that the crop to be planted is of a type and variety that will produce a THC concentration of no more than 0.3%; and documentation that the registrant has entered into a purchase agreement with a Colorado industrial hemp processor.⁴⁶ Finally, the Colorado Hemp Program established a hemp seed certification program that identifies seeds that produce industrial hemp and allows for seeds to be imported by the CDA to develop its seed certification program.⁴⁷ A

⁴⁰ <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Col. Rev. Stat. § 35-61-102(1).

⁴⁵ *Id.* § 35-61-104(1).

⁴⁶ *Id.* § 35-61-105(1).

⁴⁷ *Id.* § 35-61-104.5(1.5).

violation of the Colorado Hemp Program may result in denial, revocation or suspension of a registration, and a civil penalty up to \$2,500.00.⁴⁸

Another state that has enjoyed an outstanding reputation for its industrial hemp program is Kentucky. Specifically, Kentucky's industrial hemp program (the "Kentucky Hemp Program") created a research program and commercial licensing program that allows hemp to be cultivated for any legal purpose.⁴⁹ The purpose of the Kentucky Hemp Program is to "[p]romote the research and study methods of cultivating, processing, and marketing [of] industrial hemp," and promote the expansion of Kentucky's industrial hemp industry "in anticipation of a change in federal law."⁵⁰ The Kentucky Hemp Program grants the Kentucky Department of Agriculture ("KDA") the power to conduct one or more industrial hemp pilot programs, license persons who desire to participate in an industrial hemp pilot program, prescribe testing and sampling procedure for industrial hemp and hemp-based products, and identify categories of industrial hemp products eligible for sale or distribution to the public.⁵¹ Other states have enacted similar industrial hemp programs that allow for industrial hemp research (e.g., Alabama,⁵² Arkansas,⁵³ Delaware,⁵⁴ Illinois,⁵⁵ Kansas⁵⁶ and Michigan⁵⁷), or programs that allow for the cultivation and processing of industrial hemp and hemp-based products for commercial or research purposes (i.e., Arizona,⁵⁸ California,⁵⁹ Indiana,⁶⁰ Maryland,⁶¹ North Dakota⁶² and Oregon⁶³). Other states, such as Minnesota⁶⁴ and Montana,⁶⁵ have also enacted industrial hemp programs, but conditioned their implementation upon further action from the federal government such as legalization as occurred in the 2018 Farm Bill. Although many states have enacted industrial hemp legislation, not all of those programs comply with the requirements of the 2018 Farm Bill and as a result, many of the states will be forced to modify their industrial hemp programs before the hemp industry launches as anticipated following federal legalization.

The Hemp Industry in the Future

Although hemp has been legalized by the 2018 Farm Bill and the requirements imposed thereby are not too burdensome, it does not mean that businesses operating within the future hemp industry are free to do as they please. For example, one of the main focuses of any State Hemp Plan will be ensuring that marijuana (greater than 0.3% THC) is not cultivated under the guise of a licensed industrial hemp operation. As a result, hemp operators will need to have adequate policies and procedures in place to ensure the use of hemp seeds that do not result in the cultivation of hemp with a THC concentrate in excess of 0.3%. Hemp operators will also need to have adequate testing

⁴⁸ *Id.* § 35-61-107.

⁴⁹ Ky. Rev. Stat. § 260.850, *et. seq.*

⁵⁰ *Id.* § 260.852(1).

⁵¹ *Id.* § 260.862(1).

⁵² *See* Ala. Code § 2-8-380, *et. seq.*

⁵³ *See* Ark. Stat. Ann. § 2-15-401, *et. seq.*

⁵⁴ *See* Del. Code. Ann. tit. 3 § 2800, *et. seq.*

⁵⁵ *See* Ill. Ann. Stat. ch. 720 § 550/15.2, *et. seq.*

⁵⁶ *See* K.S.A. Ch. 62 § 1, *et. seq.*

⁵⁷ *See* Mich. Comp. Laws § 286.841, *et. seq.*

⁵⁸ *See* SB 1098, *et. seq.*

⁵⁹ *See* Cal. Food and Agric. Code § 81000, *et. seq.*

⁶⁰ *See* Ind. Code Ann. § 15-15-13-1, *et. seq.*

⁶¹ *See* Md. Agriculture Code Ann. § 14-101 (2016), *et. seq.*

⁶² *See* N.D. Cent. Code § 4-41-01, *et seq.*

⁶³ *See* Or. Rev. Stat. § 571.300, *et seq.*

⁶⁴ *See* Minn. Stat. § 18K.01, *et. seq.*

⁶⁵ *See* Mont. Code Ann. § 80-18-101, *et. seq.*

procedures in place to ensure they have adequate means to test for hemp products and identify those with a THC concentrate in excess of 0.3%. In the event a licensed hemp operator cultivates hemp or produced hemp-base products with more than 0.3% THC, then the operator must be sure to have disposal and anti-diversion policies and procedures in place to ensure that non-compliant hemp products do not make their way into the marketplace. Finally, hemp operators will need to have adequate hiring and firing procedures, and employee training in place, to ensure that those assisting in their operations do not act in a manner that would constitute a violation of the State Hemp Plan or 2018 Farm Bill. In the event of a violation, hemp operators will need to have a response plan in place to immediately cure the violation and implement steps necessary to constitute a corrective action plan pursuant to the 2018 Farm Bill and eliminate the possibility of repeat violations, which could result in a denial, suspension or revocation of the operators industrial hemp license.

Although marijuana remains illegal under the CSA, hemp operators can learn a lot from the marijuana industry by adopting and implementing many of their statutorily-mandated standard operating procedures to ensure compliance with the 2018 Farm Bill and applicable State Hemp Plan, which many hemp businesses continue to operate under today. Furthermore, the USDA still needs to issue its rules and regulations interpreting the 2018 Farm Bill, which will provide significant guidance on several unresolved issues today including transportation of hemp and hemp-based products across state lines, which remains one of the more significant issues to be resolved following enactment of the 2018 Farm Bill. Ultimately, failure to operate a hemp business under a culture of compliance could result in significant problems for the business and its owners, but the operation of a compliant industrial hemp business could be extremely fruitful in light of the legalization of industrial hemp under the 2018 Farm Bill.

Christopher P. Parrington is Co-Chair of Kutak Rock's National Cannabis & Hemp Practice Groups.