

CONGRESS PASSES FARM BILL LEGALIZING HEMP, OPENING THE GATE FOR USE OF CBD IN CONSUMER PRODUCTS

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On December 12, 2018, Congress passed the long-awaited Agricultural Improvement Act of 2018 (the “Act”), also known as the 2018 Farm Bill, which, among other things, legalizes the production and transportation of hemp and hemp products. The Act is now headed to President Trump, who is expected to sign it into law.

Countless companies, including skin care, hair care, and cosmetic companies, have anxiously awaited passage of the Act, hoping it will remove obstacles to formulating and selling personal care products containing Cannabidiol (“CBD”) oil. The wait is finally over. As of January 1, 2019, the production and transportation of hemp and hemp related products will be legal; however, consumer product companies should tread carefully before entering this burgeoning lucrative market, as the Act is precise with regard to the definition of hemp legalized under the Act. This Alert discusses that definition, as well as other provisions of particular interest to consumer product companies.

DEFINITION OF HEMP

The Act defines “hemp” as “the plant *Cannabis sativa* L. and any part of the 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.” While the definition of hemp will include any part of the *Cannabis sativa* L. plant, it retains prior regulatory limits used to define industrial hemp by *limiting permissible levels of THC concentrations to no more than 0.3%*. Hemp and hemp products that meet this definition will be exempt from the definition of “marihuana” (or marijuana) under the Federal Controlled Substances Act, thereby removing it from the list of prohibited Schedule I drugs.

STATES’ RIGHTS TO REGULATE HEMP

Although the Act removes existing federal barriers to the production and sale of hemp and related products, states will still have the opportunity to enact more restrictive laws governing the production and sale of such products; however, states that want to retain primary regulatory authority over the production of hemp must submit plans to and obtain approval from the Department of Agriculture setting forth, among other things, proposed procedures for testing levels of THC in hemp produced within the state, effective disposal plans for plants and products that fail to meet the statutory definition, and requirements to ensure adequate enforcement of the Act for crops grown within the state. The Act does not preempt any state plan provided they seek to regulate the production of hemp as defined in the Act and are more stringent than the requirements imposed by the federal law. Notably, and of particular significance to consumer product companies, the Act *bars states from enacting laws prohibiting the transportation or shipment of hemp or hemp products across their boundaries*.

Although the Act addresses states’ rights to seek regulatory authority over the production of hemp and prohibits them from interfering in the interstate transportation of hemp and hemp products, it is notably silent on whether states will have the right to enact laws restricting or precluding the sale of hemp and hemp products to consumers within the state. The 10 states and District of Columbia that have legalized marijuana for recreational use and the additional 23 states that have legalized marijuana for medical purposes are likely to permit the sale of hemp and hemp products. It remains to be seen whether the remaining states that completely outlaw the sale of marijuana can continue to restrict the sale of products that otherwise meet the Act’s statutory definition of hemp.

NO IMPACT ON FEDERAL FOOD, DRUG AND COSMETICS ACT

Of particular importance to personal care product companies, the Act does not affect or modify the Food, Drug and Cosmetics Act. Thus, companies that market products containing hemp must still refrain from making any structure or function claims that would otherwise convert a hemp product from a cosmetic into a drug, lest they attract unwanted attention from regulators at the Food and Drug Administration.

BEST PRACTICES

Regulatory responsibility for the Act will rest with the Secretary of the Department of Agriculture, who will be required to promulgate regulations and guidelines implementing the Act in consultation with the Department of Justice. Those regulations may further inform companies with respect to the interstate sale of such products. Until then, personal care companies should be careful not to rely on representations from product manufacturers or ingredient suppliers regarding the type of hemp and levels of THC used to formulate and manufacture products. Instead, companies should conduct due diligence on their suppliers and secure written substantiation – including test results, documenting the levels of THC used in finished products – and obtain written indemnification and hold harmless assurances from vendors in the event those levels are challenged, whether by regulators or consumers.

ADDITIONAL INFORMATION

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