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**Production of Industrial Hemp in the U.S.:
Overview, Status, & Legal Issues**


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Discussion Points:

- **Background**
 - Key Terminology
 - Acreage, Market Value
 - History

- **Discussion**
 - Controlled Substances Act
 - Agricultural Act of 2014
 - States Activity

- **Comments/Q&A**

Background: Key Terminology



- *Cannabis sativa L.*
 - **Marijuana** – contains high content of delta 9 - tetrahydrocannabinol (THC); psychoactive varieties

 - **Industrial hemp** – agricultural commodity that contains low levels of THC
 - seeds, fiber, & stalk can be processed into a variety of commercial products

 - THC = primary psychoactive ingredient in marijuana

Background: Production & Acreage

- **Produced in about 30 countries**
 - China, Canada, EU nations
 - Korea, Russia, and Chile as well
- **Global acreage: mixed reports**
 - Approx. 200,000 acres in 2011
 - 250,000 in 1997
 - Other estimates closer to 600,000 acres

Background: Economic/Market Value

- **Difficult to project, mixed data**
 - Seed and fiber markets
 - Canadian market has been estimated to have gross revenue of \$30 million+
- **Sales to U.S. commonly estimated at least approx. \$500 million**

Background: Industrial Hemp Uses

- Often reported that IH has 25,000 uses
- Fiber, seed, or dual-purpose crop
- Fibers used in yarns, fabrics, textiles, construction materials, paper, carpeting
- Food and beverages
- Fuel

Background: History of U.S. Production

- Marihauna Act of 1937
- World War II: “Hemp For Victory”
- 1958: Reported as date of last hemp crop
- Controlled Substances Act of 1970

Recommended Resource: “Hemp and the Rule of Law”
(2004)

Discussion: The “Moving Parts”

- Controlled Substances Act of 1970
- Drug Enforcement Administration (DEA)
- Agricultural Act of 2014, a/k/a “2014 Farm Bill”
- States’ laws – Industrial Hemp & Marijuana
- Department of Justice “Cole Memo”
- Federal appropriations process
- Proposed federal legislation – 114th Congress
- Federal Circuit Court decisions
- Executive Orders

Controlled Substances Act of 1970

- Established legal framework for listing and classifying controlled substances
- Makes unlawful to “manufacture, distribute, or dispense” any controlled substance (unless otherwise authorized)
- “Marihuana” considered Schedule I controlled substance

Controlled Substances Act of 1970

- Defines “marijuana” as:

. . . all parts of the plant *Cannabis Sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. . . .

Controlled Substances Act of 1970

- Defines “marijuana” as: (cont'd)

Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound . . . or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Controlled Substances Act

- Hemp proponents challenge the DEA interpretation of “marijuana”
- See, e.g.:
 - *Hemp Industries Association v. Drug Enforcement Administration*, 357 F.2d 1012 (9th Cir. 2004)
 - *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000)
 - *Monson v. Drug Enforcement Administration*, 589 F.3d 952 (8th Cir. 2009)
 - *U.S. v. White Plume*, 447 F.3d 1067 (8th Cir. 2006)

Controlled Substances Act of 1970

- Under CSA, all varieties of *Cannabis sativa* considered the same, regardless of varying levels of THC that may be present
- DEA position is that under CSA it is illegal to grow hemp without a permit from the DEA
 - State-issued license/permit does not alter this viewpoint
- A funny thing happened on our way to 2014

Agricultural Act of 2014

- Pub. L. 113-79, Title VII, § 7606, Feb. 7, 2014, 128 Stat. 912) (codified at 7 U.S.C. § 5940)
- Title: “Legitimacy of industrial hemp research”

2014 Farm Bill Language

(a) In general

“Notwithstanding the Controlled Substances Act, . . . or any other Federal law, an institution of higher education (**as defined in section 1001 of Title 20**), or a State Department of Agriculture may grow or cultivate industrial hemp if”:

2014 Farm Bill Language

(1) the IH is grown or cultivated for purposes of research conducted under an *agricultural pilot program* or other agricultural or academic research; and

(2) the growing or cultivating of IH is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

2014 Farm Bill Language

(b) Definitions

“Agricultural pilot program” is “a **pilot program to study** the growth, cultivation, or marketing” of IH:

(A) in States that permit the growth or cultivation of IH under laws of the state;

and

(B) in a manner that:

2014 Farm Bill Language

(i) ensures that **only** institutions of higher education and State departments of agriculture are used to grow or cultivate IH;

(ii) requires that sites used for growing or cultivating IH in a State be certified by, and registered with, the State department of agriculture; and

(iii) authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States

2014 Farm Bill Language

(2) Industrial hemp --

“. . . the plant *Cannibas sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

20 U.S.C. § 1001

- “Institutions of higher education”
- Does the state institution fall within § 1001?
- If the state law definition does not match § 1001 or otherwise seems to modify, is that drafting purposeful?
 - i.e., “. . . a State institution of higher education that offers a 4-year degree in agricultural science”

State Activity: General Picture

- Now approaching 30 states that have enacted legislation to allow commercial and/or research cultivation of IH
 - January of 2015 = approximately 20 states
 - (At least) 26, currently
 - North Carolina awaiting Governor signature, others progressing
 - Some far more comprehensive than others (i.e., Illinois, New Hampshire, Nebraska, or Maine vs. Indiana, Kentucky, or Virginia)
- Appears to be only 2 states without either law in place or at least one legislative proposal in 2014 or 2015
 - Significant activity since 2014 Farm Bill
 - Changing relatively rapidly, with origins in mid-ish 1990's
 - Approx. 20 states introduced IH bills in 2015 session

State Activity: Common provisions

- Defines IH, and excludes IH from state law definitions of “controlled substances”
- Creating an Advisory Board or Commission
- Establishing/Authorizing licensing/registration program for growers and/or seed breeders
- Recordkeeping

State Activity: Common Provisions

- Provisions requiring waiver/change of federal law
- Establish/Authorize fee structures
- Establish inspection processes
- Allow state department to collect funds for research program

State Activity: Common Provisions

- “heritage hemp seed” (Colorado, Kentucky)
- Certified seed source requirements
- Penalties

Industrial Hemp – Definitions

- “any variety of *Cannabis sativa* L. with a delta-9-tetrahydrocannabinol concentration that does not exceed 0.3% on a dry weight basis . . .”
- “means cannabis sativa L. having no more than 0.3% total THC available, upon heating, or maximum delta-9 tetrahydrocannabinol content possible” (Illinois)

Industrial Hemp -- Definitions

- “all parts and varieties of the plant *cannabis sativa* L. containing no greater than **one percent** tetrahydrocannabinol” (W. Virginia; see also Massachusetts 2015 HB773)
- “Marijuana does not include the mature stalk of such plant, . . . or industrial hemp, as defined in 7 USC 5940, as amended from time to time.” (Connecticut)

Industrial Hemp – Definitions

Indiana:

(1) “all nonseed parts and varieties of the *Cannabis sativa* plant, whether growing or not, that contain a crop wide average tetrahydrocannabinol (THC) concentration that does not exceed the lesser of:

(A) three-tenths of one percent (0.3%) on a dry weight basis; or

(B) the percent based on a dry weight basis determined by the federal Controlled Substances Act . . . ; or

Industrial Hemp – Definitions

Indiana (cont'd):

(2) Any *Cannabis sativa* seed that is:

- (A) part of a growing crop;
- (B) retained by a grower for future planting; or
- (C) for processing into, or use as, agricultural hemp seed.

The term does not include industrial hemp commodities or products.

(Missouri and Oregon* statute has same language)

Committees/Boards

- **California**
 - 11 Members, appointed by Secretary
 - Includes representative of the California Sheriffs' Association and the Hemp Industries Association
- **Colorado**
 - 11 Members, appointed by state ag committee chairs
 - Does not include a law enforcement representative, but does include someone from Attorney General's office
- **Kentucky**
 - Broad representation and is "attached to the University of Kentucky Agricultural Experiment Station for administrative purposes"
 - Significant law enforcement representation

Registration/License Application

- **Before conducting research, institution of higher education must provide written notice to state department and any local law enforcement agency (Illinois)**
- **Applicant must provide (common provisions):**
 - Name and address of applicant and of IH operation
 - GPS coordinates and legal description
 - Criminal background check
 - Amount of acreage to be planted

Registration/License Application

- **Written consent allowing sheriff's office, police department, or Department of State Police to enter premises for inspection (Virginia)**
- **Shall require a state and national fingerprint-based criminal history background check by the State Police on any applicant (Virginia)**

Fees

- Many authorize ag department to develop
- Fees charged “must be sufficient to cover the cost of administration of this chapter, including the cost of conducting audits and testing” (Indiana)
- License application fee “not less than \$50 and more than \$100”; license fee “no less than \$100 and no more than \$500”; “fees for monitoring, sampling, and testing . . . no less than \$1 per acre and no more than \$100 per acre” (Maine)

Fees

- \$5 per acre, minimum of \$150 per applicant (North Dakota)
- Nonrefundable application fee that must cover cost to conduct a state or national criminal background check (Indiana)

'Research Program' Funds

- **Kentucky: Industrial Hemp Program Fund** that includes license fees, and can include state appropriations, federal funds, gifts, grants, and “other funds both public and private”
- **Michigan: Industrial Hemp Research Fund**
 - State treasurer may receive money or other assets from any source, including federal research grants
 - Funds shall remain and not lapse to general fund
 - Can only be spent on research into growing and/or cultivating of IH, including grants to colleges or universities

'Research' Program Funds

- **Colorado: Industrial Hemp Research Grant Fund**
 - Commissioner may collect fee in addition to registration fee
 - Can include “Any moneys from foundations, private individuals, or any other funding sources that can be used to expand the scope or time frame of any hemp research authorized pursuant to this article”
 - Up to \$10 million from the “marijuana tax cash fund”

Seed Sources

- Department shall administer a certified seed program, and, in accordance with federal/state laws may import seeds to develop the program (Colorado)
- “Authorized activity under this section may include collecting seed from wild hemp sources.” (Minnesota)
- “‘certified seed source’ means a source of hemp seeds that are certified by a 3rd party as producing hemp having a delta-9-tetrahydrocannabinol concentration that does not exceed 0.3% on a dry weight basis.” (Maine)

Federal Law Waivers, Changes, Permissions, Etc.

- No license may issue “until the state seed commissioner has secured any necessary permissions, waivers, or other form of legal status by the . . . [U.S. DEA] or other appropriate federal agency regarding industrial hemp (Indiana)
 - Once obtained, must file an affidavit with the Governor
- Act contingent on federal Industrial Hemp Farming Act of 2015 or another law becoming effective (Maryland, HB803) before Oct. 1, 2030

Federal Law Waivers, Changes, Permissions, Etc.

- **“A license required by this section is not conditioned on or subject to review or approval by the United States drug enforcement agency.” (North Dakota)**
- **Registration form provided by Secretary “shall include a notice statement that, until current federal law is amended to provide otherwise”-**
 - “cultivation and possession of hemp in Vermont is a violation of the federal Controlled Substances Act; and
 - Federal prosecution for growing hemp in violation of federal laws may include criminal penalties, forfeiture of property, and loss of access to federal agricultural benefits”

Federal Law Waivers, Changes, Permissions, Etc.

- **Licensure for IH research “shall only be allowed subject to a grant of necessary permissions, waivers, or other form of valid legal status by the . . . [DEA] or other appropriate federal agency pursuant to applicable federal laws relating to industrial hemp” (Virginia)**

Penalties

- Deny, revoke, suspend registration
- Civil penalty, not to exceed \$2,500 per violation
 - Potential for state to be able to collect attorneys fees and costs as well (Colorado)

Automatic Repeal

- If Commissioner determines that IH market is economically stable enough that it no longer requires regulation (Colorado)
- If federal law created authorizing USDA to regulate cultivation and research and development of IH (Colorado)

Notable Mentions

- **Missouri statute focuses on hemp extract for treatment of intractable epilepsy**
 - But, “All hemp waste from the production of hemp extract shall either be destroyed, recycled by the licensee at the . . . facility, *or donated to the department or an institution of higher education for research purposes, and shall not be used for commercial purposes.*”
- **Tennessee amended its “Right to Farm” law**
- **Example of “simple” approach tailored to research: Nebraska & Utah**
- **“on site or off site” growth or cultivation for research (New Hampshire)**

Notable Mentions

- **Limiting number of research sites that can be authorized by commissioner to ten (New York)**
- **“No person shall be prosecuted . . . for the involuntary growth of industrial hemp through the inadvertent natural spread of seeds or pollen as a result of proximity to a licensed grower.” (Virginia)**

State Activity – Recreational Marijuana

- State-level legalization of recreational marijuana
- “Cole Memo” issued by the DOJ
- Colorado, Oregon, & Kentucky

Federal Appropriations

- **House and Senate FY15 Commerce-Justice-Science (CJS) appropriations bills**
 - Enacted as P.L. 113-235, Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, Title V, General Provisions, §539
 - Contains language that prohibits DOJ and DEA from using funds in contravention of the 2014 Farm Bill

→ FY16

Federal Legislative Proposals

- **Industrial Hemp Farming Act**
 - Reintroduced in the 114th Congress (H.R.525/S.134)
- **Would amend the CSA to remove low-level THC hemp (i.e., < 0.3%) from the CSA definition of “marijuana”**

Comments Q&A

- **2014 Farm Bill**
 - Research provision
 - Potential legislative vehicle for maintaining/expanding
 - Uncertain future
- **Research funding?**
Production and manufacturing/processing issues
- **Industrial Hemp Farming Act**
- **2016 elections**

Sources/Resources

- Moran, Courtney, *Industrial Hemp: Canada Imports, United States Imports*, 26 Fordham Env'tl. L. Rev. 383 (2015)
- *Hemp as an Agricultural Commodity*, Renee Johnson, Congressional Research Service (RL32725, Feb. 2, 2015)
- Industrial Hemp Production in the U.S.: Status and Market Potential, USDA ERS
- Hemp and the Rule of Law
- National Agricultural Law Center/Ag & Food Law Consortium

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