

DEA Interim Final Rule Could Criminalize CBD Oil Extraction Process, Contradicting 2018 Farm Bill

The U.S. Drug Enforcement Administration (DEA) on August 20, 2020, published an interim final rule that, if adopted, would essentially criminalize the hemp oil extraction process, contradicting the 2018 Farm Bill and potentially putting the entire CBD industry at risk.

The DEA is the federal agency that enforces the Controlled Substances Act (CSA), which categorizes all drugs, substances and chemicals regulated by federal law into five "schedules." Cannabis is currently categorized as a Schedule I drug, defined as drugs with no currently accepted medical use and a high potential for abuse. Other Schedule I drugs include lysergic acid diethylamide (LSD) and 3, 4-methylenedioxymethamphetamine (ecstasy).

The 2018 Farm Bill removed hemp, a lawful form of cannabis, from the CSA. Hemp is a versatile crop used to make a variety of products, including paper, food products and cosmetics. Hemp is perhaps best known as the source of CBD, a non-psychoactive ingredient in cannabis. To qualify as hemp, the plant must have 0.3% or less of delta-9 tetrahydrocannabinol concentration (THC) on a dry weight basis. THC is the compound in cannabis that, when ingested at certain levels, can create a "high" sensation.

Since the passage of the 2018 Farm Bill, the hemp industry has grown exponentially. It is estimated the industry had \$1.1 billion in revenues in 2018, and could have revenues of \$2.6 billion by 2022.^[1]

The DEA's interim final rule establishes that the DEA still considers any "cannabis derivative, extract, or product that exceeds the 0.3% D9-THC limit [to be] a schedule I controlled substance, *even if the plant from which it was derived contained 0.3% or less D9-THC on a dry weight basis.*" The DEA's interim final rule presents a potential threat to the booming hemp industry, particularly CBD production, by criminalizing the hemp extraction process.

This portion of the interim final rule appears to contradict the 2018 Farm Bill, which only addresses the legal limits of THC in hemp on a *dry weight basis*.^[2] The statute is silent as to the lawful levels of THC in hemp *extract*, the "wet" oil derived from the plant.

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CBD manufacturers see this rule as problematic, as it would almost assuredly eliminate “plant to bottle” extraction. This is because, when CBD is extracted from hemp (even hemp containing <0.3% THC), typically there will be at least one stage in the extraction process where the material that is extracted contains >0.3% THC. However, the hemp extraction process is such that the products that are ultimately sold to consumers meet the 0.3% THC limitation.

The DEA's interim final rule effectively criminalizes the extraction process by designating any hemp oil that exceeds 0.3% during the extraction process to be a Schedule I substance. Enforcement of this rule could effectively halt all hemp extraction and eliminate the CBD industry.

The interim final rule will be open to public comment until 11:59 p.m. on October 20, 2020. As of this article's publication, more than 750 comments have been submitted, many of which are from businesses in the hemp industry or hemp industry consumers expressing concern about the effect of the interim final rule.

Business and consumers that may be impacted by the interim final rule should assess whether to participate in the comment period between now and October 20, 2020. Your comments could change the substance of the final rule published by the DEA.

If you have questions about the interim final rule and the impact it may have on your business, contact [Jessica Huston Polakowski](#), [Shannon \(Toole\) West](#) or any Reinhart attorney in our [Cannabis Law Group](#).

[1] Bob Woods, *Newly Legalized Hemp Industry Set to Create a Jobs Boom in the U.S.* (May 24, 2019), available at <https://www.cnbc.com/2019/05/24/newly-legalized-hemp-industry-set-to-create-a-jobs-boom-in-the-us.html>.

[2] The 2018 Farm Bill defines 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 [THC] of not more than 0.3 percent *on a dry weight basis*"

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