



The Business of Hemp & CBD

An Overview of a Budding Market

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

THE BUSINESS OF HEMP & CBD

AN OVERVIEW OF A BUDDING MARKET

Jessica H. Polakowski
608-229-2219
jpolakowski@reinhartlaw.com

Paloma A. Kennedy
414-298-8344
pkennedy@reinhartlaw.com

Sara McNamara
414-298-8373
smcnamara@reinhartlaw.com

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700, Milwaukee, WI 53202
22 East Mifflin Street, Suite 700, Madison, WI 53703
www.reinhartlaw.com

Definitions

THC = Tetrahydrocannabinol; key psychoactive compound in the Cannabis plant.

Marijuana = Cannabis plant with high THC (5% to 35%).

Hemp = Cannabis plant with low THC (<.3%).

CBD = Cannabidiol; chemical compound extracted from either hemp or marijuana plants.

Current Legal Landscape--Federal

Currently, at the federal level:

1) Marijuana is a Schedule 1 (illegal) drug. Marijuana was generally defined as any part of the plant genus Cannabis until 2018 when hemp was removed from federal definition of marijuana.

2) CBD is an extract from either a
a) Marijuana plant (federally illegal); or
b) Hemp plant (federally legal).

Current Legal Landscape--Federal (cont.)

Efforts to remove marijuana from Schedule 1 drug list (re-scheduling)

1) Second Circuit, in a May 30, 2019 opinion, told DEA to “promptly” reconsider its classification of cannabis as a Schedule 1 drug. *Washington, et al. v. Barr, et al.*, No. 18-859 (2d Cir. 2019).

2) Numerous bills introduced--most recently September 13, 2019, H.R. 4323 “Marijuana 1-to-3 Act of 2019,” to reschedule marijuana from Schedule 1 to Schedule 3 drug to allow access to federal funds for researching medicinal value.

Industrial Hemp Programs

2014 Federal Farm Bill allowed states to grow or cultivate industrial hemp with *not more than* .3% THC if:

- 1) Hemp is grown for research under pilot program; and
- 2) State law allows for growing/cultivating hemp.

2018 Federal Farm Bill continued the program.

- 1) CBD derived from hemp is excluded from Schedule 1 drug, but CBD derived from marijuana is still illegal;
- 2) Interstate transportation of hemp;
- 3) U.S. Department of Agriculture (USDA) to regulate federal program.

USDA Regulations Effective 10/31/2019

Key Takeaways:

1) Creates a cushion in THC limits for farmers growing industrial hemp under state programs: “acceptable hemp THC level” includes a measurement of uncertainty (essentially a standard deviation), thereby creating an acceptable range.

- If lab result of sample is 0.35% THC with a measurement of uncertainty of ± 0.06 , the distribution or range is 0.29% to 0.41%. Because 0.3% is within that distribution or range, the sample, and the lot it represents, is considered hemp (and not illegal marijuana) for the purpose of compliance with USDA regulations.

USDA Regulations Effective 10/31/2019 (cont.)

2) States may impose hemp production laws stricter than the 2018 Farm Bill's.

3) Creates avenue for producers in states where hemp is legal but state does not have USDA-approved plan to apply for license from USDA.

4) Interstate transportation of hemp lawful if hemp produced under USDA-approved plan.

U.S. Hemp Industry By the Numbers

In 2018:

- 3,543 hemp producers
- 77,844 acres of hemp; expected to double in 2019
- Prices paid for hemp by the pound
 - Fiber: \$0.07 to \$0.67
 - Grain or seed: \$0.65 to \$1.70
 - Flowers: \$3.50 to \$30.00 (or more, depending on CBD content)
- Approximately 2/3 of acreage planted for flowers while the remaining 1/3 is divided evenly between fiber and grain or seed
- Kentucky statistics: farmers made \$17.75 million from 6,700 acres, which equates to approximately \$2,650 per acre

8

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

Current Legal Landscape--States

- Marijuana:
 - 22 states have legalized marijuana for medicinal purposes only
 - 11 states and the District of Columbia have legalized marijuana for both medicinal and recreational use by adults
 - Illinois becomes first state to legalize sale and possession through legislation which will go into effect January 1, 2020
- Hemp:
 - 47 states allow for the cultivation of hemp for commercial purposes, research or pilot programs
- CBD:
 - Hemp-derived CBD is legal in 47 states with varying restrictions

9

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

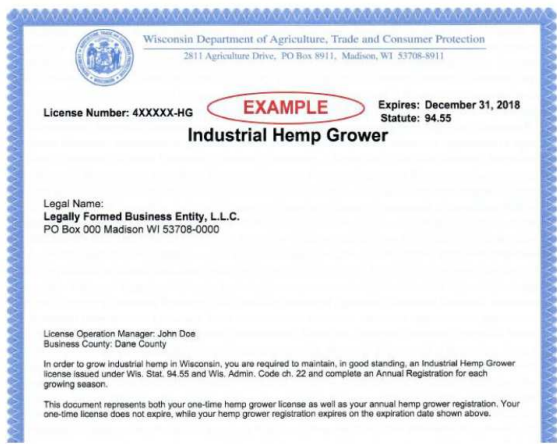
Wisconsin Hemp Industry By the Numbers

- Wisconsin grower licenses issued
 - 245 in 2018
 - 1,247 in 2019
- Wisconsin processor licenses issued
 - 99 in 2018
 - 556 in 2019
- Wisconsin acreage
 - 1,872 acres in 2018
 - Approx. 5,000 acres in 2019
- “Hot Crops” in Wisconsin (tested over .3% THC)
 - 21 out of 303 samples in 2018 (7%)
 - 289 out of 2,200 samples in 2019 (13%)

Wisconsin Industrial Hemp Pilot Program (WIHPP)

- Wisconsin growers and processors are required to:
 - Destroy crops that test higher than the federally-allowable levels of THC
 - Obtain a hemp grower or processor license
 - Pass a criminal background check
 - Pay license fees and/or annual registration fees
 - Submit a signed Research Agreement and a Research Plan
 - Submit a planting report within 30 days of planting the hemp crop
 - Provide Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) with a 30-day notification of anticipated harvest date
 - Provide access to DATCP hemp inspectors to obtain a hemp sample for each growing location and variety of hemp licensed
 - Pay a \$250 sampling fee for each growing location and variety of hemp sampled by DATCP
 - Submit a final production/processing report at the end of the growing season and prior to registering for the following growing season
- Enforced by DATCP
- No license required for retailers
- 2020 growing season applications (growers and processors) accepted November 1, 2019 through March 1, 2020

Sample Wisconsin License and Fit for Commerce Certificate



Wisconsin Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive, PO Box 8911, Madison, WI 53708-8911

License Number: 4XXXXX-HG **EXAMPLE** Expires: December 31, 2018
Statute: 94.55

Industrial Hemp Grower

Legal Name:
Legally Formed Business Entity, L.L.C.
PO Box 000 Madison WI 53708-0000

License Operation Manager: John Doe
Business County: Dane County

In order to grow industrial hemp in Wisconsin, you are required to maintain, in good standing, an Industrial Hemp Grower license issued under Wis. Stat. 94.55 and Wis. Admin. Code ch. 22 and complete an Annual Registration for each growing season.

This document represents both your one-time hemp grower license as well as your annual hemp grower registration. Your one-time license does not expire, while your hemp grower registration expires on the expiration date shown above.



State of Wisconsin
Governor Scott Walker
Department of Agriculture, Trade and Consumer Protection
Sheila E. Harsdorf, Secretary

**State of Wisconsin Industrial Hemp Pilot Program
Fit for Commerce Certificate** (Wis. Stat. §94.55, Wis. Admin. Code ATCP 22)

This Industrial Hemp of variety _____ (Hemp Seed variety name) _____ for License Number _____ 123456 _____ from field _____ (Field Name) _____ has tested below 0.3% THC and is in compliance with Wis. Stat. §94.55 and Wis. Admin. Code ATCP 22 under Section 7006 of the Agriculture Act of 2014.

A copy of this certificate must accompany the industrial hemp specified above to all licensed industrial hemp processors with whom the licensed industrial hemp grower does business.

By: _____ Date: _____

Wisconsin Department of Agriculture, Trade and Consumer Protection

12

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

Wisconsin Hemp 2.0: SB 188, AB 206

- Passed in the Senate October 8, 2019; Assembly Committee on Agriculture to review
- Creates Permanent Wisconsin hemp program
- Aligns Wisconsin definition of “hemp” with federal definition
 - “*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 [THC] concentration of not more than 0.3 percent on a dry weight basis or the maximum concentration allowed under federal law up to 1 percent, whichever is greater.”
- Provides mechanism for third-party testers
- Negligent violators of hemp program must comply with a plan established by DATCP to correct violations
- Prohibits a person from mislabeling hemp or a hemp product, knowingly making an inaccurate claim about the content, quality, or origin of hemp or a hemp product in the course of transferring or selling, or knowingly selling at retail mislabeled hemp or hemp products

13

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

Emerging Issues

1) Reconciling new USDA Interim Regulations and Wisconsin Industrial Hemp Pilot Program

- Wis. Stats. § 94.55(1) requires that hemp contains no more than 0.3% delta-9 THC; the statute does not prescribe a testing method
- Currently, if samples test above .3% delta-9 THC (and below 1%), grower may request a re-test within 10 days of receiving sample results
- Will Wisconsin growers be given a “measure of uncertainty”?
 - Wisconsin’s Hemp Research Pilot Program Sampling, Testing, and Variety FAQ, updated October 31, 2019, states:
 - “DATCP’s testing process is on a sound technical foundation, compliant with state statute, consistent with other states, and will not need to be changed to comply with the hemp program authorized under the 2018 Farm Bill.”
 - Wisconsin AB 206

Emerging Issues (cont.)

2) Wisconsin retailer concerns

- Fit for Commerce Certificates
- Ensuring appropriate THC levels in products
- Municipalities

3) Wisconsin grower and processor concerns

- Licensing
- Record keeping and reporting
- “Hot crop”
- Private testing

4) Edible market and U.S. Food and Drug Administration (FDA) regulation

5) Insurance and banking

Regulation of Cannabis

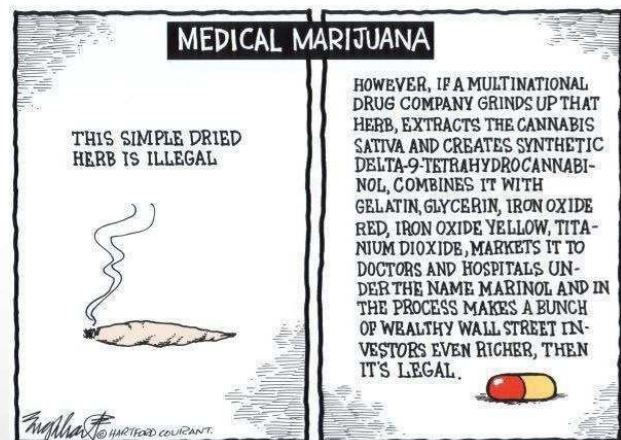
16

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

FDA

- Farm Bill: Congress explicitly preserves authority to FDA to regulate cannabis and cannabis-derived products
- FDA approval for products marketed as drugs
 - Epidiolex
 - Liver damage



[jokejive.com]

17

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

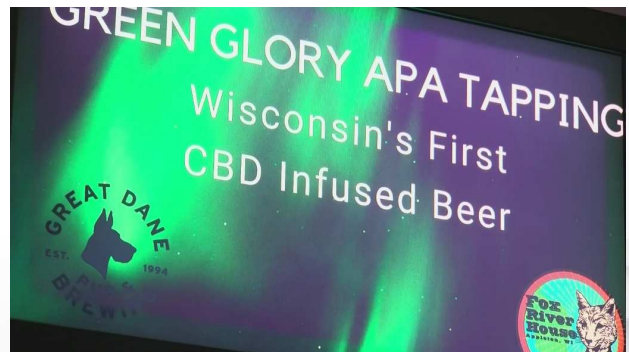
Reinhart
Boerner Van Deuren s.c. Attorneys at Law

FDA (cont.)

- Illegal:
 - to put CBD into interstate commerce
 - to market CBD as a dietary supplement
- Foods, dietary supplements and cosmetics not generally approved by FDA
 - Food additives exception
 - Substance generally recognized as safe (GRAS)
- No current plan to regulate non-drug applications

Food Additive: State Oversight

- License from DATCP
 - Food manufacturers must obtain a Wisconsin food processor license
 - Food product re-sellers must obtain a Wisconsin retail license



[Bar to Introduce CBD-Infused Beer, wearegreenbay.com]

- Hemp utilized in the production of food must have obtained a “fit for commerce” certificate either from the state of Wisconsin or a state with a hemp pilot program

Lack of Regulation



[justcbdstore.com]

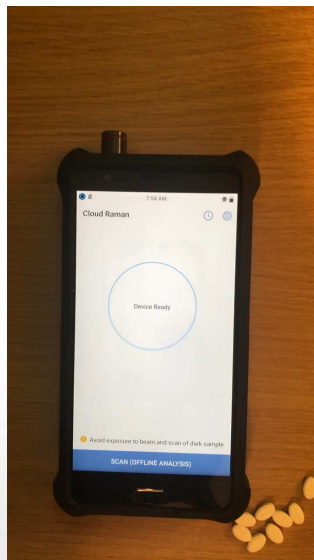
- State-led regulation
- Food safety concerns
- Unintended digestion by minors

20

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

Emerging Technology



21

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

Mergers & Acquisitions

22

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

Stats and Information

- 233 M&A Transactions as of August 2019
- Ohio-based Green Growth Brands completed its acquisition of Florida's Spring Oaks Greenhouses in a \$54.65 MM deal.
- Cannex Capital Holdings of Vancouver, British Columbia, and Phoenix-based, multistate operator 4Front Holdings completed a merger valued at almost \$500 MM
- Unorthodox deal structure

[Deal Watch: Public cannabis companies snapping up private ones, mjbizdaily.com]

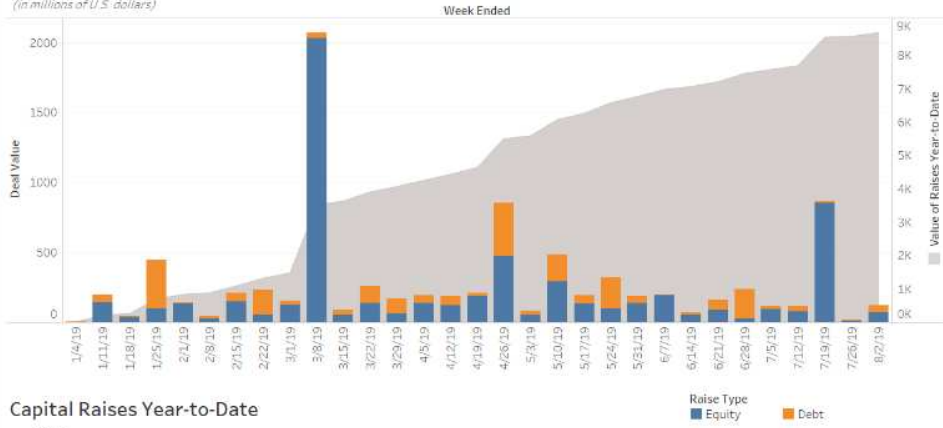
23

© 2019 All Rights Reserved
Reinhart Boerner Van Deuren s.c.

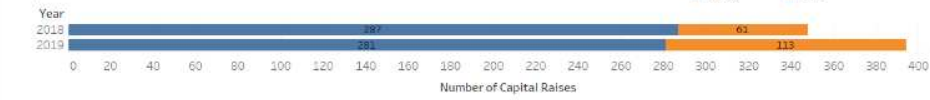
Reinhart
Boerner Van Deuren s.c. Attorneys at Law

2019 Capital Raises by Type & Week

(in millions of U.S. dollars)



Capital Raises Year-to-Date



Sources: Viridian Capital Advisors
© 2019 Marijuana Business Daily, a division of Anne Holland Ventures Inc. All rights reserved.

[Deal Watch: Public cannabis companies snapping up private ones, mjbizdaily.com]

Cannabis in the Workplace

Employer Policies and Recent Litigation

- Marijuana is the “most commonly used illicit drug in the United States,” with 52% of Americans age 18 years or older having reported trying it at least once in their life and, among those who have, 44% are currently using

- National Institute on Drug Abuse, *Drug Facts: Marijuana*, June 2018, <https://www.drugabuse.gov/publications/drugfacts/marijuana>; Yahoo News & Marist Poll, *Weed & The American Family*, April 17, 2017, http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417_Summary%20Yahoo%20News-Marist%20Poll_Weed%20and%20The%20American%20Family.pdf

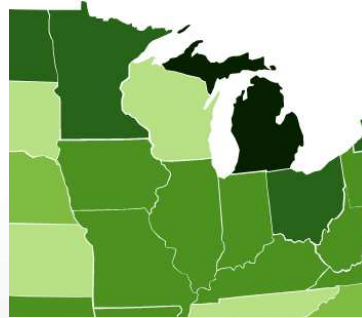
- Off-duty use--not a safe harbor
- Government organizations and zero tolerance policies
- Private entities

Flawed Testing Methodologies

- Urinalysis
 - Metabolites
- Blood sample
 - Fat soluble
- Frequency of use
- Form of consumption
- Unknown content / lack of regulation

Neighbor States Legalize Medical and/or Recreational

- Illinois
- Minnesota
- Michigan
- Canada
- Implications for Wisconsin
 - Worker shortage
 - Investment dollars
 - Tourism impact
 - Tax revenue considerations



Banking and Finance

Banking a CBD Business

- CBD derived from hemp is legal at a federal level and in Wisconsin
 - Must contain less than 0.3% THC
- Potential Concerns:
 - Regulation of product
 - Treatment as a “marijuana-related business” (MRB)
 - Green Rush

Banking MRBs

- Possession, use, growth and distribution of cannabis are illegal under federal law and Wisconsin law
- Rules and regulations are confusing and constantly changing
- Conflicting advice from government and regulatory authorities
- Potential opportunities

The Cole Memo

- Enforcement of marijuana-related activities limited to certain federal priorities:
 - Preventing distribution to minors
 - Preventing sales revenue from going to criminal enterprises
 - Preventing diversion of marijuana from one state where it is legal to another state where it is illegal
 - Preventing violence and use of firearms
 - Preventing legal activity from being used as a cover for illegal activity

Additional Guidance by James Cole

- The Cole Memo did not address impact on certain financial crimes (e.g., Bank Secrecy Act, money laundering statutes and unlicensed money remitter statute)
- Cole issued an additional memo to provide guidance on these issues
- Guidance essentially ties back to the Cole Memo
- Most important thing to consider is due diligence

FinCEN Guidance

- Clarified Bank Secrecy Act expectations for financial institutions
- Financial institutions should:
 - Verify MRB is duly licensed and registered
 - Review license application and related documents
 - Request information from state licensing authority
 - Develop understanding of the MRB
 - Regularly monitor publicly-available information and suspicious activity

Suspicious Activity Reports (SARs)

- Financial Institution is required to file a SAR if it “knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at or through the financial institution”
 - Involves funds derived from illegal activity;
 - Designed to evade Bank Secrecy Act regulations; or
 - Lacks an apparent lawful or business purpose

Three Types of SARs

- Marijuana Limited
 - MRB does not implicate one of the Cole Memo priorities or violate state law
 - Must file continuing activity reports
- Marijuana Priority
 - MRB implicates one of the Cole Memo priorities or violates state law
- Marijuana Termination
 - Financial institution terminates relationship with MRB to maintain anti-money laundering compliance program

How to Distinguish Priority SARs

- MRB receives substantially more revenue than may be reasonably expected
- MRB is depositing more cash than is commensurate with amount of revenue
- MRB's deposits are structured to avoid Currency Transaction Report requirements
- MRB's funds are frequently moved
- MRB's financial statements are inconsistent with actual account activity

Rescission of the Cole Memo

- Requires U.S. attorneys to weigh all relevant considerations when deciding which cases to prosecute
- Resulted in widespread uncertainty and heavy criticism from various state officials and representatives
- Left many financial institutions in a regulatory limbo, as FinCEN guidance remains in effect

SAFE Banking Act of 2019

- Legislation would prohibit federal regulators from penalizing a financial institution for providing banking services to a legitimate MRB
- Passed in the House of Representatives in September
- Currently being considered by the Senate
- Over \$3.5 million spent on lobbying through Q3 of 2019

What do I do with this information?

- Discuss risks and rewards with your Board of Directors
- Develop a clear approach to MRBs
 - Never provide products or services to MRBs
 - Provide products or services to MRBs on a limited exception basis
 - Actively seek out MRBs
- Create a written policy and review and revise it as the legal landscape changes

Questions?



Thank You!

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.