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Hemp Law 101: The Regulation of Industrial Hemp

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Introduction

Industrial hemp—with more than 25,000 uses including clothing, paper, health supplements, hempcrete and as an additive to foods and beverages—is a crop with potential to revive struggling farms into financially viable and booming production centers.

The Congressional Research Service estimates that current annual hemp-related product sales in the United States are \$700 million and projects that by 2020 they will grow to an estimated \$1.8 billion. Until recently, legal restrictions in the U.S. prohibited the production and sale of hemp and hemp products and as a result, imported a large percentage of hemp seeds and fibers—an estimated \$67.3 million in 2017.

The hemp industry is growing nationally and particularly so in North Carolina. According to Hemp Industry Daily, “North Carolina has gone all-in on hemp, which state officials see as a natural fit for an economy once dominated by tobacco farming and textile manufacturing. North Carolina finished its hemp-growing season in 2017 with more growers, more acres and more processors than any other state in its first year of hemp production.”

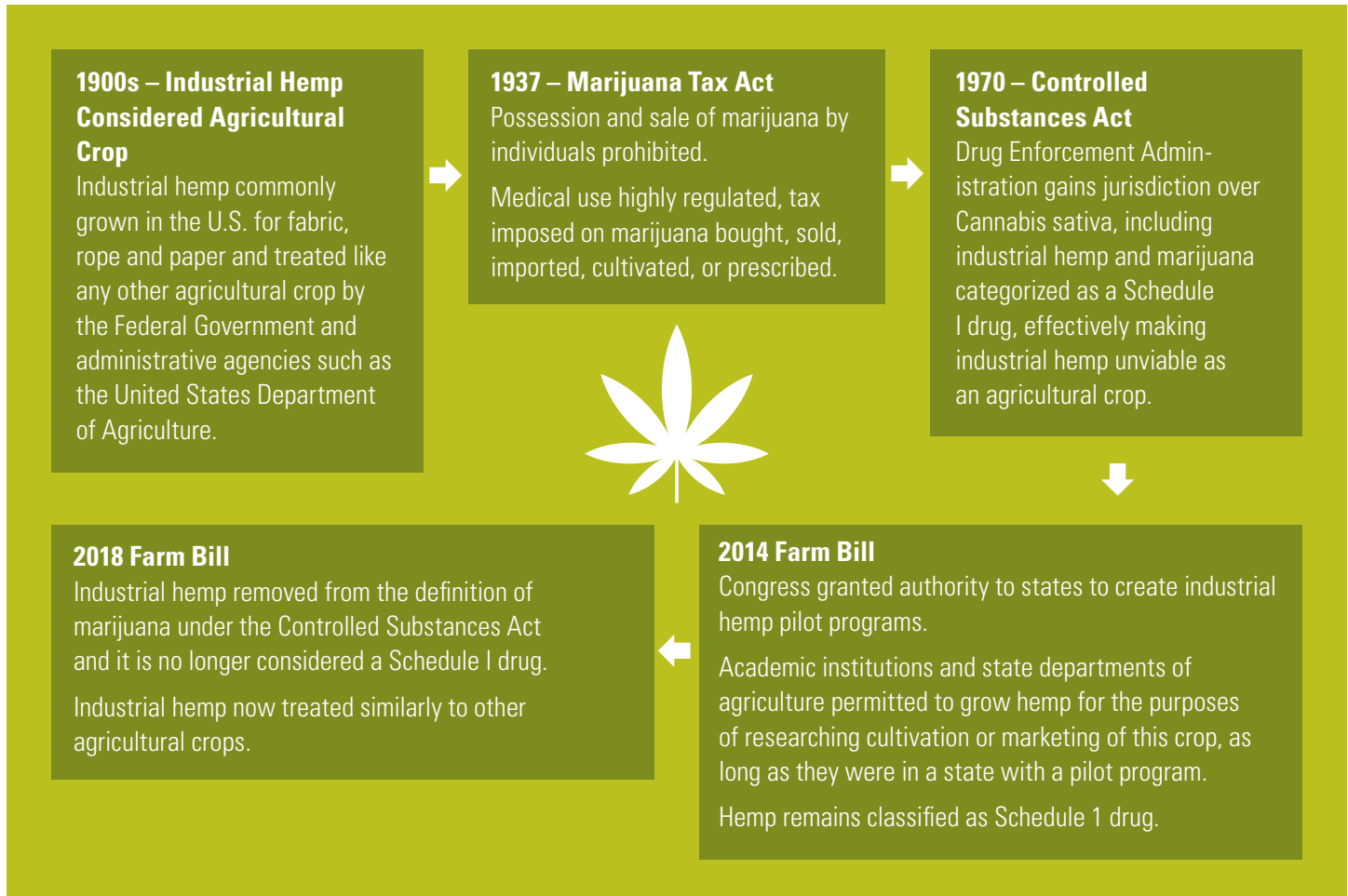
Despite the interest and the potential economic impact of this industry in North Carolina and nationwide, legal questions and misconceptions about industrial hemp and its byproducts—especially hemp-derived Cannabidiol (CBD)—hamper the growth of the industry. This is due, in part, to new and rapidly developing hemp laws. In some respects, the industry and the infrastructure that supports it has been developing faster than the law. For the industry to grow and prosper, areas of the law currently considered to be “gray,” or unsettled, need to be clarified for farmers, producers and consumers.



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Defining Industrial Hemp

Industrial hemp (referred to below simply as “hemp”) is distinctly different from marijuana. According to federal law, industrial hemp is defined as any part of the Cannabis sativa L. plant, whether the plant is growing or not, as long as the tetrahydrocannabinol (THC) concentration is 0.3 percent or below. If the THC concentration is above 0.3 percent then it is legally considered to be marijuana and other relevant laws apply.



Legal History of Hemp

Up until the mid 1900s, industrial hemp was commonly grown in the U.S. It was used for a variety of purposes such as for fabric, rope and paper and was treated like any other agricultural crop by the Federal Government and administrative agencies such as the United States Department of Agriculture (USDA).

Hemp regulation shifted in 1937 when Congress passed the Marijuana Tax Act. The Tax Act did not prohibit the production of marijuana outright; however, it did make it much more difficult to grow it. It also prohibited the possession and sale of marijuana by individuals. While medicinal use was still permitted, it became highly regulated. Extensive documentation was required and a tax was imposed if marijuana was bought, sold, imported, cultivated or prescribed.

One point of significance is that the Tax Act made a distinction between marijuana and industrial hemp. It did not prohibit the production or sale of industrial hemp. In fact, the Federal Government actually encouraged the production of hemp for fiber and oil during World War II.

In 1970, Congress passed the Controlled Substances Act (CSA), which represented a major shift in how the Federal Government categorized and regulated hemp. The CSA gave the Drug Enforcement Administration (DEA) jurisdiction over Cannabis sativa. Notably, the law did not distinguish between marijuana and industrial hemp. The impacts from this categorization have been far-reaching. Hemp has not been a viable agricultural crop in the U.S. until the present day due in large part to the passage of this law.

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The CSA categorized marijuana as a Schedule I drug, a category reserved for the most dangerous drugs that typically have no accepted medical use and also have a high potential for abuse. It was the DEA’s position that under this law the agency had authority to regulate all categories of Cannabis sativa, including industrial hemp.

Current Federal Law: The 2014 and 2018 Farm Bills

The 2014 Farm Bill paved the way for the industrial hemp industry to be revitalized in the U.S., although still in a limited capacity. Under this law, Congress granted authority to states to create industrial hemp pilot programs. And it specifically allowed academic institutions and state departments of agriculture to grow hemp for the purposes of researching cultivation or marketing of this crop, as long as they were in a state with a pilot program.

Although the 2014 Farm Bill allowed hemp to be grown legally for the first time in almost fifty years, there remained significant restrictions on growing hemp and for the industry overall. First, Congress did not exercise its authority to mandate that hemp could be legally grown in all states. It specifically left it up to individual states to determine whether they wanted to create a pilot program, leaving farmers who lived in a state without a pilot program unable to grow hemp legally.

Once a state did decide to create a pilot program, it still did not mean that producers were able to simply purchase and plant hemp seed like they would with other crops. Because of the language of the Farm Bill, farmers—and sometimes processors—who grow hemp in a state that permits its production must follow the regulations of the state. For example, in North Carolina the pilot program rules dictate that producers must apply for a license to grow hemp. To obtain a license, farmers must be able to show that they have farm income based on the previous year’s tax return. In addition, because the basis of the pilot program is for research, farmers with a license must report back certain information to the state at the end of each calendar year. For example, most states with pilot programs will require some type of licensure for farmers who want to grow hemp.

Perhaps most significantly, the language of the 2014 Farm Bill did not clarify that industrial hemp was exempt from the definition of marijuana under the Controlled Substances Act. This meant that hemp was still a Schedule I drug and under DEA’s authority. As a result, producers needed to register with the DEA if they wanted to grow hemp (although this could be done by the state pilot program on their behalf). It further complicated the process of purchasing seed, because Schedule I drugs—including hemp—are not permitted to be transported across state lines. This restriction applied whether the seed was being transported in a vehicle, through the United States Postal Service, or via another carrier. The punishment for violating this law is a fine and/or prison sentence. The practical result was a limitation on the sources and ways through which farmers in states with pilot programs could obtain seed.

Congress took steps in the 2018 Farm Bill to address some of the issues above. Significantly, industrial hemp was removed from the definition of marijuana under the Controlled Substances Act, and it is no longer considered a Schedule I drug. The 2018 Farm Bill also stated that industrial hemp is to be treated similarly to other agricultural crops. This shift allows federal agencies to create regulations that will apply to hemp. For example, it permits the Federal Crop Insurance Corporation to develop crop insurance policies that will be available to hemp farmers. Also, the USDA—which regulates organic certification—can now treat hemp like other crops, making organic certification of industrial hemp possible.

The 2018 Farm Bill also established shared authority between the states and the USDA for regulating hemp. Under the 2018 Farm Bill, the USDA must establish regulations for hemp. States may also create their own plans for regulating hemp, which must be submitted to and approved by the USDA. If a state does not submit a plan, then the regulations created by USDA will apply to farmers who want to produce hemp in that state, making it possible for farmers in every state to produce hemp.

Remaining Limitations

Regulatory issues

Although the 2018 Farm Bill cleared many of the legal roadblocks for the hemp industry, a number of obstacles still remain. First, although the Farm Bill is effective now, some provisions have yet to be implemented. This is because the main agencies responsible for promulgating regulations in their respective areas—USDA, Federal Drug Administration (FDA) and Environmental Protection Agency (EPA)—have not yet had time to do so.

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The USDA held a public listening session in February 2019 to gather public input. At this session the agency stated its goal of having regulations developed by the end of 2019 so they would be in place before the beginning of the 2020 planting season. The USDA will not be able to review state plans until these regulations are in place. In the meantime, relevant provisions of the 2014 Farm Bill remain valid. This means that for the time being states are operating under their current pilot programs; and farmers that reside in states without a valid pilot program cannot grow hemp this season.

The FDA has authority to regulate both food products and drugs under the Federal Food, Drug and Cosmetic Act (FDCA). On Dec. 20, 2018, the day the Farm Bill was signed into law, the FDA released a statement that it had authority to regulate hemp-derived CBD under the FDCA. Specifically, FDA stated that CBD was not permitted in food products and that any CBD products that made health claims needed to be approved by the agency before entering interstate commerce.

Furthermore, the FDA proclaimed, “It’s unlawful under the FD&C Act to introduce food containing added CBD or THC into interstate commerce, or to market CBD or THC products as, or in, dietary supplements, regardless of whether the substances are hemp-derived. This is because both CBD and THC are active ingredients in FDA-approved drugs and were the subject of substantial clinical investigations before they were marketed as foods or dietary supplements. Under the FD&C Act, it’s illegal to introduce drug ingredients like these into the food supply, or to market them as dietary supplements.”

On Feb. 8, 2019, the NC Department of Agriculture & Consumer Services issued a similar statement directed at retailers and processors, stating that NC law follows the federal law in this area and therefore CBD cannot

be added to food products or animal feed and that CBD products cannot make health claims.

In April 2019, the FDA released a statement that it would investigate a regulatory path for hemp and hemp-derived CBD products, while reiterating its authority over CBD in human and animal food and drugs. In the statement, the FDA announced that it would take certain steps towards this goal which included holding the first public hearing on this issue on May 31, 2019. It remains to be seen how the FDA will regulate CBD products. Unlike the USDA, the FDA did not commit to a specific timeframe, so it may be another year (or longer) until the regulations are in place. In the meantime, this remains one of the most significant legal “gray” areas in hemp law and provides little guidance for this segment of the industry.

The role of the EPA as it relates to hemp is to approve pesticides that may be applied to the crop. To date, the EPA has not approved any pesticides or herbicides for use on hemp. This means that farmers are more limited on what they can apply in the event of pest or weed pressure during the growing season than they are with other crops.

Business Limitations

In addition to regulatory limitations, businesses that operate within the burgeoning hemp industry are also finding it difficult to access general services needed to set up and run a business. For example, some banks and insurance companies are hesitant to work with hemp retailers. Alternatively, those that are willing to work with hemp retailers may charge higher rates. This is either because there is still a misunderstanding as to the legal distinction between hemp and marijuana, or because hemp retailers are perceived to be high risk for the service providers. Having clear, consistent regulations in place will help to alleviate some of these concerns.

Conclusion

In the relatively short time since the 2014 Farm Bill made it legal to grow, process and sell hemp, the industry has grown tremendously. Although Congress has mandated that the production, sale and transport of hemp are legal across the U.S., legal hurdles remain for this nascent industry. As these legal roadblocks are cleared, the hemp industry will continue to grow and reach its lucrative potential for farmers, processors and retailers in North Carolina and nationwide.

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Research Cited

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