MARIJUANA AND HEMP: THE EVER CHANGING LEGAL LANDSCAPE

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TOPICS TO COVER

1. Marijuana
2. Hemp
3. Outlook for additional reform: 2020 and beyond
4. Interesting cannabis-related litigation
5. Equipment used in cannabis production
MARIJUANA REFORM

- States leading the way
  - Trend is to pass legislation as opposed to reliance on ballot initiatives
- Currently little to no resistance from the federal government
  - Rescission of Cole Memo mitigated by current funding prohibitions
- Common threads between various state programs, but still very clear differences in approaches
  - Businesses with operations in multiple states may have difficulty synthesizing policies across the country to comply with unique state laws
  - Ever-changing state laws make continued compliance difficult
CHANGES IN FEDERAL POLICY?

• Cannabis (other than hemp) remains illegal under federal law
• But November 2020 election results could portend major cannabis reform. States to watch include:
  • Ohio
  • Arizona
  • Florida
  • New York
  • New Jersey
  • Pennsylvania
• COVID-19 “shelter in place” orders have hampered signature collection efforts across the country
  • Some markets (such as Ohio and Florida) saw booms during COVID-19
  • Designation of cannabis businesses as “essential” reflects a definite change in states’ approaches to marijuana
CHANGES IN FEDERAL POLICY? (CONT.)

• Banking legislation (SAFE Act)
  • Proposed as a standalone bill, and also included in recent version of House COVID relief bill

• STATES Act
  • Bipartisan support in both chambers, also supported by President Trump

• Reform was progressing, but then derailed due to two significant developments:
  • Impeachment inquiry
  • COVID-19

• Joe Biden has signaled some support for reform, but has stopped short of supporting full commercial legalization
THE CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL

• Legalize possession of up to 1 ounce (8 grams of which can be in concentrate form) for adults 21 and older
• Current medical operators can begin selling to adults beginning July 1, 2021
• Department of Commerce can issue additional licenses once program implemented
  • Initial limit of 1 retail marijuana store per 60,000 residents
  • Initial limit of additional 1.5 million square feet of cultivation area
  • The above limits can be increased by the Department
• Tax revenue
  • 50% to State Local Government Fund
  • 10% back to communities in which retail sales occurred
• Localities can prohibit medical marijuana dispensaries from selling to adults
• Localities can:
  • Regulate the time, place, manner, and number of retail marijuana stores
  • Establish a schedule of operating fees for marijuana establishments
  • Establish civil penalties for violation of an ordinance governing the time, place, and manner of marijuana establishments
  • Prohibit the operation of establishments, provided that the prohibition must appear on the general election ballot during an even numbered year
  • Control zoning relating to marijuana establishments
• Nothing affects employer drug policies
• Property owners can restrict on-site use
WHAT IS HEMP?

- Hemp was poorly defined prior to 2014
- The 2014 Farm Bill permitted states to establish pilot programs to research hemp
  - Defined hemp as the cannabis plant, including its derivatives, with less than 0.3% THC
  - States decided to research not only the science of hemp, but the commercial viability of hemp markets
- In 2018, Congress passed the 2018 Farm Bill and expanded on the prior law
  - Removed hemp (and its derivatives) from the Controlled Substances Act
  - Permitted states to set up full commercial hemp programs, subject to USDA approval
  - USDA just released interim rules that will govern the 2020 hemp crop production
  - Did not alter the Food, Drug, & Cosmetic Act

Key Term Cheat Sheet

- **Hemp** = cannabis with <0.3% THC
- **Marijuana** = cannabis with >0.3% THC
- **THC** = cannabis compound that produces a high
- **CBD** = one of the many non-intoxicating compounds in cannabis
- **Terpene** = aroma and flavor compound found in cannabis (also present in other plants)
- **Processing** = making hemp into a hemp product under Ohio law
FDA GUIDANCE ON CBD

• FDA approved a CBD-based epilepsy drug named Epidiolex

• Under the Food Drug & Cosmetic Act, one cannot introduce into interstate commerce any food (including any animal food or feed) that includes an active ingredient in an FDA-approved drug, or a drug undergoing substantial clinical investigations
  
  • So, FDA concluded that it is a prohibited act to introduce or deliver for introduction into interstate commerce any food (including any animal food or feed) to which THC or CBD has been added.

• FDA has issued regulations that authorize individual synthetic terpenes for use in food

• Many forms of botanical extracts are authorized for use in food in specific FDA regulations; botanical extracts from cannabis (hemp) are not included in these regulations

• FDA has advised that alcohol beverage industry members interested in using botanical extracts containing mixtures of terpenes sourced from hemp, or any other plant, should consider submitting a GRAS notice

• FDA has sent warning letters to various CBD companies that made health-related claims about their products – only enforcement action by FDA so far

• FDA is trying to find a “pathway” for the lawful introduction of CBD products into the market
HEMP REFORM AT STATE LEVEL

• States have three options to develop hemp programs:
  • Operate under 2014 pilot program for 2020 growing season
  • Develop new, commercial hemp program under 2018 Farm Bill
  • Cede control to USDA to regulate hemp
• Confusion abounds given the patchwork system
  • Hemp-derived products may be specifically legal under state law, while FDA still takes a different position
  • Testing requirements under 2018 Farm Bill differ from 2014 Farm Bill requirements
  • Banking access can still be a problem
  • Sourcing product can be difficult for manufacturers
CANNABIS LITIGATION

• **Product liability**
  - Hemp product THC levels too high
  - Vaping injuries

• **Class action**
  - Hemp products sold allegedly contrary to FDA guidance
  - Mislabeling claims (lower CBD than advertised)

• **Investor suits**
  - Stock prices for many marijuana companies down more than 60%
  - Many startups raising money through private placement memorandums have not succeeded
  - Lack of access to banking can complicate these suits

• **Administrative actions**
  - Ownership transfer restrictions and ownership disclosure requirements

• **Employment**
  - Many states have codified employee protections into their marijuana legislation

• **New theories of liability every day**
  - We are sure to see additional litigation and confusion as we learn more about the cannabis plant and its constituent parts
CANNABIS PRODUCTION EQUIPMENT

• Growing
  • Outdoor marijuana or hemp farms may use specialty farming equipment
  • Indoor cultivation facilities can be very high-tech
  • Fertilization and water purity
  • Automatic trimmers
  • Pre-roll machines

• Processing
  • Butane, CO2, ethanol extraction equipment
  • Commercial kitchens

• Packaging and labeling equipment
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