Cannabis in the United States: The laws of the land in 2019

DECEMBER 13, 2019 9 MIN READ

Related Expertise

- Cannabis

Author: Rob Lando

Canada made history in October 2018 by becoming the first major country in the world to legalize the "adult use" of cannabis for recreational purposes at both the federal and provincial government levels. That watershed development in Canada was all the more significant in contrast to the regulatory morass in the United States, where state laws legalizing cannabis for medical or recreational use continued to be overshadowed by the U.S. federal law decreeing the cultivation, sale and use of cannabis to be a federal crime across every state in the land, even for the most compelling medical purposes.

This progress continued in Canada in 2019, as we discuss in our article on Canadian cannabis developments. In the United States, as 2019 draws to a close, cannabis is legal for medical use under state law in more than 30 states, and is even legal for adult recreational use under state law in more than 10 states. However, cannabis continues to be illegal under U.S. federal law in all states – unless it is hemp.

CBD is everywhere!

It is impossible to walk down the streets of most major U.S. cities these days without losing count of the number of stores selling CBD in one form or another. But what is CBD? Cannabidiol, or CBD, is a cannabinoid that does not intoxicate the user. It is showing up everywhere in the United States – in food, drinks, capsules, tinctures, balms, vapes, oils, creams, gels, lotions and potions. While it does not make you high, CBD has become something of a health fad, with its proponents pointing to its value for pain management, reduction of anxiety and depression, and other health and wellness benefits.

CBD is the white sheep in the cannabinoid family. Its more rambunctious sibling tetrahydrocannabinol (THC) is the cannabinoid that makes you high.

Since the end of 2018, following the signing into law of the federal *Agriculture Improvement Act of 2018* (the 2018 Farm Bill), the U.S. cannabis market is now divided in two, as far as the federal *Controlled Substances Act* is concerned. One of the prohibited substances listed in Schedule I to the *Controlled Substances Act* is "marihuana." Under the definition of that term prior to the 2018 Farm Bill, all types of cannabis were a federally prohibited illegal substance, just like heroin and morphine. However, the 2018 Farm Bill changed the definition of "marihuana" to exclude cannabis that has not more than 0.3% THC on a dry weight basis, which is now called "hemp."

As a result, in the United States, hemp is no longer marihuana, even though both hemp and marihuana are cannabis. Only marihuana is federally prohibited under the *Controlled Substances Act*, while hemp, and CBD products made from hemp, are not. And to add to the mix from a cross-border perspective: in Canada, although there is a separate regime regulating industrial hemp, the *Cannabis Act* itself makes no such distinction. This means that

most of the CBD products now being sold in the United States are subject to the same regulations in Canada that apply to cannabis with more than 0.3% THC.

Unfortunately, however, it is not quite as simple as removing hemp from the definition of marihuana in the *Controlled Substances Act*. While CBD products made from hemp are no longer federally illegal in the United States under the *Controlled Substances Act*, they are still subject to the U.S. federal *Food, Drug and Cosmetic Act,* which makes them subject to regulation by the Food and Drug Administration (the FDA). If a CBD product is sold with a claim that it can cure or prevent a disease, it is a "drug" and must be approved by the FDA before it can be sold in the United States in compliance with U.S. federal law.

Moreover, if a CBD product is sold as a food additive, it must be approved by the FDA as a food additive by regulation, or fit within the FDA's criteria for a substance that is "generally recognized as safe" (GRAS). However, a food additive cannot qualify as GRAS if it is an active ingredient in an approved drug or a study drug, unless it was sold for use in food before being investigated as a drug in clinical trials. For this reason, a number of CBD products being sold in the United States are labelled as "hemp oil" rather than CBD, since CBD arguably was studied as a drug before being used in food.

So the legality of CBD under U.S. federal law actually depends on your view of whether improper claims are being made about its usefulness, whether the active ingredients are sufficiently dissimilar to anything previously studied as a drug without having been used in food before then, whether the FDA will take the same view that you do, and whether a judge hearing an enforcement proceeding will take the same view as the FDA.

And, ironically, while federal law is the source of the problem with selling cannabis that has enough THC to qualify as marihuana in the states where it is legal under state law, there are a handful of states where the problem is the opposite, and all THC, CBD, marihuana and hemp products remain illegal at the state level.

Nevertheless, CBD products are being sold all across the United States, and if they are made from hemp instead of marihuana, and legal under state law, and do not violate the U.S. federal *Food, Drug and Cosmetic Act*, they just ***may*** in fact be legal, or close enough to being legal to avoid a successful prosecution by the FDA.

Marijuana is still federally illegal! (but we're working on it)

If a cannabis plant has more than 0.3% THC by dry weight, then under the U.S. federal *Controlled Substances Act* it is marihuana, not hemp, and it remains a federally prohibited substance just like cocaine. It does not matter what state law has to say about it, or whether it is being used for recreational or medical purposes.

And yet, marihuana – cannabis with enough *intoxicating* THC to make it federally illegal, is a multibillion-dollar industry in the more than 30 states where it is legal under state law. What keeps the wheels of that industry turning is a fairly high degree of confidence that the risk of enforcement of the federal law prohibition is relatively low, at least for those who are not tied to organized crime, or other unsavoury characters.

There are, however, many financial industry participants, professional services providers and others who find it especially challenging to participate in an industry that runs afoul of U.S. federal law. While more than 550 banks and 150 credit unions are already providing banking and financial services to the cannabis industry, the vast majority do not. Those that do must file "suspicious activity reports" (SARs) routinely with the U.S. Financial Crimes Enforcement Network (FinCEN), and demonstrate to their prudential regulators that they are following

prescribed guidelines when dealing with cannabis companies. Most major federal financial institutions still will not deal with U.S. cannabis growers (at least not those growing marihuana), nor will most investment banks, or the U.S. stock exchanges. And while politicians almost never agree about anything, almost all of them agree that the current disconnect between state and federal law when it comes to marihuana is untenable.

There are three separate legislative proposals underway in an effort to untangle this knot: SAFE, STATES and MORE:

- **SAFE**: The *Secure And Fair Enforcement (SAFE) Banking Act* is a bill to protect banks working in the marihuana industry from enforcement action by federal banking regulators. While financial institutions would still have to comply with FinCEN guidance, there would be express protections from liability for providing financial services to the industry, the bank would be protected against having its deposit insurance cancelled, and proceeds from the sale of marihuana would be deemed not to be proceeds of crime under federal money laundering laws. SAFE was passed by the Democrat-controlled House of Representatives in September 2019, but despite some cautious optimism, its chances of being passed by the Senate remain unclear.
- **STATES**: The *Strengthening the Tenth Amendment Through Entrusting States Act* (the STATES Act) would amend the U.S. federal *Controlled Substances Act* to exclude activities involving marihuana taking place in states where those activities are legal under state law. Proceeds of state-law-compliant sales of marihuana would not be proceeds of crime for money laundering or other purposes. The bill was introduced in April 2019, but does not appear to be going anywhere quickly.
- **MORE:** The *Marihuana Opportunity Reinvestment and Expungement Act of 2019* (the MORE Act) was introduced in July 2019. It would remove marihuana entirely from Schedule I to the federal *Controlled Substances Act*, putting an end to its illegality under U.S. federal law as a controlled substance, even in states where it was not legal under state law. But wait, there is more to MORE – in the form of more taxes. The bill would impose a national 5% tax on cannabis products (excluding hemp) that are manufactured in or imported into the United States, with the funds raised from this tax to be used to fund a number of social justice programs. The bill was passed by the House Judiciary Committee in November 2019 and is heading to a full House vote, but there is little optimism for Senate approval.

These legislative attempts to resolve the current conflict between federal and state laws are valiant, but SAFE, which is considered the most likely of the three to have a chance of becoming law, would only ease the tension in the financial industry and not resolve all of the problems faced by marihuana growers themselves. And while STATES may have some prospect of surmounting the challenges to passing both the House and Senate eventually, the chance of Senate approval seems less for MORE.

Conclusion

CBD seems to be everywhere in the United States this year, thanks to the 2018 Farm Bill. While there are still questions about the extent of its legality under federal law, we have made significant progress of a sort, as those issues are now within the purview of the FDA under the *Food, Drug and Cosmetic Act* instead of the Drug Enforcement Administration (DEA) under the *Controlled Substances Act*. Marihuana, or cannabis with more than 0.3% THC,

continues to be illegal under the *Controlled Substances Act,* putting federal law at odds with the law in a majority of U.S. states. Will STATES, MORE or some other legislative initiative finally resolve that problem in 2020? While it is too soon to say, we can certainly have high hopes.