VIRGINIA INDUSTRIAL HEMP COALITION

Opinion on the Legality of Industrial Hemp
Interstate Transfers and Market Research in Virginia

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Overview

Since the passage of the 2014 federal Farm Bill, industrial hemp research has been authorized by law in numerous states, including Virginia. Under federal law, industrial hemp may legally be cultivated subject to certain restrictions in the Farm Bill and in state laws authorizing such research. In authorizing industrial hemp research, Congress established a definition of industrial hemp distinguishing it from marijuana so that these research programs could proceed unencumbered by controlled substance laws. Nevertheless, the Drug Enforcement Administration (DEA) continues to misinterpret Congress's express exemption of industrial hemp from controlled substance laws to the ongoing harm of industrial hemp research programs.

For example, the DEA has opined that the transfer of viable seed from hemp research programs across state lines is illegal. This is incorrect. Controlled substance laws do not proscribe participants in Farm Bill hemp research programs from making sales of any and all hemp products produced in compliance with such programs, even across state lines and to entities not licensed pursuant to any hemp research program. Moreover, the DEA has no jurisdiction over any industrial hemp products (including viable or nonviable hemp seeds, hemp seed oil, hemp flowers, hemp leaves, and oil, resin or extract derived from any part of the hemp plant, including flowers and leaves) grown in compliance with the Farm Bill provisions (i.e., containing 0.3 percent THC or less).

Legislative History

1. Legitimacy of Industrial Hemp Research ("Farm Bill")

On February 7, 2014, President Obama signed into law the 2014 Farm Bill, containing the following: "Section 7606, Legitimacy of Industrial Hemp Research."[1] Under this law, states may conduct industrial hemp research programs "…[n]otwithstanding the Controlled Substances Act … or any other federal law."[2] Industrial hemp is defined to mean all parts of the *Cannabis sativa* L. plant under 0.3 percent THC dry weight, whether growing or not.[3] The broad language of Section 7606 thus expressly exempts from federal controlled substance laws (including both the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act (CSIEA)) industrial hemp grown in compliance with a Farm Bill research program. Farm Bill industrial hemp is not a controlled substance.

2. Consolidated Appropriations Act ("Omnibus Law")

Because the DEA unlawfully interfered with hemp research programs after the passage of the Farm Bill, Congress was forced to act. On September 29, 2016, President Obama signed into law the Continuing Appropriations Act of 2016 (the Omnibus Law).[4] This law preserves in operation the previous fiscal year's provision in the "Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 (Division B of Public Law 114–113)"[5] which states as follows:

> Sec. 763. None of the funds made available by this Act *or any other Act* may be used—
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> (1) in contravention of section 7606 of the Agricultural Act of 2014 (7 U.S.C. 5940); or
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> (2) to prohibit the transportation, processing, *sale*, or use of industrial hemp that is grown or cultivated in accordance with section 7606 of the Agricultural Act of 2014, within *or outside* the State in which the industrial hemp is grown or cultivated.[6]

3. Virginia Statute Authorizing Industrial Hemp Research

On March 1, 2016, Governor Terry McAuliffe signed into law H.R. 699 and S.B. 691, 'Industrial Hemp."[7] Under this Virginia statute, industrial hemp research is legal in Virginia under certain conditions, including compliance with the provisions of the Farm Bill. Notably, the Virginia statute goes beyond the Farm Bill in authorizing (pending subsequent federal authorization of

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[1] 7 U.S. Code § 5940.
[2] 7 U.S. Code § 5940(a).
[3] 7 U.S. Code § 5940(b)(2).
[4] Continuing Appropriations Act of 2016, PUBLIC LAW 114–223—SEPT. 29, 2016 (130 STAT. 857).
[5] *See Id.*, 130 STAT. 908.
[6] Consolidated Appropriations Act, 2016, PUBLIC LAW 114–113—DEC. 18, 2015, Division A, Section 763 (129 STAT. 2285), italics added.
[7] Va. Code §§ 3.2-4112 through 3.2-4120.

commercial cultivation) industrial hemp research "for any lawful purpose."[8] The statute defines "industrial hemp" as "*all* parts and varieties of the plant Cannabis sativa, cultivated or possessed by a licensed grower, whether growing or not, that contain a concentration of THC that is no greater than that allowed by federal law. Industrial hemp as defined and applied in this chapter is excluded from the definition of marijuana as found in § 54.1-3401."[9]

Discussion

1. The DEA's Statement of Principles on Industrial Hemp sets forth several misstatements of law.

On August 12, 2016, the U.S. Department of Agriculture (USDA), in consultation with the U.S. Drug Enforcement Administration (DEA) and the U.S. Food and Drug Administration (FDA), published the "Statement of Principles on Industrial Hemp" (Statement of Principles) in the Federal Register.[10] This document expressly states that it "does not establish any binding legal requirements."[11] In fact, the Statement of Principles is in conflict with legal authorities in numerous respects. The following assertions, without limitation, contained within the Statement of Principles are erroneous and contrary to law.

A. "Section 7606 did not remove industrial hemp from the controlled substances list."[12]

First, "industrial hemp" does not appear on the controlled substances list. Second, even if it did, the Farm Bill defines "industrial hemp" out of the CSA by authorizing hemp research "notwithstanding the CSA or any other federal law," and by defining industrial hemp as a separate and distinct legal substance from marijuana. Given these facts, Farm Bill-compliant industrial hemp is not a controlled substance and is not subject to the CSA or the CSIEA. This point is discussed further below.

B. "For purposes of marketing research … industrial hemp products may be sold in a State with an agricultural pilot program or among States with

[8] Va. Code § 3.2-4113(A).
[9] Va. Code § 3.2-4112, italics added.
[10] USDA, in consultation with DEA and FDA, "Statement of Principles on Industrial Hemp," 81 FR 53395 (August 12, 2016)("Statement of Principles").
[11] *Id.* at 53396.
[12] *Id.* at 53395.

> agricultural pilot programs but may not be sold in States where such sale is prohibited. Industrial hemp plants and seeds may not be transported across State lines."[13]

The above provision purporting to restrict seed transport across state lines has wreaked havoc on hemp research programs, despite the fact that there is no basis in law for such a blanket restriction.

As noted above, the Omnibus Law states that "…[n]one of the funds made available by this Act *or any other Act* may be used … to prohibit the transportation, processing, *sale*, or use of industrial hemp that is grown or cultivated in accordance with section 7606 of the Agricultural Act of 2014, within *or outside* the State in which the industrial hemp is grown or cultivated."[14] Thus, the Omnibus Law expressly permits the sale of any and all Farm Bill-compliant hemp products across state lines. There is no "viable hemp seed" exception to this broad authorization.

Any purported ambiguity about this commonsense, black-letter result can be discarded in light of the swift responses by the author of this legislative provision and others in response to the Statement of Principles. On October 6, 2016, Senate Majority Leader Mitch McConnell, the author of the Omnibus Law, wrote, in reference to the Statement of Principles, to Agriculture Secretary Thomas Vilsack as follows:

> …[T]he Joint Statement appears to limit marketing research for industrial hemp products … in contravention of federal law. The Joint Statement provides that 'industrial hemp products may be sold in a State with an agricultural pilot program or among states with agricultural pilot programs, but may not be sold in states where such sale is prohibited.' Federal law, however, does not limit the ability to sell lawfully grown industrial hemp products only to states with agricultural pilot programs. It only requires that the products be from 'industrial hemp that is grown or cultivated in accordance with' an authorized pilot program. See Section 763(2) of P.L. 114-113 (Division A). The importation of hemp products is legal in all fifty states.[15]

On October 27, 2016, several members of the House and Senate wrote a similar letter to Secretary Vilsack. This letter states:

> Congress prohibits the federal government from interfering with the transportation *and sale* of industrial hemp grown in accordance with a pilot program, while leaving it up to the states to regulate industrial hemp within their borders. … [T]he guidance prohibits the transport of plants and seeds across state lines. Again, because of Sec. 763, the federal government does not have the authority to issue this part of the guidance. **We request that you please remove the attempted prohibition on transporting plants and seeds across state lines**.[16]

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[13] *Id.*

[14] Consolidated Appropriations Act, 2016, PUBLIC LAW 114–113—DEC. 18, 2015, Section 763 (129 STAT. 2285), italics added.

[15] McConnell to Vilsack, October 6, 2016.

[16] Paul, et. al. to Vilsack, October 27, 2016, boldface in original; italics added.

This letter was signed by Senators Paul, Wyden, Merkley and Daines as well as by House Members Polis, Blumenauer, Massie, Bonamici, Cramer, DeFazio, Delbene, Lee, Norton, Pocan, Rohrabacher, Schrader, Yarmouth, Zinke, and Farr.

On September 12, 2016, the Kentucky Department of Agriculture (KDA) wrote a letter to the USDA, DEA and FDA. This letter states as follows:

> …[T]he statement's declaration that '[i]ndustrial hemp plants and seeds may not be transported across State lines' flies in the face of Congressional intent. …Given Congress's clear command, the *Statement*'s attempt to discourage interstate movements of hemp plants and seeds is difficult to understand – let along justify. It is even more bizarre in light of two salient facts: first, importation from foreign sources was, and remains, lawful when conducted under the authority of a research pilot program; and second, the importation and sale of internationally grown hemp grain and fiber is lawful in all fifty states. I cannot understand why the importation rules should be more restrictive for interstate transfers than for international transfers. In any event, no federal agency may expend federal funds to implement this declaration. Accordingly, KDA considers this declaration to be null and void.[17]

In Virginia, the General Assembly has recognized the importance of seed research and provided broad authorization for development of seed varieties, including "seed research on various types of industrial hemp that are best suited to be grown in Virginia," "creation of Virginia hybrid types," and "in-the-ground variety trials and seed production."[18] The DEA's unlawful prevention of viable seed interstate transfers severely limits the ability of Virginia farmers to conduct such seed research. Virginia regulatory agencies should mirror the KDA's position: the DEA's baseless assertion of an interstate seed transfer restriction based on controlled substance laws should be treated as null and void.

C. "Section 7606 specifically authorized certain entities to 'grow or cultivate' industrial hemp but did not eliminate the requirement under the Controlled Substances Import and Export Act that the importation of viable cannabis seeds must be carried out by persons registered with the DEA to do so."[19]

For the same reasons noted above with respect to interstate seed transfer, this assertion is wrong. The Farm Bill authorizes hemp research programs "…[n]otwithstanding the Controlled Substances Act … *or any other federal law*."[20] Moreover, this assertion presents a straw-man. To be precise, hemp farmers do not merely plant "cannabis seeds." They plant <u>hemp seeds</u>. The use of the term "cannabis seeds" is misleading. "Cannabis seeds" include marijuana seeds, but "hemp seeds" produced in compliance with a hemp research program <u>by definition</u> are not marijuana seeds. Hemp and marijuana are distinct subspecies (varieties) of the species *Cannabis*

[17] Quarles to Vilsack, et. al., September 12, 2016.
[18] Va. Code § 3.2-4120.
[19] Statement of Principles at 53395-53396.
[20] 7 U.S. Code § 5940(a).

sativa L. The Farm Bill declares that the hemp variety, when produced in compliance with the Farm Bill's requirements, falls outside the scope of controlled substance laws.[21] Pilot program hemp seeds, therefore, fall outside the scope of the CSA and the CSIEA, and any attempt by the DEA to restrict or regulate the importation of pilot program hemp seed is without legal authority.

D. "For purposes of marketing research by institutions of higher education or State departments of agriculture (including distribution of marketing materials), but not for the purpose of general commercial activity, industrial hemp products may be sold in a State with an agricultural pilot program or among States with agricultural pilot programs but may not be sold in States where such sale is prohibited."[22]

This provision is simply made up out of whole cloth. As the above-cited letter from Senate Majority Leader Mitch McConnell quotes Kentucky agronomist David W. Williams: "…if it becomes illegal to sell processed hemp products except in states with pilot research programs and/or for profit (general commercial activity) in this country, it will almost certainly have a very negative impact on the evolving hemp industry."[23] Thus, Senator McConnell, the author of the Omnibus provision, clearly intended for that provision to authorize, as part of research, commercial sales of Farm Bill-compliant hemp products across state lines and to buyers within states that have not authorized a hemp research program. The DEA continues to ignore clear Congressional intent.

Moreover, the Farm Bill contemplates that commercial activity may be conducted within market research, and by entities other than institutions of higher learning and departments of agriculture. The Farm Bill defines "agricultural pilot program" as "a pilot program to study the growth, cultivation, *or marketing* of industrial hemp in States that permit the growth or cultivation of industrial hemp under the laws of the State; and in a manner that ensures that only institutions of higher education and State departments of agriculture are used to *grow or cultivate* industrial hemp…"[24] Here, the language of the Farm Bill makes clear that "marketing" activities are not limited to institutions as is "growth or cultivation." Otherwise the statute would read, "…in a manner that ensures that only institutions of higher education and State departments of agriculture are used to *grow, cultivate or market* industrial hemp."

There can be no doubt, furthermore, that the Virginia General Assembly has authorized broad market research in industrial hemp. The Virginia statute lists numerous goals of hemp market research programs in Virginia, including feasibility studies for hemp marketing in Virginia, reports on value-added benefits to Virginia businesses, promotion of Virginia hemp on the world market, and the development of commercial markets for Virginia hemp products.[25] This broad range of authorized marketing activities renders the DEA's attempted restriction of hemp product sales to states with hemp pilot programs an absurdity. Under the Farm Bill and the Omnibus law,

[21] *Id.*
[22] Statement of Principles at 53395.
[23] McConnell to Vilsack, October 6, 2016.
[24] 7 U.S. Code § 5940(b)(1), italics added.
[25] Va. Code § 3.2-4120.

the DEA has no jurisdiction to regulate hemp marketing research, including the sale of legitimate hemp research products across state lines.

2. The Anti-Deficiency Act Prevents the Federal Government Agencies From Spending Federal Funds That Have Not Been Appropriated.

The Anti-Deficiency Act (ADA) provides as follows:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. […][26]

Furthermore, "…[a]n officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."[27]

While the ADA was enacted in part to combat fraud in government contracting, its broad language applies beyond such cases to any instance in which a federal employee or agency acts in an official capacity without Congressional funding. As discussed above, the Farm Bill defines hemp products produced in compliance with an authorized research program out of the CSA. Moreover, the Omnibus Law clearly denies funding to any federal activity that would prohibit the sale of Farm Bill-compliant hemp products, whether across state lines or not. Therefore, any prohibition or restriction by the DEA of the sale or transfer of Farm Bill-compliant hemp products constitutes a violation of the ADA.

Conclusion

The USDA/DEA/FDA's Statement of Principles should be withdrawn and replaced with a guidance document that clarifies the law in accordance with the general consensus of the hemp industry as outlined above: the Farm Bill, taken with the Omnibus law, removes the jurisdiction of the DEA from all industrial hemp products produced in compliance with Farm Bill hemp research projects. Farm Bill hemp is not a controlled substance under the law, and its treatment as such is in violation of law. Industrial hemp is advancing in other countries around the world to the benefit of those economies. The American hemp farmer stands ready. There is no rational or legal basis for government agencies to continue to burden the new American hemp industry by yielding to the DEA's obstructionist tactics.

[26] 31 U.S.C. § 1341(a)(1)(A) & (B).
[27] 31 U.S. Code § 1350.

Disclaimer

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