State and National Regulation of Industrial Hemp

"Industrial Hemp" is a plant belonging to the plant genus cannabis which has no more than three-tenths of 1% tetrahydrocannabinol (THC) and high levels of the cannabinoid CBD. The uses of CBD's have been reported to successfully treat people with arthritis, chronic pain, and epilepsy. Despite industrial hemp having no psychoactive effects, in 1970 the Federal Controlled Substances Act banned cultivation of industrial hemp by classifying all marijuana varieties as a Schedule 1 drug.

The California Industrial Hemp Farming Act in 2013 (Senate Bill 566) authorized the commercial production of industrial hemp and established the general requirements for registration, testing and sampling. The law was contingent upon the passage of federal laws allowing industrial hemp production.

The Federal 2014 Farm Bill allowed established agricultural research institutions (EARI's) to cultivate industrial hemp for purposes of agricultural or academic research provided that the cultivation of industrial hemp was allowed under state law. Hemp remained classified as a Schedule 1 drug under the Federal Controlled Substance Act.

The passage of Proposition 64 in California (the Control, Regulate and Tax Adult Use of Marijuana Act) in 2016 formally amended state law to remove the contingent federal provisions of SB 566 and made the industrial hemp provisions of SB 566 effective January 1, 2017.

California Senate Bill 1409 went into effect on January 1, 2019. This bill expanded the industrial hemp cultivation provisions and regulations of state law. Under SB 1409, all growers of industrial hemp must register with the local county agricultural commissioner prior to cultivation.

The Federal 2018 Farm Bill allowed industrial hemp to be grown not just by EARI's but by commercial businesses and removed industrial hemp as a Schedule 1 drug.

Although the 2018 Farm Bill allows industrial hemp production, there are still a number of federal and state issues that still must be addressed. While industrial hemp has been removed as a Schedule I drug, the 2018 Farm Bill states that it does not "affect or modify the Federal Food, Drug, and Cosmetic Act . . . [or] the authority of the Commissioner of Food and Drugs and the Secretary of Health and Human Services." The U.S. Food and Drug Administration ("FDA") has taken the position that cannabinoids, including CBD, are impermissible for use in food and dietary supplements. This determination greatly restricts access to those consumer markets.

The 2018 Farm Bill also allows states to regulate industrial hemp production. However, states must submit their regulatory plans to the USDA for approval prior to becoming effective. These state plans must be developed to meet the minimum federal standards and include information concerning the location of hemp production, testing for THC concentration, disposal of non-compliant plants, enforcement provisions, and law enforcement coordination.

The 2018 Federal Farm Bill directed USDA to establish a national regulatory framework for hemp production. However, USDA did not provide guidance to states until October 2019 when it released an interim rule, outlining requirements for the uniform regulation industrial hemp programs. Because of this delay, CDFA and county agricultural commissioners have been operating California's industrial hemp program under emergency regulations since June 2019. USDA's interim rule is in effect until November 1, 2021. The initial comment period on the

rule closed on January 29, 2020. The rule as drafted presents several inconsistencies with California's current hemp regulations including:

- California regulation allows for 30 days to complete harvesting after THC sample testing; the USDA interim rule requires harvesting to be completed within 15 days of sample collection. The interim rule also significantly increases the number of plant samples to be collected for THC testing which will require more Agriculture Department staff time.
- The interim rule requires testing laboratories to be registered with the DEA; only 7 labs in California are currently registered with the DEA, which will be unlikely to handle harvest volume from over 600 registered hemp producers in the state.
- California regulation allows County Agricultural Commissioners to determine acceptable methods for crop destruction; the USDA interim rule requires non-compliant crops be disposed of in accordance with the Controlled Substance Act by DEA-registered reverse distributors. Currently, there are only 3 reverse distributors in California, none of which are equipped to handle destruction of large acreages of industrial hemp. This restriction limits local control and decision-making which will burden Agricultural Commissioner and Sheriff resources.

At the state level, there are other issues that have yet to be resolved. Regulations pertaining to cultivation, testing, disposal, manufacturing, etc. need to be developed by the State, which will take additional time. Food products derived from industrial hemp are under the jurisdiction of the California Department of Public Health (CDPH) - Food and Drug Branch (FDB). However, the FDB will not allow any CBD products in any food product or in dietary supplements. Finally, there is currently no state regulatory agency that provides oversight for the production of CBD oil from industrial hemp.

CDFA has not yet submitted a proposed state regulatory plan to the U.S. Department of Agriculture (USDA) for review and approval but is in the process of preparing a plan for submission. According the U.S. Department of Agriculture (USDA) Hemp webpage, hemp growers are not subject to the cultivation requirements outlined in the federal interim final rule if a state has an approved regulatory plan or is in the process of developing a regulatory plan. California is in the process of developing a state plan, and thus, California hemp growers are not currently subject to the federal interim rule.

California's industrial hemp law can be found in Division 24 of the California Food and Agricultural Code. So far, CDFA has only adopted permanent regulations pertaining to registration fees and the list of approved cultivars. CDFA has adopted emergency regulations pertaining to sampling and testing for THC content, harvest, and destruction through emergency rulemaking. Those emergency regulations took effect on June 10, 2019 and were readopted on December 10, 2019 for an additional 90 days.

CDFA has proposed to permanently adopt regulations pertaining to industrial hemp planting, sampling and testing for THC content, harvest, and destruction. The written comment period for the proposed regulations closed on December 2, 2019.

As CDFA develops a state regulatory plan to be submitted to the U.S. Department of Agriculture (USDA) in compliance with the 2018 Farm Bill, amendments to the current regulations and new regulations will be required.

Further regulations pertaining to cultivation will be developed with consideration of recommendations from the Industrial Hemp Advisory Board and promulgated through the regular rulemaking process in accordance with the California Administrative Procedure Act.

Senate Bill (SB) 153 took effect on January 1, 2020 and requires CDFA to develop and submit a state plan to the United States Secretary of Agriculture by May 1, 2020. The USDA will have 60 days to approve or deny that plan, which can be resubmitted if changes are required. SB 153 is intended to conform California hemp law to the requirements for a state plan under the 2018 Farm Bill.