

## **CBD Advertising in Texas and The 2018 Farm Act: Are There Spoils For Stations Running Spots For CBD Oils? Here's What Weed Want You To Know**

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We've been getting a lot of calls lately from broadcasters asking about cannabidiol (or CBD) oil. Besieged over the last several years with pleas by marijuana dispensaries for advertising, many a broadcaster believes the [2018 Farm Bill](#) (the Agricultural Improvement Act of 2018) is the saving grace by which they will now be able to lawfully advertise a lawful cannabis product. The calls go something like this. "The CBD oil folks have been beating down our door to advertise on our station. We certainly can use the revenue and our demos are perfect for them, I know there were issues about taking ads for weed, I mean cannabis, and for CBD oil, but they tell me that the 2018 Farm Bill changed all that and made CBD oil legal. I'm ready, but thought I'd better check first with legal."

Well, glad they did and it falls upon us lawyers to say "Not quite – **IT'S COMPLICATED.**"

Here is what happened. The 2018 Farm Bill did indeed create a new regulatory regime for the production and sale of "hemp" and hemp products, which previously had been prohibited or heavily restricted under federal law. As broadcasters repeatedly have been told, the Controlled Substances Act (CSA) prohibits the possession, manufacture, and distribution of anything meeting the definition of "marijuana." Because hemp and marijuana both derive from the Cannabis Sativa species of the Cannabis family (whereas marijuana, but not hemp, can derive from the other species, Cannabis Indica), they do share certain similarities; however, due to each plant's biological structure, they have several very distinct *and crucial* differences. The sibling hemp plant produces hemp CBD, which has no buds and therefore primarily consists of CBD, and is claimed to have less than 0.3% tetrahydrocannabinol (or THC). That 0.3% THC claim is the important factor to keep your eye on.

Prior to the 2018 Farm Bill, virtually ALL parts of the Cannabis plant, and almost anything containing a compound derived from the plant were deemed to be marijuana except for certain limited "industrial hemp" programs carve outs in 2014. As a Schedule I prohibited controlled substance, anything containing a compound derived from the plant was deemed to be marijuana, and therefore advertising its sale was tantamount to advertising for the sale of an illegal product. Despite having been legalized under various state laws, advertising a prohibited controlled substance under FEDERAL LAW could be considered aiding and abetting a federal crime, and therefore creates serious problems at renewal time when the focus again returns to the broadcaster's "character" to be a licensee.

The 2018 Farm Bill now exempts "hemp" from the definition of marijuana, including any part, extract or derivative of the Cannabis plant. But here is the rub. The THC concentration has to be 0.3% or less dry weight. This new definition is consistent with the "industrial hemp" definition adopted in 2014. While the terms "cannabis" and "marijuana" are often used interchangeably, the [Controlled Substances Act of 1970](#) specifically excluded the mature stalks of

the cannabis plant used in industrial applications — essentially hemp — from its definition of marijuana.

### **Impact of DoJ Enforcement on CBD**

It is true that under the 2018 Farm Bill’s legalization of hemp, a CBD product previously considered marijuana may no longer violate the CSA. To do so it must meet the Farm Bill’s definition of hemp, which requires that the CBD oil contain 0.3% or less THC. However, despite industry claims, this leaves CBD oil in a very gray area because it is not clear that hemp is capable of sourcing commercially viable amounts of CBD consistent with Justice Department drug enforcement guidelines.

Here is the reason. The CSA prohibitions on products derived from marijuana, including CBD oil, are based on the part of the plant used to produce CBD. Products made from the mature stalk and seeds were “excluded” from the CSA definition of marijuana and therefore were permissible. By contrast, products made from the flowering tops, resin and leaves were included in the CSA definition of marijuana and therefore were prohibited. The U.S. Department of Justice, Drug Enforcement Division has taken the position that “it is not practical to produce extracts that contain more than trace amounts of cannabinoids using only the parts of the cannabis plant that are excluded from the CSA definition of marijuana,” inferring that CBD can only be produced in commercially useful quantities from the unlawful parts of the plant. Now that hemp has been excluded from the CSA, products made from any part of the plant are excluded from the definition of marijuana *as long as the product has 0.3% THC or less*. Accordingly, it is unclear to what extent compliant hemp-derived CBD oil can or will actually be produced commercially. See: [Clarification of the New Drug Code 7350 for Marijuana Extract](#)

What this means is that it is unknown to what extent useful CBD oil actually can be produced and result in a product that has 0.3% THC or less. If the product has more than 0.3% THC, it remains unlawful under the U.S. Department of Justice guidelines and advertising it would likewise be unlawful.

### **Food and Drug Administration (FDA) Regulation**

The problems don’t stop at the Justice Department. CBD retailers often may make health claims and include CBD in foods. The FDA has concluded that THC and CBD products are excluded from the definition of dietary supplements. Therefore, for FDA purposes it’s unlawful to introduce CBD into the food supply, or to market it as a dietary supplement without FDA approval. That means that businesses selling CBD, including CBD infused food and beverages, that make unapproved health-related claims are subject to FDA oversight and enforcement. The FDA has cracked down on dozens of companies selling CBD products online for making unsupported health claims.

Shortly after the 2018 Farm Bill passed, former FDA Commissioner Dr. Scott Gottlieb emphasized the FDA’s continuing authority to regulate CBD as a prescription drug subject to safety and effectiveness testing. Notably, the FDA did recently approve a prescription drug for certain epileptic seizures called [Epidiolex](#), the main ingredient of which is CBD. Given the unchanged FDA regulatory regime for CBD products, and the potential to be marketed as

supplements, food products or prescription drugs, broadcasters should be wary of advertisements that make or hint at unapproved health claims.

### **Local Regulation**

The 2018 Farm Bill also established a regulatory scheme whereby states and tribal governments may become the primary regulators over hemp production in their territories, provided their plans for monitoring and regulation have received approval from the U.S. Department of Agriculture (USDA). If the states don't receive USDA approval, production may proceed only under a federal regulatory scheme, and a federal scheme has yet to be developed by the USDA. However, if approved, the Farm Bill does eliminate the need for a state run pilot program imposed by the earlier 2014 version of the Farm Bill.

### **Texas**

So, how might a state regulate CBD? Currently, we haven't found a state that separately and specifically regulates CBD, but according to the web site [Governing](#), 33 states and the District of Columbia currently have passed laws broadly legalizing marijuana in some form. Some passed limited laws, but have made it impractical to offer CBD oils. For example, Louisiana enforcement officials are planning a crackdown on CBD products sourced from out-of-state hemp farms, despite hemp's recent legalization via the 2018 Farm Bill, and make no distinction between hemp-derived CBD and marijuana-derived CBD.

According to [the](#) Texas chapter of the National Organization for the Reform of Marijuana Laws (Texas NORML), "Texas is in the process of rolling out the [Texas Compassionate Use Program](#), which allows for state sanctioned Low-THC oil (defined as <10% CBD and >0.5%THC). However, this Low-THC oil is available only to patients who have intractable epilepsy and have two doctor's recommendations, and it is available only from a limited number of state licensed dispensaries. Until this law is changed, only these patients will be served by the program. There is no legal hemp growing program in Texas and therefore CBD oil from hemp is not available.

However, that may be about to change. Texas NORML lists a slew of bills introduced in the [86<sup>th</sup> Texas Legislature](#) to revise laws in Texas relating to all forms of Cannabis and CBD. [KXAS, the NBC station in Dallas Ft. Worth reported](#) that Texas lawmakers recently heard overwhelming support for CBD and hemp farming in committee hearings on a hemp and CBD legalization bill sponsored by Rep. Tracy King, who represents farming communities.

### **NACB Voluntary Standards**

Recently, the National Association of Cannabis Businesses (NACB), which claims to be the Cannabis industry's self-regulatory organization, released a national standard for advertising. These guidelines ([available here](#)) are comparable to the standards used in the alcohol industry. See Gregg Skall's article on alcohol advertising [here](#). However, the guidelines are strictly voluntary and have no bearing on the specific restrictions or allowances under local, state, or federal law.

The NACB voluntary standards are extensive and should be reviewed in their entirety, but the core media proscriptions instruct members to: (1) pledge not to buy advertising that specifically targets persons located outside the licensing state, (2) require any ad buyer to “utilize a method of age affirmation” to prevent ads from targeting anyone under 21 years of age, and (3) prohibit any false or misleading ads.

**IMPORTANT NOTE: Despite covering a variety of regulations dealing with legalized CBD Oil under federal and some state laws, Texas has yet to legalize CBD Oil except in the very limited case of intractable epilepsy, and then only if the product can be proven to contain less than 0.3% THC. Moreover, unless the state has received USDA approval of its regulatory program, the product remains illegal under federal law.**

If, despite the foregoing risks, broadcasters still choose to accept CBD product advertisements on their station, it would be still be wise to obtain a certification from the advertiser that the CBD product contains less than 0.3% THC, do not allow health claims and follow the NACB guidelines.

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