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Industrial Hemp and its Impact to Forensic Laboratories

The Agricultural Improvement Act of 2018 was signed into law by President Trump on December 20, 2018. Among other items, it established a legal framework for the legal production of hemp in the United States.

“Hemp” in the Act is defined in Section 297A(1) as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” Section 102(16) of the Controlled Substances Act (21 U.S.C. 802(16)) was amended to exclude hemp from the term “marihuana” and the tetrahydrocannabinols in hemp from the definition of “tetrahydrocannabinols” in Schedule I of the Controlled Substances Act (21 U.S.C. 812(c)). (Sec. 12619)

States that wish to permit the production of hemp can obtain primary regulatory authority by submitting their regulatory plan to the Secretary of Agriculture. The regulatory plan would be submitted through the state department of agriculture, after consultation with the Governor and chief law enforcement officer for the state. A state plan to regulate the production of industrial hemp must be approved within 60 days of receipt. If disapproved, the state can submit an amended plan to bring it into compliance with the law’s requirements.

A state can further restrict the cultivation of industrial hemp, or it may prohibit its cultivation altogether. Sections 297B(a)(3) and 297B(f)(2). However, a state cannot prohibit the transportation of legally cultivated hemp through the state in interstate commerce. (Section 10114)

If those states that do not submit a plan for approval and do not prohibit the cultivation of hemp altogether, the Department of Agriculture (FDA) will develop a plan to permit the production of hemp. The FDA will promulgate regulations to establish the process to license hemp producers in those states. It would be unlawful to produce hemp in those states unless the producer has a licensed issued by the Secretary of Agriculture.

Impact:

With these new definitions, the potential exists where in order to prove that a material is in fact “marihuana,” a quantitative determination of the percentage of delta-9-tetrahydrocannabinol would be required to differentiate it from hemp. This

would add significant time to the analysis of suspected marijuana and have a drastic impact on laboratory seized drug sections.

Some states that currently have statutes in place permitting the production of hemp continue to include hemp in the definition of marijuana, unless it is possessed by a licensed or registered individual. If an individual who does not have a license or registration possesses plant material from the *cannabis sativa L.* plant, that plant material would then meet the statutory definition of marijuana without determining the level of tetrahydrocannabinols in the plant material. Some states have also created affirmative defenses that shift the burden to the individual to prove that he or she is a licensed individual and the plant material meets the definition of industrial hemp through a quantitative analysis of the tetrahydrocannabinols.

Each laboratory should discuss the Agricultural Improvement Act of 2018 and the relevant hemp state code provisions with their Attorney General's Office.

Resources:

- [Agricultural Improvement Act of 2018](#)
- [National Conference of State Legislatures](#) (At the publishing date of this memo, this link not been updated with the Agricultural Improvement Act of 2018, but it is helpful to see the different approaches of states.)
- <https://www.ocj.com/2019/01/the-2018-farm-bill-industrial-hemp-and-what-it-means-for-ohio/>
- <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>