

The 2023 Farm Bill and the Future of Hemp

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There is a moment in the movie *Wall Street*, just before a fresh-faced Charlie Sheen as Bud Fox interviews for a coveted position with a peak-of-his-fame Michael Douglas playing the iconic Gordon Gecko, where Sheen looks in the mirror, adjusts his tie, and [says](#): “Well, life all comes down to a few moments...this is one of them.” Ladies and gentlemen, buckle your seatbelts – it’s time for another Farm Bill.

If you watch the news or listen to talk radio, you probably haven’t heard about it. After all, there are apparently UFOs circling North America and the 2024 horse race has already begun. Compared to those stories, the Farm Bill is not sexy.

But make no mistake that when it comes to cannabis, this is one of those moments.

What Is the Farm Bill?

Every approximately five years, Congress passes [legislation](#) that sets national agriculture, nutrition, conservation, and forestry policy, commonly referred to as the “Farm Bill.” It is hugely consequential, with provisions encompassing an extraordinary array of policy areas that impact every American. By way of examples, Farm Bills typically [include](#) provisions such as:

- Farm commodity revenue support;
- Agricultural conservation;
- Trade and foreign food assistance;
- Rural development;
- Forestry;
- Bioenergy;
- Horticulture; and

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- Domestic nutrition assistance.

It is a full-employment act for lobbyists and one of the most important and underreported pieces of legislation every time it comes up.

Cannabis and the Farm Bill

To be clear, hemp is a small part of the Farm Bill. And for decades, it wasn't part of the Farm Bill at all. Hemp was included within the definition of "marijuana" in the Controlled Substances Act and, like its sister cannabis plant, was a Schedule I controlled substance.

Starting in 2014, however, the Farm Bill began to impact the cannabis industry. Specifically, the 2014 Farm Bill [carved](#) out the newly defined term "hemp" from the definition of marijuana, defining hemp as "the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis." It also established the Hemp Research Pilot Program:

The pilot program allowed for hemp cultivation for research purposes only (i.e., not for commercial use) by either institutions of higher education or state departments of agriculture. Production was subject to state/territory laws and regulations and was not legalized under federal law or in interstate commerce (e.g., crossing state borders).

The 2014 Farm Bill allowed for hemp operators in the United States to begin to develop a hemp program and assess the newly legal product's capabilities.

The 2018 Farm Bill [expanded](#) on these hemp provisions, establishing the Domestic Hemp Production Program:

Under the program, USDA is responsible for evaluating and approving plans submitted by state, territory, or tribal authorities, in cases where local authorities want to have primary regulatory authority over hemp production under their jurisdiction. If a state, territory, or tribal plan is not approved by USDA, then hemp production will be subject to USDA's general license.

The 2018 Farm Bill was the equivalent of pouring rocket fuel on the U.S. hemp industry. According to one [source](#), "[t]he global industrial hemp market size was valued at \$4.9 billion in 2019, and is projected to reach \$18.6 billion by 2027." Others estimate much larger growth, which will come from both the CBD/processed oil and the industrial hemp side (think replacements for plastic, concrete, paper, etc.) of the industry.

In addition to the intended expansion of the hemp industry, the 2018 Farm Bill contained a number of loopholes that catapulted the industry to even higher – if you'll pardon the pun – levels. If you've been in a retail establishment in the past few years, you've probably noticed products labeled as Delta-8, Delta-10, and similar cannabinoids that advertise a euphoric effect. That is a direct result of the 2018 Farm Bill, although it is almost certainly not what Congress intended. To be fair, I'm not sure Congress thought about it at all.

All that said, the 2018 Farm Bill expires September 30. In 2018, hemp was almost and essentially an afterthought. This will not be the case in 2023.

The 2023 Farm Bill: Possibilities and Predictions

So now what happens when Congress addresses hemp with much greater clarity of the stakes and the consequences of its policy choices? There are three broad issues we would like to discuss as an illustrative, but by no means an exhaustive, list of the myriad hemp policy choices facing Congress.

1. Delta-8, Delta-10, and Other Popular Cannabinoids That Cause a Euphoric Effect

Our friends at Vicente Sederberg put the issue succinctly, [writing](#):

The recent proliferation of hemp products sold in convenience stores, gas stations, online, and elsewhere that can get a person just as high as a product sold in a regulated cannabis dispensary can largely be attributed to the definition of “hemp” in the 2018 Farm Bill. This definition allows for all “derivatives,” “extracts,” and “isomers” of hemp, and limits only the THC concentration of delta-9 THC, but is silent as to any other potentially intoxicating cannabinoids such as delta-8 and delta-10 THC, THC-O, HHC, and others that have yet to be discovered or created.

While common sense dictates that Congress did not intend to allow the unregulated sale of intoxicating hemp products when it passed the Farm Bill, the reality is that the broad definition of “hemp” under the current Farm Bill opened the door for the sale of these products notwithstanding other federal laws that may prohibit their sale.

In some ways, the 2018 Farm Bill shows what happens when the dog catches the car. Have those operating in the gray areas of the law gone too far and forced Congress to act? Or have they shown hemp possibilities that Congress almost certainly never considered in 2018?

2. Increasing the Allowable THC Limit

Many hemp industry advocates have [lobbied](#) for an across-the-board increase in the allowable THC limit for hemp under the Controlled Substances Act:

Raising the THC limit would give producers additional leeway to harvest, rather than destroy, crops that test above the [existing] THC limit but remain below 1%. Doing so would also increase flexibility concerning genetics research.

3. “In-Progress” Hemp Testing

A current gap in the federal hemp regime is that it does not address what happens when the THC level of raw hemp temporarily exceeds 0.3% as it is being processed into a product that ultimately will test below that level. This is often referred to as “in progress” hemp. This [makes](#) hemp processors “susceptible to potential civil penalties, criminal misdemeanor, or felony charges for possessing and transporting work-in-progress hemp extract that exceeds the legal definition of hemp and is therefore considered marijuana.”

Congress can fill this gap by permitting the temporary “in process” spike in THC levels. On the other hand, Congress could threaten the existence of the hemp industry by either failing to address or

closing this gap by expressly criminalizing “in progress” spikes.

Broadly speaking, Congress has four options for addressing hemp.

First, Congress could make no change to the hemp provisions of the 2018 Farm Bill. This seems exceedingly unlikely given hemp’s popularity and the controversy surrounding some of the psychoactive cannabinoids.

Second, Congress could liberalize federal hemp policy. It could, for example, increase the allowable THC percentage in hemp and/or make clear that certain psychoactive cannabinoids are legal under federal law.

Third, and somewhat related to the second option, Congress could liberalize hemp policy but provide for more regulations. It could, for example, provide age limits for psychoactive cannabinoids and/or increase the allowable THC percentage in hemp only for “in process” testing.

Fourth, Congress could close some or all of the 2018 Farm Bill’s perceived loopholes. For example, Congress could entirely prohibit psychoactive cannabinoids and/or reduce the allowable THC percentage in hemp to 0%.

The Latest on Congressional Negotiations

To be sure, there have already been discussions in Congress about the hemp provisions of the 2023 Farm Bill, albeit before the midterm elections shifted control of the House of Representatives in November.

In the summer of 2022, the House Agriculture Subcommittee on Biotechnology, Horticulture, and Research held a [congressional panel](#). This was in an effort to see in which ways the current rules on hemp production could be improved with the next farm bill.

Some key areas for improvement brought up by panelists included:

- Addressing the FDA’s stance on CBD products
- Raising the allowable THC threshold in hemp products from 0.3% to 1%
- Revising bank regulations and easing limitations for hemp companies
- Removing the cumbersome Drug Enforcement Administration’s lab testing requirement for hemp
- Providing a USDA stamp of approval for hemp that is shipped between different jurisdictions in the U.S.

Whether any of these proposed revisions will become law is to be determined, but they perhaps provide a glimpse into Congressional thinking on the issues.

So, I guess that brings us back to the beginning and to a simple question: Later this year will Congress [say](#), to paraphrase Mr. Gecko, that “weed is good”?

Stay tuned.

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